

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 110

September Term, 2016

MOTOR VEHICLE ADMINISTRATION

v.

VANESSA HOBBS

Meredith,
Arthur,
Beachley,

JJ.

Opinion by Meredith, J.

Filed: March 17, 2017

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.

Until her employment was terminated, Vanessa Hobbs, appellee, worked for the Motor Vehicle Administration (“MVA”), appellant. Ms. Hobbs pursued an administrative appeal of her termination as provided for in COMAR 11.02.08.10. Following a contested hearing conducted pursuant to the Administrative Procedure Act, an Administrative Law Judge (“ALJ”) found that MVA’s termination of appellee’s employment could not be sustained, and ordered Ms. Hobbs restored to her position with back pay and benefits. MVA filed a petition for judicial review in the Circuit Court for Anne Arundel County, and that court affirmed the administrative law judge. MVA appealed.

QUESTIONS PRESENTED

In its Brief, MVA presented two questions:

1. Did the ALJ commit an error of law in not upholding the MVA’s decision to terminate Ms. Hobbs for improperly taking money in exchange for securing an applicant’s driver’s license?
2. Did the ALJ err in failing to address issues relating to Ms. Hobbs’ credibility?

We answer “no” to each question, and we affirm the circuit court’s judgment upholding the ruling of the ALJ.

STANDARD OF REVIEW

In *Rosov v. State Board of Dental Examiners*, 163 Md. App. 98, 109-10 (2005), we said:

The standard of appellate review of administrative agency decisions requires us to review the decision of the agency, not of the circuit court. *Dep’t of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303-04, 641 A.2d 899 (1994). “Judicial review of administrative agency action is narrow.” *Mayer v. Montgomery County*, 143 Md. App. 261, 270, 794 A.2d

704 (2002) (quoting *United Parcel Serv. v. People's Counsel for Baltimore County*, 336 Md. 569, 576, 650 A.2d 226 (1994)).

To the extent that issues on appeal turn on the correctness of an agency's findings of fact, such findings must be reviewed under the substantial evidence test. [*Dept. of Human Resources v. Thompson*, 103 Md. App. 175, 190, 652 A.2d 1183 (1995)] (citing *State Election Bd. v. Billhimer*, 314 Md. 46, 58-59, 548 A.2d 819 (1988)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 191, 652 A.2d 1183 (quoting *Caucus Distributors, Inc. v. Md. Securities Comm'r*, 320 Md. 313, 323-24, 577 A.2d 783 (1990)). See also *Relay Improvement Ass'n v. Sycamore Realty Co., Inc.*, 105 Md. App. 701, 714, 661 A.2d 182 (1995), *aff'd*, 344 Md. 57, 684 A.2d 1331 (1996) (stating that "substantial evidence means more than a 'scintilla of evidence,' such that a reasonable person could come to more than one conclusion."). In other words, the question on appeal becomes whether a reasoning mind could reasonably have reached the agency's factual conclusion. [*Eberle v. Baltimore County*, 103 Md. App. 160, 166, 652 A.2d 1175 (1995)]. We may not uphold the agency's decision "unless it is sustainable on the agency's findings and for the reasons stated by the agency." *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 577, 650 A.2d 226 (1994) (quoting *United Steelworkers v. Bethlehem Steel*, 298 Md. 665, 472 A.2d 62 (1984)).

Maryland State Dept. of Educ. v. Shoop, 119 Md. App. 181, 196-97, 704 A.2d 499 (1998).

On judicial review, the court does not re-weigh the evidence that was before the ALJ, nor does the court second-guess the ALJ's credibility determinations. "Our review of the [agency]'s fact-finding does not permit us to engage in an independent analysis of the evidence. *Anderson v. Dep't of Pub. Safety & Corr. Servs.*, 330 Md. 187, 212, 623 A.2d 198, 210 (1993). Under no circumstances may we substitute our judgment for that of the [administrative agency's finder of facts]. *Id.*" *Bereano v. State Ethics Comm'n*, 403 Md.

716, 732 (2008). In employment matters, the MVA delegates final decision-making authority to the Office of Administrative Hearings. COMAR 11.02.08.09.

In *Finucan v. Maryland State Bd. of Physician Quality Assur.*, 151 Md. App. 399, 421 (2003), *aff'd*, 380 Md. 577 (2004), we emphasized that an ALJ's credibility findings are given "great deference":

Dr. Finucan complains that the ALJ did not appropriately assess the credibility of the witnesses. . . . It is well settled that the credibility findings of an agency representative who sees and hears witnesses during an administrative proceeding are entitled to great deference on judicial review. *Anderson v. Dep't of Pub. Safety & Corr. Servs.*, 330 Md. 187, 217, 623 A.2d 198 (1993); *accord Gabaldoni v. Board of Physician Quality Assurance*, 141 Md. App. 259, 261-62, 785 A.2d 771 (2001) (noting that "'where credibility is pivotal to the agency's final order, [the] ALJ's findings based on the demeanor of witnesses are entitled to substantial deference and can be rejected by the agency only if it gives strong reasons for doing so'") (quoting *Dep't of Health and Mental Hygiene v. Shrieves*, 100 Md. App. 283, 302, 641 A.2d 899 (1994)).

(Emphasis in *Finucan*.)

FACTS AND PROCEDURAL HISTORY

In this case, the MVA bore the burden of persuading the ALJ that Ms. Hobbs committed the wrongful acts that formed a basis for termination. After a full evidentiary hearing, the ALJ was not persuaded that the MVA had met its burden of persuasion, and, as a consequence, the ALJ ordered the termination be reversed. Although the MVA urges us to hold that the ALJ committed reversible error in failing to be persuaded, we perceive no error in the ALJ's resolution of the case. We will describe in some detail the evidence that is in the record.

The record reveals the following. As of August 2014, Ms. Hobbs was employed by MVA as a Customer Agent II, working at the Glen Burnie branch. She had been employed by MVA for five-and-one-half years at that point, and had previously worked as a Maryland State Trooper for three years.

During the summer of 2014, there was an internal investigation being conducted at the Glen Burnie branch relative to allegations, made by a confidential source, that some MVA employees were accepting bribes to supply driver licenses to applicants who had been unsuccessful in securing driver's licenses through traditional means. Ms. Hobbs was not initially a target of the investigation, but became a target when, according to the testimony of John Poliks (an investigator), a "confidential source" told him that an acquaintance of the source "was receiving preferential treatment from a couple of different [MVA] employees and was paying those employees to furnish him with products that he would not ordinarily have been able to get himself."¹

The acquaintance of the confidential source was a man named Pedro Mario Castro Diaz, who lived in the same apartment block as Ms. Hobbs. Investigator Poliks said that Ms. Hobbs came to his attention because the confidential source advised him that there

¹ The main focus of the investigation appears to have been an employee named Jamie Wood, who ultimately was found to have been accepting money in exchange for various MVA "products." According to Mr. Poliks, Ms. Wood took money from "probably" in excess of ten people as part of this scheme. Ms. Hobbs had, at one point, trained Ms. Wood, and testified that she had used her own log-in and access codes when she did so.

were “communications between the customer, Pedro, and Ms. Hobbs regarding Ms. Hobbs obtaining a driver’s license for Pedro.”

Poliks began investigating Ms. Hobbs based on this information. Poliks testified that “the first step in the procedure towards getting a [driver’s] license” is the “law test.” An applicant must “[t]ake the law test, [and] get a learner’s permit before you can obtain a driver’s license.” Pedro Mario Castro Diaz had failed the law test several times, and for that reason, he was already under suspicion as someone who potentially would offer a bribe in exchange for a driver’s license. On August 20, 2014, Poliks received a report that Mr. Castro Diaz was at the Glen Burnie MVA, “attempting to get a license.” Poliks and his co-investigator went to that location, and observed Castro Diaz talking with Ms. Hobbs outside of one of the examination buildings. As Poliks “continued to observe them,” he watched them get into a car driven by Ms. Hobbs but registered to Castro Diaz. Poliks tailed them and photographed them as they ran errands, and the investigators then followed Ms. Hobbs and Castro Diaz back to their apartment complex.²

Poliks then returned to the MVA, and pulled records showing that Ms. Hobbs’s unique access code had been used to sign on to the MVA’s system and access Castro Diaz’s “customer file” numerous times on August 20. Poliks could see, in the MVA digital records, that Castro Diaz had failed the law test “about 18 or --- numerous times.” He had numerous failures before “a passing score was entered for him[.]” Poliks testified that “the

² According to Poliks, these photographs were not given to management until months after Ms. Hobbs had already been fired, and could not have played a role in the decision to terminate.

entry that was made on August 20th [showed] passing scores were submitted for the skills test, all three parts of the skills test, which we knew that Mr. Castro Diaz did not take.” Poliks also determined that Ms. Hobbs, whom he had photographed and surveilled at MVA on August 20, was not scheduled to work on that date. She had submitted a leave request for that day a few weeks earlier.

Poliks also testified about observing Ms. Hobbs interact with Mr. Castro Diaz the following day, August 21:

[BY MR. POLIKS]: On August 21st, the next day, Mr. Pedro Mario Castro Diaz returned to Motor Vehicles. At that time, Ms. Hobbs was working in Building A at counter 37, which is a miscellaneous counter. Pedro approached her, went up to the counter and spoke to her, walked away. I was a few feet away at the time. He walked back up and spoke to Ms. Hobbs again briefly at her counter and then he exited the building and he walked across the parking lot to Building B, which is the driver’s license building.

He was inside the driver’s license building for less than five minutes. We later determined from the camera system that he had walked up to a particular counter. If I may refer to the report I’ll tell you the exact counter.

Counter 13. What we viewed on the video was that he stood next to counter 13. There was a woman and a child seated at that counter. As soon as they got up, he slid right into the seat and was processed for a driver’s license, which we determined later. He walked out of the building.

Myself and [my co-investigator] were sitting in a vehicle right outside the door, observed him come out of the building with the driver’s license in his hand. He walked back into Building A. I followed him back in. He walked up close to where Ms. Hobbs was but did not approach her counter, and gave her a thumbs up indication and then he left the building.

On August 26, 2014, Poliks interviewed Ms. Hobbs. He described that interview as follows:

[BY MR. POLIKS]: The first question was regarding her residence. At that time we knew that Ms. Hobbs was actually living on Furnace Branch [Road] at the same complex that [Castro Diaz] was living, yet her driver's license information with Motor Vehicles showed an address down in Berlin, Maryland. Ms. Hobbs explained that she stays at Furnace Branch during the week and that that's her mother's address down in Berlin that she uses.

We showed her a picture of Pedro. She knew that he had taken the law test a few times and she stated that she doesn't work over there, meaning the law trailer, anymore, so she didn't know what his current status was. She admitted that she had seen Pedro recently and had a conversation with him about his brother who was also trying to get products from Motor Vehicles.

Ms. Hobbs stated that he may have given Jamie, referring to Jamie Wood, money and that --- she also stated that whoever was working in what they call the box has access to the computer no matter who initially signed in in the morning and also offered that employee logins, passwords, and the VB numbers, which I described earlier, are shared among other employees, which is a violation of MVA procedures.

She also added that Pedro told her that he gave money to Jamie but that she didn't help him. And then she was questioned about her activities on August 20th, the day that she was observed on her day off at Motor Vehicles with Pedro and driving Pedro's car. She said that she was driving his car because her car had been repossessed. She came to see a friend of hers who worked there who was identified as Quanche McCloud and also to pick up insurance papers so she could get her car out of repo.

She was asked if she received any money from Pedro for doing anything and she said, I had nothing to do with him getting his license, although, she was not asked specifically about the license. She mentioned license. She said – she admitted that she knew that Pedro gave money, \$400, because Pedro complained to her about Jamie and that he couldn't get his money back from Jamie. She again denied helping him get his license, denied that she entered the skills test scores for him on August 20th.

And also, she was asked about another VB number that was used, [code redacted], denied any knowledge of that or --- also, again, denied taking any money from Pedro.

Poliks met three times with Castro Diaz: on August 26 (following his interview with Ms. Hobbs); September 5; and September 9. Poliks described those meetings as follows.

On August 26, 2014, after interviewing Ms. Hobbs, Poliks and his co-investigator went to Castro Diaz's workplace, Gino's restaurant. Poliks testified about his meeting at Gino's:

[MR. POLIKS]: We learned from Pedro *through an interpreter that he called in to assist him at the Gino's* that he had paid Ms. Hobbs a total of \$1,200 in order to obtain the driver's license.

[HOBBS'S COUNSEL]: Objection.

[THE ALJ]: Basis?

[HOBBS'S COUNSEL]: I'm hearing, again, hearsay attributed to a translator. I'd ask that the translator be identified who was translating for Mr. Castro Diaz when this statement was allegedly made.³

[THE ALJ]: Any response?

[MVA'S COUNSEL]: I can find out if he knows the name of the interpreter or the substance of it.

[THE ALJ]: Well, let's start there. Do you know the name of the interpreter?

[MR. POLIKS]: Yes, I do.

[THE ALJ]: What is it?

[MR. POLIKS]: He goes by Manny. First name is Emmanuel.

[MVA's COUNSEL]: Would it help you to read --- look at your investigative report?

³ Maryland Rule 5-801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[MR. POLIKS]: I don't believe his name is in the report.

[THE ALJ]: So all you know is the first name Emmanuel?

[MR. POLIKS]: His first name --- legal name is Emmanuel. He goes by Manny. I may be able to come up with it if I ---

[MVA'S COUNSEL]: Can you look --- is it in your investigative report?

[MR. POLIKS]: No, it is not. I know it's not in there.

(Emphasis added.)

Referring to August 26, MVA's counsel elicited from Poliks that Castro Diaz, "[a]t that time [] spoke a little bit of English. At this present time he speaks more."⁴ Poliks testified that he was only able to have "a small amount" of communications in English with Castro Diaz, and that Castro Diaz requested an interpreter because "he wanted someone there to help him understand what we were talking about." Poliks was asked:

[BY MVA'S COUNSEL]: Did he say in English what had occurred at all with he and Ms. Hobbs?

[BY THE WITNESS]: Well, the amounts that he provided was in English, yes. I mean, he didn't --- he didn't say \$1,200 in Spanish. He said it in English.

When Poliks was asked by MVA's counsel if Castro Diaz had informed the investigators, in English, that he had given Ms. Hobbs \$1,200 for a license, Ms. Hobbs's objection was sustained. MVA's counsel argued to the court that it should hear the

⁴ It is unclear what the basis is for that statement, because Castro Diaz was not produced at the hearing before the ALJ, and the record does not reflect that Poliks had any communications with him after September 9, 2014.

testimony about the alleged statements by Castro Diaz (who was, for reasons that were never explained, not a witness at the hearing on the merits), as translated for Poliks through the interpreter (identified, to that point, only as “Manny”) because, although “[i]t is hearsay evidence, through an interpreter might be secondary hearsay evidence[,] Pedro [Castro Diaz] was on their witness list. They had a chance to --- they put him on their witness list. They’ve had a chance to talk to him if they have any problems with his potential testimony. They can bring him in.” The ALJ ultimately permitted Poliks to testify to what Castro Diaz supposedly told him, as filtered through “Manny,” but the ALJ stated that he would “treat the objection as something that I will consider when I --- when I decide what weight to give this evidence.”

MVA then offered into evidence, over objection, its Exhibit 6, a three-page document. The first page is handwritten, and contains signature lines at the bottom that, according to Poliks, were signed by Castro Diaz, the interpreter (whose name cannot be discerned from the signature, and does not appear elsewhere in the document), and the two MVA investigators. Pages one and two were dated and signed September 5, 2014. Page three (which, like page two, was typewritten) was dated and signed September 9, 2014. Ms. Hobbs’s counsel objected to the admission of Exhibit 6, and was permitted to ask Poliks the following questions about the provenance of the document:

[BY HOBBS’S COUNSEL]: Who --- what --- both of these contain a signature of someone purported to have translated it. What’s the name of that individual?

[BY THE WITNESS]: That’s Manny, Emanuel. I think it’s Dumont. I – I can check in my documents if you want me to, but I believe it’s ---

* * *

The name is Emmanuel Dumont. It's E M M A N U E L, and the last name Dumont, D U M O N T.

Q. And is Mr. Dumont employed by the MVA?

A. Excuse me?

Q. Is Mr. Dumont employed by the MVA as a translator?

A. No.

Q. Where is Mr. Dumont employed?

A. He's the person that Pedro called to come to Gino's to interpret for him.

Q. Do you know what Mr. Dumont does for a living? Is he a translator?

A. No. He was an acquaintance of Pedro. That's why he called him. That's what we understood.

Q. And did Mr. Dumont write the third page of the exhibit?

A. I believe Mr. --- the first page.

Q. The first page is Mr. Dumont's handwriting?

A. I believe it is, yes.

Q. Do --- well ---

A. But it was signed by both of them in my presence, so, Pedro signed up here and Mr. Dumont signed over there. On --- on the statements you cannot read Mr. Dumont's signature. That's why I couldn't tell you what his name was without looking at this other document in Pedro's MVA file.

Q. But --- so my question is, do you know whose handwriting it is on the first page?

A. I --- I ---

Q. Okay.

A. I believe it's Mr. Dumont's.

Q. And you base that on what?

A. Because I don't believe Pedro can write English.

* * *

Q. No one told you that Mr. Dumont wrote this?

A. No. It was just presented to me as Pedro's statement, but my assumption is that Mr. Dumont wrote it.

Q. And did --- again, and who wrote the --- the typed document that's the third page?

A. I --- both the second page and the third page is my typewritten document signed by all of the individuals.

Q. And it's your testimony that the words that are typed were the words that Mr. Dumont exactly translated --- that were given to you by --- as given to him by Mr. Castro Diaz?

A. The second page ---

Q. No, the third page.

A. The second page is the typed version of the first page.

Q. Yes.

A. The third page is what I wrote, an addendum to the original statement. Those are my words. I --- I wrote that, I typed that.

Q. Those are your words. Those are not Mr. Castro Diaz's words or the translator's words?

A. Those are his words that I put on paper. There was no written statement like the first one that le[d] to that one.

Q. I get --- so, my question is, when you write, [“]Jamie did not send me to Vanessa [Hobbs] but our relationship developed as a coincidence because we live in the same building,[”] is that you[] paraphrasing information that was related to you by Mr. Dumont?

A. No. That’s what he told me and [. . .] that’s what I reduced to writing.

* * *

Q. . . . So, Mr. Dumont said to you --- translated from Mr. Castro Diaz, [“]Jamie did not send me to Vanessa but our relationship developed as a coincidence because we live in the same building,[”] and then you wrote down exactly what Mr. Dumont said?

A. That’s correct.

Q. But you don’t know who Mr. Dumont is or where he works or what he does for a living?

A. He used to live in that same apartment setup, I’ll call it. He does not live there anymore as far as I know. He used to work at a Denny’s restaurant in Laurel. I understand --- without having spoken to him, I understand that he’s now driving a truck. So he does not live at the same location anymore and he does not work at the location that I previously knew that he worked.

Q. And he --- and he doesn’t work as a translator or an interpreter?

A. No. I don’t believe he ever did.

Q. Okay.

A. If you’re referring to the translators that are authorized by MVA and also the courts ---

[BY THE ALJ]: Sir --- **sir, you don’t know any of this, correct?**

[BY MR. POLIKS]: **I know he’s not on the translator list, right.**

[THE ALJ]: You do?

[MR. POLIKS]: Yes, I do know that.

[THE ALJ]: And how do you know that?

[MR. POLIKS]: Because I've looked.

[THE ALJ]: And the translator's list is what?

[MR. POLIKS]: **Motor Vehicles puts out a very lengthy list of translators** that are authorized by them to translate many, many different languages. Some of those people on that translator list are also on the court authorized translator list. **Mr. Dumont is not on that list and never has been.**

[BY HOBBS'S COUNSEL]: Your Honor, I'm going to object to this document [MVA's Exhibit 6].

* * *

. . . The Agency has produced neither Mr. Dumont nor Mr. Castro Diaz. It is obviously being submitted for the truth of the matter (inaudible) hearsay within hearsay and we're being asked to rely on the translation of an individual who is not a translator for the MVA, a translator for anyone, and, you know, there's certainly been no indication that he is --- has ever worked as a translator or has any authority to translate.

I --- there's no recording of the statement, no independent indication of reliability here. So we're objecting to the admission of this very obviously material piece of hearsay.

[BY THE ALJ]: Okay. Mr. [counsel for MVA]?

[BY MVA'S COUNSEL]: Well, Your Honor, first and foremost, internally if Your Honor looked at it, it's actually an admission of a crime. So, in and of itself there are exceptions, obviously, to the hearsay rule and one of them is when the document or a statement in the document in and of itself is an admission of a crime. It's not looked at in the same way as regular hearsay.

Secondly, the court can give whatever weight the court ultimately deems it necessary and there's no indication that a --- that a registered translator or someone needs to be used. There's testimony -- the officer --- I

mean, Agent Poliks --- Investigator Poliks is here. He explained the circumstances surrounding how the documents were provided to him and these documents were used in the Administration's decision making process.

We believe Your Honor can give it what weight the court wants to give it. However, we believe that they do --- are admitted not only --- and they're not hearsay because they are actually statements against party interest because they actually do admit him [sic] to a crime.

[BY THE ALJ]: I'm --- do you want something else in ---

[BY HOBBS'S COUNSEL]: I'm sorry. That goes to if they were used against Mr. Castro Diaz, not against Ms. Hobbs --- Ms. Hobbs is not making an admission here, and so, the exception for admissions is not apt.

(Emphasis added.)

Although the ALJ overruled Ms. Hobbs's objection to Exhibit 6, the ALJ noted that he would take the parties' arguments regarding the reliability of the document into consideration when assigning how much weight to give the exhibit. The ALJ then had "a couple quick questions" for Poliks about Exhibit 6:

[BY THE ALJ]: So, it's my understanding that the second page is something that you typed up and you typed it up directly from the person ---

[BY MR. POLIKS]: Verbatim, yes.

Q. Okay. So that's yes. Okay. Now, **on the first page, who actually wrote those words, if you know?**

A. **I don't know.**

(Emphasis added.)

Upon further questioning by Ms. Hobbs's counsel, it was established that Poliks did not audio- or video-record any of the meetings he had with Castro Diaz; that page 3 of Exhibit 6 was based on Poliks's notes, which he had immediately destroyed upon typing

up the document; that he had never shown the notes to Castro Diaz (or Manny) and asked either of them to affirm that the notes accurately reflected the meetings; and that neither Castro Diaz nor the alleged translator was asked to sign the exhibit under penalty of perjury or provide any attestation or verification.

It was also established that a formal report of Poliks's investigation was not turned over to management until November 19, although Ms. Hobbs had been terminated on September 5. Furthermore, Poliks testified that the much-discussed Exhibit 6 was never turned over to MVA administrators, despite the fact that, in arguing for the admission of Exhibit 6, MVA's counsel insisted that "these documents were used in the Administration's decision making process."

Poliks was also cross-examined regarding his testimony that, when he continued his surveillance operation at the MVA on August 21, he had made certain determinations based on viewing video. The pertinent cross-examination colloquy is as follows:

[BY HOBBS'S COUNSEL]: Okay. Now you testified with regard to the date that Mr. Castro Diaz came back to the MVA on [August] 21st. You said you later determined from the camera system that on August 21st Mr. Castro Diaz, after, I guess visiting Ms. Hobbs at her counter, went over to counter number 13. Is that correct?

[BY MR. POLIKS]: Correct.

Q. So there's a camera system set up inside the MVA to video tape what's going on inside. Isn't that correct?

A. Yes, correct.

Q. And there's also a camera that's set up in Building C and was in Building C on August 20th. Isn't that correct?

A. Yes. There's ---

Q. Did you --- **did you, as part of your investigation, pull the video footage from the camera in Building C?**

A. No.

Q. **Why not?**

A. **Just didn't as part of the investigation.**

Q. And is that footage from the building --- of the camera in Building C still exist?

A. No.

Q. **But that footage, had it been pulled in a timely manner, would have shown a video of Ms. Hobbs if she had accessed her computer during that time. Isn't that correct?**

A. **I don't know** what it might have shown.^[5]

Q. Did you determine what the cameras were pointed to in Building C?

A. No. Never looked into that at all.

Q. Okay. But so, you accessed the cameras in --- at counter 13. What building is counter 13 in?

A. Counter 13 is in Building B, the driver's license building.

Q. Well, you --- you said that you accessed the cameras and saw Mr. Castro Diaz going to [counter] 13. Do these cameras reflect the thumbs up that Mr. Castro Diaz gave to Ms. Hobbs?

A. That was not at that counter.

⁵ Counsel later clarified on re-cross examination that, if Ms. Hobbs had made entries in the MVA database to assist Mr. Castro Diaz, Ms. Hobbs's access to the database "would have been accessed via a computer in Building C[.]" but the investigators claimed they did not review video recordings from the building where Ms. Hobbs worked.

* * *

Q. . . . Did the camera --- did any other camera reflect or did you look at any other counter to determine whether or not that thumbs up was caught on camera?

A. No.

Poliks testified that he did not record his interview with Ms. Hobbs on August 26, that he had “no knowledge of any written statement” by her, and that he did not obtain a written statement from her as part of his investigation. Ms. Hobbs’s written statement from August 27, 2014, was admitted into evidence in her case as Employee’s Exhibit 3. Poliks testified that the access code “[code redacted]” “[d]oes not exist,” and that one is “not supposed to” be able to access the MVA database with a fictitious code, even though he also testified that “[code redacted]” was significant to the investigation because it had been used (thus demonstrating its existence) “in accessing Pedro’s customer file to make an entry, if I remember correctly.”⁶

MVA’s second and final witness was Virginia Colon, the district manager overseeing the Glen Burnie branch. Ms. Colon was in charge of eight branches across the

⁶ It was plain from Poliks’s testimony that it was his belief, based on Exhibit 3, that Ms. Hobbs had accessed Castro Diaz’s file on August 20 and entered passing scores for him on the tests he needed to obtain his driver’s license. The exhibit is specific to log-ins made by Ms. Hobbs’s access code of “[code redacted]” between July 8, 2014 and August 25, 2014, and Ex. 3 reflects that the access code was used several times on August 20 to log into Castro Diaz’s file. It is not clear where, or at what juncture, the “[code redacted]” access code appeared; it is not in the August 20 entries on Exhibit 3. Further, Poliks testified on cross examination that he did not see Exhibit 3 until October 22, 2014; so it was not part of the report he gave to MVA management on August 26, 2014.

State. Ms. Colon testified that she generally would not be called in for a local disciplinary issue that might result in a written reprimand, but that, “when it becomes an infraction that may lead to a recommendation for termination, that is when I get involved as district manager.” Ms. Colon was aware that there was a larger investigation being conducted relative to bribery allegations at the Glen Burnie MVA. She was first advised of the specific allegations against Ms. Hobbs on August 26, when Ms. Hobbs was interviewed by Poliks and his co-investigator and then sent home on administrative leave. Ms. Colon testified that she was provided a “summary,” admitted in evidence as MVA Exhibit 18, written by “investigations” and summarizing the conclusions, to that point, of the investigators.⁷

⁷ Exhibit 18 is unsigned and undated. Ms. Colon testified that “investigations” authored it. Ms. Colon was given this summary in preparation for her “investigatory interview” with Ms. Hobbs that occurred on August 27. According to the summary, investigators ran a check of Castro Diaz’s “DLS Web Portal” on August 20, after observing him talking to Ms. Hobbs “standing near the Driving Course.” The summary described what the investigators did after the investigators had followed Ms. Hobbs and Castro Diaz later that day as they went to Royal Farms, McDonald’s, a liquor store, and then back to their apartment complex:

Investigators returned to the MVA and queried [the system for] Pedro Castro Diaz (pending) application to see if anything had changed [the investigators had performed a “cursory check” on Castro Diaz’s file the previous day] or was updated.

The application showed the following entries; 1) a blank Basic Control Skills Test Score Sheet, not signed 2) Private Provider Certificate -- - which stated in these words --- IN PREVIOUS TRANSACTION 3) Skills Log Final Certification Page – showing Mr. Castro Diaz as been [sic] under 25 years of age (who is [sic] currently 37 years of age) has completed 60 hours behind the wheel, and then Pedro Castro Diaz signing off that he

Ms. Colon testified that, after she received the investigators' summary, Ms. Hobbs was called in for an "investigatory meeting" that took place on August 27. Ms. Hobbs also provided a written statement on that date, in which she denied that she had assisted Castro Diaz. Ms. Colon also testified that, during the interview, Ms. Hobbs told her that "other people may have had her password," and that she had been at MVA on her day off on August 20 "to have her repo company send information to her state email." These two facts "led us to the decision to recommend termination[.]" However, because MVA did not specify in the charges for termination later presented to Ms. Hobbs that she was being

observed **himself** complete the 60 hours of driving 4) Also a blank Control Skills Test.

The application shows that an employee with a VB of [code redacted] had administered the following tests: 1) Skills Pre-Trip 2) Skills-on-Course 3) Skills on-Road and that Pedro Castro Diaz had passed the skills successfully. A query of the VB ([code redacted]) on the statewide system indicated there was no employee with that VB.

It must be noted that at no time did Pedro Castro-Diaz take or pass the above tests, the scores were entered into the computer by Vanessa Hobbs.

It is unclear what the actual evidentiary basis was for the investigators' assertion that "the scores were entered into the computer by Vanessa Hobbs." The summary noted, as quoted above, that there is no employee with the [code redacted] access number, and it noted later that investigators had interviewed Ms. Hobbs and she "denied helping Pedro get his license, denied entering skills scores for him (on her day off on August 20), denied knowing who [code redacted] is and denied taking any money from Pedro." The summary is what was given to management to bring them up to speed on the investigation prior to management's interview with Ms. Hobbs. The assertion in the summary that Ms. Hobbs entered passing scores for Castro Diaz using the fictitious access code --- denied by her, and the basis for which was unexplained in the summary --- was the basis for the charges against her that led to her termination.

fired for violating the e-mail policy or for failing to safeguard her access code, the ALJ sustained Ms. Hobbs's objection to this testimony.

Ms. Colon also conducted a "mitigation conference" with Ms. Hobbs, after which Ms. Colon recommended charges to "the executive team," and then "it was pretty much filtered up the chain to the chief deputy administrator, and at that point, [the chief deputy administrator] made the decision to suspend, pending charges."

On September 5, 2014, Ms. Hobbs was served with a letter notifying her that she was being

suspended indefinitely pending the filing of Charges for Termination. This suspension is for [sic] the employee has taken for personal use, a fee, gift, or other valuable thing in the course of work or in connection with it when the fee, gift, or other valuable thing is given to the employee by any person in the hope or expectation of receiving a favor or better treatment than that accorded other persons (The employee accepted a bribe, entered fraudulent information in the MVA Database and produced a fraudulent driver's license.) This action is taken in accordance with COMAR 11.02.08.06C.

The balance of the notification letter, which was entered into evidence as MVA Exhibit 19, informed Ms. Hobbs of her appeal rights. The letter was signed by Christine Nizer, the chief deputy administrator and the designated appointing authority in this case. Ms. Nizer did not testify before the ALJ.

On September 8, 2014, Ms. Hobbs was served with Charges and Specifications for Termination of Career Service Employee, entered into evidence as MVA Exhibit 16. This document informed Ms. Hobbs that, pursuant to COMAR 11.02.08.06, she was being terminated for cause. The charges asserted that she had violated the following provisions of COMAR 11.02.08.06B:

- (4) The employee has engaged in or attempted to engage in bribery or extortion in the performance of job duties;
- (6) The employee has violated a statute [sic], regulation, executive order, written policy, written policy [sic], written directive, or written rule;
- (8) The employee has committed an act of misconduct or a serious breach of discipline;
- (12) The employee's action or inaction has caused or reasonably could be expected to result in loss or injury to the State or members of the public;
- (13) The employee has stolen, or attempted to steal, State property, State resources or property of a member of the public;
- (14) The employee has misappropriated or mishandled State funds, revenue, resources or property; and
- (18) The employee has taken for personal use a fee, gift, or other valuable thing in the course of work or in connection with it when the fee, gift, or other valuable thing is given to the employee by any person in hope or expectation of receiving a favor or better treatment than that accorded other persons[.]

The "Specifications" listed in support of these Charges stated:

- April 22, 2009 Ms. Vanessa Hobbs was hired as a Customer Agent I with the Motor Vehicle Administration (MVA)
- April 22, 2009 Ms. Hobbs received and acknowledged she would abide by the Ethics Bulletin, Security Advisory, MVA Policy/Executive Order receipt, and the MVA Integrity Guidelines
- October 19, 2010 Ms. Hobbs received and acknowledged she would abide by the Ethics Bulletin, Security Advisory, MVA Policy/Executive Order receipt, and the MVA Integrity Guidelines
- March 13, 2012 Ms. Hobbs received and acknowledged she would abide by Security Advisory

- August 2014 As a result of an internal investigation of other MVA employees concerning the improper issuance of driver's license [sic], Ms. Hobbs became under investigation.
- August 20, 2014 Internal investigators, Francis Sheeler and John Poliks, observed Ms. Hobbs meet Mr. Pedro Mario Castro-Diaz (co-conspirator) behind the law test trailer. The investigators also observed Ms. Hobbs get into Mr. Diaz vehicle, as the driver, with Mr. Diaz, and drive away.
- August 21, 2014 The investigators observed Mr. Diaz at the MVA. Mr. Diaz was observed at Ms. Hobbs counter. Mr. Diaz was told by Ms. Hobbs to go to the Annex to receive a MVA product.
- September 5, 2014 Mr. Diaz wrote a statement to the MVA investigators implicating Ms. Hobbs in a scheme to issue fraudulent driver's license. Mr. Diaz wrote: **“Once I had my permit, the other employee named Vanessa, which by the way is my neighbor, told me if I payed her \$1,200.00 she would give me the license. I payed Vanessa \$500.00 first, then I gave her \$700.00 total of \$1,200.00. In about a week I had my regular license.”**

(Emphasis in original.)

Ms. Hobbs additionally was served, on September 8, with a Notice of Disqualification from Future Employment, listing her “effective date of separation” as September 5, 2014, and barring her from employment with the State Department of Transportation for five years. This was entered into evidence as MVA Exhibit 17.

Ms. Colon reiterated on cross examination that, following the investigatory and mitigation meetings with Ms. Hobbs, which occurred back to back on August 27, she recommended to her superiors that Ms. Hobbs's employment be terminated. Ms. Colon made this recommendation on the strength of the summary she was given by

“investigations,” in evidence as Exhibit 18. At the time she made the recommendation, she did not have Poliks’s surveillance photographs, MVA Exhibit 3, or any of Castro Diaz’s purported statements (Exhibit 6). After concluding Ms. Colon’s testimony, MVA rested its case.

Ms. Hobbs testified in her defense. She freely admitted knowing Castro Diaz because he was one of her neighbors. She testified that, as of August 2014, she knew Jamie Wood as an intern who had been working at the Glen Burnie MVA for “maybe five or six months.” Ms. Hobbs testified that she had trained Wood in the “law room,” which she described as the area where people would take MVA tests on computers. In order to provide hands-on training to Wood, Ms. Hobbs had to log in to the MVA system under her own access number. She testified that, “when you’re training somebody, they have to work under your number.” Ms. Hobbs testified that she normally kept her password information in her purse or her lunch pail, stored under the desk of the station at which she was working, but, she asserted that “it’s possible that if somebody wants to get some of your personal information, they can get it.” She noted that Jamie Wood had access to this area in August 2014.

Ms. Hobbs initially encountered Castro Diaz in the law room, where he was taking a test. Ms. Hobbs, who was proctoring the test, realized that she and Castro Diaz lived in the same apartment complex, and he told her that he had been having a hard time passing the test. But, in her testimony, Ms. Hobbs denied ever helping Castro Diaz with any MVA issue, or ever taking money from him for any reason. She testified that she knew she was

under constant surveillance at MVA. She recounted that she had put in a leave request on August 8 to take the day off on August 20, because August 20 was the day after her birthday. As it happened, her car had been repossessed shortly before August 20, and she had to go into MVA on her day off after all to pick up a fax from her insurance company in order to get her car back. She was outside her apartment building on the morning of August 20, about to call a cab, when she happened to see Castro Diaz. He offered to give her a ride to MVA and said he was going there to see Jamie Wood; he had previously told Ms. Hobbs that Jamie Wood was his girlfriend.

Ms. Hobbs acknowledged that, on August 21, Castro Diaz passed by her work station at MVA and displayed a “thumbs up,” as Poliks had testified, but Ms. Hobbs’s interpretation of that gesture was that Castro Diaz was conveying that he had finally passed his driving test. He had stopped by her counter earlier on August 21 to tell her he was on his way to take the test. She explained that she drove Castro Diaz’s car on August 20, as depicted in the surveillance photographs that Poliks took (but never showed management), because Castro Diaz did not yet have a driver’s license on that date.

Although the MVA had accused Ms. Hobbs of entering false information in the MVA records to indicate that Castro Diaz had passed his driver’s license tests, the MVA elicited uncontradicted testimony from Ms. Hobbs that she had never been trained on, and did not know how to sign on to, the driver’s license testing database. Her testimony on this point was as follows:

[BY MVA’S COUNSEL]: Okay. Let’s talk about the VB number which has been referenced. That’s not --- you don’t use that VB number for when you

sign in your computer initially to access your emails? That's a whole different identification, correct?

[BY MS. HOBBS]: Yes.

Q. Okay. So the VB number is only for the databases, correct?

A. Yes.

Q. Specifically, the driver's licensing, the test database, correct?

A. No.

Q. Or just all databases?

A. Yes.

Q. Including the ones that you saw the documentation for, which had the passing [scores] of Mr. Pedro [Castro Diaz] under your name and VB number, correct?

A. I don't know how to sign on to that computer, because when I worked in the box, that was not my assignment. I scheduled out-of-countries. I did not schedule the driving test.

Q. Okay. So you have --- **you never even knew how to do that?**

A. **Never knew how to do that at all.**

(Emphasis added.)

Ms. Hobbs further expanded upon this point on re-direct examination:

[BY HOBBS'S COUNSEL]: . . . Okay, now you were asked about accessing certain systems in --- under the DLS [Driver's License System], and you indicated that you --- you said, "I don't know how to sign on to that computer." Can you explain what systems did you have training on and information about and which systems under the DLS did you not have familiarity with or not know how to handle, if that question is clear?

[BY MS. HOBBS]: I had familiarity to the computers that were in the law room as far as giving the test and printing tests out for the interpreters that

came in and, you know, had to, you know, give the written test. And the law room, in the box, I worked on the system that where you would make the --- I guess the --- I was set up for them to come in to take the test, the driving test, make the next available date for them. I didn't do --- I didn't put people outside to take the driving test.

Q. You didn't put people? So is that --- when you say, "I didn't put people outside to take the driving test," is that the basic controls skills test?

A. Yes, the driving. Yes.

Q. Okay. So I'm going to show you what's in evidence as MVA Number 3, a computer printout. First of all, in any of your interviews [on] August 26th, 27th, 28th, were you shown a copy of this document or a document that looks like this, a computer printout?

A. When?

Q. During your interviews in August prior to your termination?

A. No.

Q. Looking at this document [Exhibit 3] now, specifically what's marked in the upper-right-hand page as page 40, my version of which has a highlight for August 20, 2014. Are you able to look at this document, interpret what the various entries are?

A. Well, I see my VB code here with my initials [code redacted].

Q. Okay. Do you know what these terms mean in the next column over where it says IBM term?

A. No.

Q. Do you know what the TRAN ID number refers to?

A. Yeah, the system. It looks like DLS ---

Q. Okay, so that ---

A. --- driver's license system.

Q. Okay. And then in the last column, the entry there, insert document, insert APP DS7. Do you know what these documents --- these entries mean?

A. No.

Q. I'm showing you what's in evidence as MVA Number 18. It was identified by Ms. Colon as the summary reports provided to [sic] the investigators on August 26th. "There are indications here that the application" --- I'm looking at the fourth paragraph. It states, "The application shows the following entries, first a blank basic controls skills test scores sheet, not signed." Is that entry something that is found in the computer, or is that a hard copy, if you know?

A. I don't know.

Q. Okay.

A. I've never heard of it.

Q. "Private provided certificate." Would that be something that's shown as a transaction in the computer, or is that a hard copy?

A. I don't know what that is.

Q. "Skills log file certificate showing Mr. Castro Diaz as being under 25 years of age, has completed 60 hours behind the wheel." Again, is that a hard copy of an application, or is that something that gets entered into the computer?

A. I believe it's just something they entered into the computer, because when I would check people in, I would give them these documents and hand them to the person that's setting up the driving skill test. And I do remember that one as having to be signed, you know, saying that you have a certain amount of driving time.

Q. So that would be a form that the driver would come in with?

A. Yes.

Q. And they would give it to you?

A. Yes, I would --- [. . .] I would make sure that they had everything that they needed to go to the next table to go out on the driving course.

Q. Okay, are these physical forms, or are they --- do you take those forms and enter them into the computer?

A. I don't enter anything. I just make sure they have everything and give it to the person that's at the desk that's setting up the driver's skills test.

Q. So when you're in the box, you take in these forms and pass them along; you don't enter them?

A. No.

Q. Okay. So when you said on cross examination that you don't know how to do that computer, are you referring to entering this information into the system?

A. Yes, I was not trained on that.

Ms. Hobbs further testified that she did not know who the code “[code redacted]” referred to; that she had never used that access code; and that she did not administer or verify any of the tests which “investigations” accused her of altering, on Castro Diaz’s behalf, in MVA Exhibit 18.

MVA did not ask her to clarify any of this testimony on recross. It merely asked her if she knew “what documents needed to be in the system for someone to then qualify for the skills test,” even if she herself “might not have known how to put entries into the system.” Ms. Hobbs replied that she did know what documents were required.

Larry O’Brien, Ms. Hobbs’s boyfriend, also testified in her case. He confirmed that Ms. Hobbs’s car had been repossessed before “she was terminated from her job,” and that he had paid over \$1,500 to redeem it. MVA asked Mr. O’Brien no questions.

In closing arguments to the ALJ, MVA argued: “She got the money. How do we know that? Because [Mr. Castro Diaz] said so. There’s nothing testified to in these two days of proceedings to contradict Mr. Castro Diaz.” But Ms. Hobbs pointed out in argument that neither Mr. Castro Diaz nor his alleged “translator” gave any testimony whatsoever, and the hearsay statements contained in Exhibit 6 bore no oath or other independent indicia of reliability. She further urged the ALJ to rule that the exhibit itself should be given no weight because it “was not before the appointing authority at the time the decision was made to terminate.”

On June 15, 2015, the administrative law judge issued an opinion agreeing with Ms. Hobbs’s argument in this regard. The opinion made the factual finding that “**MVA failed to prove by reliable, credible, and probative evidence that the Employee took money in exchange for providing a driver’s license to Mr. Castro Diaz.**” (Emphasis added.) The opinion discussed the evidence presented by both sides, and noted that “[t]he appointing authority has the burden of proof by a preponderance of the evidence. COMAR 11.02.08.10K(1),(2)(a).” After referring to *Kade v. Charles H. Hickey School*, 80 Md. App. 721 (1989), and *Travers v. Baltimore Police Department*, 115 Md. App. 395 (1997), the administrative law judge made a finding that Castro Diaz’s purported hearsay statements, which were a major focus of MVA’s case against Ms. Hobbs, were unreliable.

The ALJ explained:

... I find that [] Mr. Castro Diaz’s oral and written statements are not reliable hearsay for the following reasons: First, the hearsay statements, like the written hearsay statements in *Kade*, are not sworn. While it is true that the *Travers* Court found [un]sworn hearsay statements to be reliable hearsay,

none of the reasons [the *Travers* Court] provided for finding the statements reliable exists in this case. Although Mr. Poliks told Mr. Castro Diaz that he was investigating criminal activity, Mr. Poliks is not a police officer and the record establishes that Mr. Castro Diaz's proficiency with English was poor. Furthermore, the record does not include any direct corroboration of Mr. Castro Diaz's hearsay statement, and the alleged incident (giving \$1,200.00 to the Employee for a driver's license) and the hearsay statements did not occur in close proximity to one another. In the MVA's version of events as reported by Mr. Castro Diaz on September 5, 2014, the cash exchange occurred about a week before August 26, 2014, or about twelve days before Mr. Castro Diaz first told Mr. Poliks about the exchange of money. This is not the close proximity scenario described in *Travers*.

In regard to the availability of "someone who could be examined as to when, where, and how the hearsay statements were made" factor mentioned in *Kade* as a factor among the guidelines that have been "developed . . . to assure that the [hearsay] evidence is credited as reliable and competent," Mr. Poliks, through whom the hearsay evidence was offered, testified at the hearing. However, the record does establish that Mr. Castro Diaz's proficiency with the English language was such that he felt the need to have someone with him who was a translator. In addition, there was no translator present when Mr. Poliks spoke to Mr. Castro Diaz on August 26, 2014. Furthermore, Mr. Poliks testified that Mr. Castro brought the written statement, which was in English, with him to the meeting on June [sic-September] 5, 2014. Also, Mr. Poliks testified that no one read the statement to Mr. Castro Diaz in Spanish. Finally, although the translator was present on September 9, 2014, and Mr. Poliks testified that the translator read the statement in Spanish to Mr. Castro Diaz before he signed it, Mr. Poliks knew nothing about the interpreter other than his name. He was not of [sic] the MVA list of approved interpreters. Accordingly, this factor, by itself, is not sufficient to persuade me that the hearsay statements are reliable.

Moreover, in the *Kade* Court's summary of case law in which hearsay was permissibly considered in an administrative proceeding, the Court stated that a common thread among those cases "was some logical reason why the declarant was not available to testify at the hearing." *Kade* at 728. In this case, the MVA has the burden of proof. In addition, the MVA knew that the Employee had specifically denied that she took any money from Mr. Castro Diaz. The MVA certainly anticipated that the Employee would testify to that at the hearing and, therefore, credibility would be critical to the outcome of the case. Nonetheless, **the MVA did not produce Mr. Castro Diaz as a witness, request that a subpoena be issued to compel his testimony, or**

give some logical reason why he was not available to testify. Thus, what is left in regard to the reliability and credibility of Mr. Castro Diaz's hearsay statements is that the MVA asks that I believe that Mr. Castro Diaz is honest and forthright that he gave the Employee \$1,200.00 for a license and also believe he has no qualms about lying, deceiving, falsifying, or cheating, as long as doing so advances a goal of obtaining something he desires. I believe that to be asking too much.

Accordingly, I do not find Mr. Castro Diaz's hearsay statements reliable or credible and, therefore, do not give them evidentiary weight. As a result, I do not find that the MVA has sustained its burden to prove that the Employee told Mr. Castro Diaz to go to the Annex to receive a[n] MVA product or that Mr. Castro Diaz gave \$1,200.00 to the Employee to obtain a license.

(Emphasis added.)

Accordingly, the ALJ ordered that the charges for termination and disqualification from future employment be reversed, and that Ms. Hobbs be reinstated to her position, with full back pay and benefits, nunc pro tunc to September 9, 2014. MVA filed a petition for judicial review in the Circuit Court for Anne Arundel County, which affirmed the ruling of the ALJ. The MVA appealed.

DISCUSSION

Although MVA couches its arguments as alleged errors the ALJ made in applying the law, both of MVA's arguments are, in reality, attacks upon the ALJ's findings of fact. In this case, the MVA bore the burden of proving its allegations by a preponderance of the evidence. COMAR 11.02.08.10K. After considering and weighing the evidence, the ALJ concluded that MVA had not met its burden of proving the misconduct it had alleged. It is the province of an administrative law judge, and not the prerogative of an appellate court, to decide what weight to give testimony and other evidence, and to evaluate the credibility

of witnesses. Here, the ALJ was not persuaded that the preponderance of the evidence established the charges against the employee.

In *Starke v. Starke*, 134 Md. App. 663 (2000), Judge Charles E. Moylan, Jr., wrote for this Court and analyzed an appellate contention that the trial judge's findings of fact in that case were clearly erroneous because the judge had failed to find abuse of a confidential relationship. *Id.* at 669. Judge Moylan pointed out that "[t]he dominant focus of the trial was almost exclusively on the issue of whether the appellant signed the deed to her home or whether her purported signature was a forgery." *Id.* at 674. The trial judge was not persuaded by the plaintiff's evidence of forgery, and found that the questioned documents were "genuine." *Id.* at 675. Responding to the argument that the trial judge's finding was clearly erroneous, Judge Moylan observed: "How a fact finder . . . assesses credibility and how much weight a fact finder gives to evidence . . . are matters within the exclusive control of the fact finder." *Id.* at 676. With respect to the argument that the trial judge should have been persuaded by the evidence, Judge Moylan wrote: "[T]o be persuaded of something requires a requisite degree of certainty on the part of the fact finder **Mere non-persuasion, on the other hand, requires nothing but a state of honest doubt. It is virtually, albeit perhaps not totally, impossible to find reversible error in that regard.**" *Id.* at 680-81 (emphasis added). Further emphasizing this point, Judge Moylan explained:

What is before us ultimately distills down into a single issue. . . . On appellate review of the evidence, how could we ever hold, in a non-jury case, that a judge was clearly erroneous for not being persuaded of something.

Resolving disputed credibility and weighing disputed evidence are matters, of course, in the unfettered control of the fact finder. **Where either the credibility of a witness or the weight of the evidence is in dispute, therefore, there is no way in which a fact finder, with such matters properly before him, could ever be clearly erroneous for not being persuaded.**

Id. at 683 (emphasis added).

On appeal, MVA cites *Bereano v. State Ethics Comm'n*, 403 Md. 716, 756 (2008), in support of its contention that the ALJ's decision is premised upon an erroneous conclusion of law. MVA asserts in its brief that the ALJ "placed inappropriate and undue weight on Mr. Castro Diaz not being called by the MVA as a 'live' witness at the OAH hearing, resulting in an error of law." The MVA's argument continues: "While not specifically citing the missing witness rule by name, the ALJ's Decision attached outsized weight to the fact that the MVA did not have Mr. Castro Diaz testify in person at the hearing." According to MVA, the ALJ committed an error of law because, "[w]hile an administrative agency may properly evaluate the weight and credibility of a witness's testimony, '[i]t may not assign, however, negative weight to the testimony, inferring the opposite of that witness's statements is true, without the consideration of any other evidence.' *Bereano*, 403 Md. at 747."

MVA's argument misperceives that the ALJ in this case based its ruling on an inference that Mr. Castro Diaz's lack of testimony *proved* anything. To the contrary, the ALJ justifiably gave no weight to hearsay and double hearsay regarding statements that Mr. Castro Diaz *might* have testified to if he had been called as a witness at the administrative hearing. Failing to assume that a person who did not testify at a hearing

would have testified in accordance with hearsay documents of questionable validity is not the error that the Court of Appeals addressed in *Bereano*.

In *Bereano*, the administrative agency, which (like the MVA in this case) had the burden of proving a violation by the respondent, relied upon the respondent's failure to call a particular witness, and drew an inference that, if the witness had been called, he would have testified to facts that established the violation as charged. Under those circumstances, the Court of Appeals held that it was legal error for an administrative agency that bore the burden of proof to rely upon a missing witness inference as the proof establishing an element of its case. The agency cannot meet its burden by urging the finder of fact to simply draw an inference that the missing witness would have provided testimony that proved a necessary element of the agency's case. The *Bereano* Court observed that, if the agency is permitted to rely upon a missing witness inference to establish a fact under those circumstances, "the missing-witness inference allows the state to create "evidence" from the defendant's failure to produce evidence." 403 Md. at 746 (quoting *State v. Brewer*, 505 A.2d 774, 777 (Me. 1985)).

The *Bereano* Court further observed: "The finder of fact properly may assign no weight and no credibility to a particular witness's testimony. It may not assign, however, negative weight to the testimony, inferring that the opposite of that witness's statements is true, without the consideration of any other evidence." *Id* at 747. In the case against Ms. Hobbs, the ALJ complied with this principle. The ALJ, as permitted, assigned no weight to the hearsay documents and testimony purporting to contain incriminating accusations

made by Mr. Castro Diaz; and the ALJ did not make a finding of fact that “the opposite of that witness's statements” was true. The ALJ merely found that the MVA had not carried its burden of proof, and concluded: “**I do not find that the MVA has sustained its burden to prove** that the Employee told Mr. Castro Diaz to go to the Annex to receive a[n] MVA product or that Mr. Castro Diaz gave \$1,200.00 to the Employee to obtain a license.”

The MVA’s second argument on appeal --- that the “ALJ erred in not properly considering significant record evidence relating to Ms. Hobbs’s credibility for truthfulness” --- fails for similar reasons. The weight to be given to Ms. Hobbs’s testimony and the evidence that MVA contends impugned her credibility were matters committed to the adjudicative discernment of the ALJ. As we said in *Starke, supra*, 134 Md. App. at 683: “Where either the credibility of a witness or the weight of the evidence is in dispute, . . . there is no way in which a fact finder, with such matters properly before him, could ever be clearly erroneous for not being persuaded.” The ALJ’s evaluation of Ms. Hobbs’s credibility in this case was not arbitrary and capricious.

As we stated in *Finucan, supra*, 151 Md. App. at 422: “It was the ALJ’s responsibility to resolve any conflicts in the evidence presented, and to draw inferences from that evidence. It was also for the ALJ, not us, to accord each item of testimonial and documentary evidence the weight it deserves.” We perceive no reason for us not to defer to the ALJ’s findings and conclusions, as final decision-maker, in this case.

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