

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2439

September Term, 2015

ADEGOYEGA ANIBABA

v.

MARYLAND DEPARTMENT OF HEALTH
AND MENTAL HYGIENE

Eyler, Deborah S.,
Reed,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: January 20, 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.

Appellant, Adegoyega Anibaba, appeals a decision by the Circuit Court for Baltimore County which affirmed the dismissal of his administrative appeal by an Administrative Law Judge (“ALJ”) because neither he nor his representative appeared for a scheduled hearing. He presents one question for our review: Did the ALJ abuse his discretion in refusing to vacate a default order when Anibaba’s representative missed a motions hearing because he noted the wrong date on his calendar? We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was employed by the Department of Health and Mental Hygiene (“DHMH”) as a Security Attendant LPN at Clifton T. Perkins Hospital Center. On May 9, 2013, DHMH notified appellant that, because he had been absent from work for five days without contacting his supervisor, he had resigned from his position. On May 29, 2013, appellant filed an Appeal and Grievance Form contesting DHMH’s action. The Office of Administrative Hearings (“OAH”) received the matter and scheduled a hearing before an ALJ pursuant to Md. Code (2009, 2015 Repl. Vol.) § 11-110 of the State Personnel & Pensions Article (“SPP”).

On September 17, 2013, DHMH filed a Motion to Dismiss, alleging that appellant’s pleadings were deficient. DHMH next filed a Motion to Compel Discovery on September 30, 2013. Appellant responded to DHMH’s motions on October 7, 2013. On October 8, 2013, the ALJ granted DHMH’s motion to dismiss.¹ Appellant appealed the dismissal to

¹ This same ALJ presided over all subsequent proceedings before OAH in this case.

the Circuit Court for Baltimore City. On February 6, 2014, the circuit court remanded the case to OAH for consideration of appellant's response to DHMH's motion to dismiss.² On November 18, 2014, the ALJ considered appellant's response and denied DHMH's motion to dismiss. OAH scheduled a contested case hearing for February 3, 2015, and notice of the hearing was mailed to appellant and his representatives, Ricardo Silva & Associates.

On January 15, 2015, DHMH filed a new Motion to Dismiss or in the Alternative Motion for Summary Decision, as well as a Motion to Enforce Order Compelling Discovery and Motion to Compel Discovery. On January 27, 2015, counsel for DHMH and appellant's representatives, Robert LaRhue and Ricardo Silva, were notified by telephone that the February 3, 2015 hearing would be converted to a hearing on motions. On January 30, 2015, appellant responded to DHMH's motions and moved for summary judgment. The response also noted that Mr. Silva would be handling the case on his own due to its complexity. DHMH filed an opposition to appellant's response on February 2, 2015.

Appellant and his representatives failed to appear at the February 3, 2015 hearing. At that time, DHMH moved for entry of default, which the ALJ took under advisement. DHMH proceeded to argue its motions before the ALJ. On February 5, 2015, the ALJ entered a Final Default Order.³ On February 6, 2015, Mr. Silva submitted a motion

² The parties filed a Stipulation to Dismiss and Remand prior to the circuit court's decision.

³ In the Final Default Order, the ALJ noted that, because he was entering a default, all motions before him were moot.

requesting that the default order be vacated. In the motion, Mr. Silva alleged that he did not appear because he incorrectly noted the date of the hearing as February 9, 2015. Further, he alleged that he had advised appellant that he did not need to attend the hearing due to it being a motions hearing. On February 13, 2015, the ALJ denied appellant's motion to vacate the default order, finding that appellant had failed to demonstrate good cause for his failure to appear at the hearing. Appellant filed a petition for judicial review of the ALJ's decision in the Circuit Court for Baltimore County. The circuit court affirmed the ALJ's decision, and appellant timely noted this appeal.

STANDARD OF REVIEW

When reviewing an administrative decision, we “look only at the decision of the agency, and not that of the circuit court.” *White v. Workers' Compensation Comm'n*, 161 Md. App. 483, 487 (2005). As a result, the circuit court's decision affirming the ALJ's dismissal of appellant's administrative appeal is not relevant to our analysis. When reviewing an agency's legal conclusions in a contested case, we determine “the correctness of the agency's conclusions and may substitute the court's judgment for that of the agency's.” *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 528 (2004). On the other hand, “when an agency is not interpreting law but instead makes a ‘finding of fact,’ we have applied ‘substantial evidence’ review.” *Id.* at 529. Finally, “when an agency acts neither as a finder of fact nor as an interpreter of law but rather in a ‘discretionary’ capacity,” the agency's decision must be reviewed under an even more deferential standard. *Id.*

DISCUSSION

Appellant’s challenge to DHMH’s termination of his employment was forwarded to OAH pursuant to SPP § 11-110(b)(1)(ii). All hearings conducted under Title 11 of the State Personnel & Pensions Article are governed by Code of Maryland Regulations (“COMAR”) 17.04.07 and COMAR 28.02.01. *See* COMAR 17.04.07.01D. COMAR 17.04.07.10 requires parties to “attend and participate in good faith in a scheduled conference or hearing.” If a party fails to attend, the regulation grants an ALJ the authority to enter a decision adverse to a party upon a showing the party “[f]ailed to show good cause for not attending.” COMAR 17.04.07.10A(2). Similarly, COMAR 28.02.01.23A grants an ALJ the authority to enter a default order against a party who “fails to attend or participate in a prehearing conference, hearing, or other stage of a proceeding.” COMAR 28.02.01.23B(2)⁴ provides that “[i]f the judge finds that there is good cause for the party’s failure to attend or participate in the proceeding, the judge shall vacate the order and set the case in for further proceedings as appropriate.” In a variety of contexts, the Court of Appeals has previously described good cause to be a “substantial reason, one that affords a legal excuse.” *G. Heileman Brewing Co., Inc. v. Stroh Brewery Co.*, 308 Md. 746 (1987);

⁴ In the ruling denying appellant’s motion to vacate the default order, the ALJ upheld the Final Default Order citing COMAR 17.04.07.10 and COMAR 28.02.01.2. The reference to COMAR 28.02.01.2 is obviously a typographical error, as COMAR 28.02.01.02 is the definitions provision for COMAR 28.02.01. Further, in the Final Default Order the ALJ noted that absent a showing of good cause the order would be upheld, correctly citing to COMAR 28.02.01.23.

Erwin & Shafer, Inc. v. Pabst Brewing Co., 304 Md. 302, 313 n. 14 (1985); *In re Robert G.*, 296 Md. 175, 179 (1983).

In his brief, appellant argues that his representative's failure to enter the correct hearing date in his calendar constitutes good cause to vacate the default order under COMAR 17.04.07.10. Appellant contends that "the ALJ abused his discretion in refusing to vacate the default order." He therefore concedes that the ALJ was acting in a discretionary capacity. In his ruling on appellant's motion to vacate the default order, the ALJ noted that "[t]he notice of hearing was mailed to the parties at their address of record. Notices were also mailed at Ricardo Silva of Ricardo Silva & Associates, the [appellant's] representative." The ALJ also noted that *both* "Robert [sic] Silva and Robert LaRhue, the [appellant's] representatives, were notified by telephone that the hearing scheduled for February 3, 2015 would be a hearing on motions." Based on these findings, the ALJ determined that appellant's representative's calendaring error did not constitute good cause to vacate the Final Default Order. Under our deferential standard of review, we cannot say that the ALJ improperly exercised his discretion in this case⁵. Accordingly, we affirm.

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

⁵ Appellant's reliance on *Ryan v. Johnson*, 220 Md. 70 (1958) is misplaced. That case involved interpretation of the predecessor to Maryland Rule 2-613 and held that the defendant there had demonstrated a meritorious defense requiring that the default order be vacated. It did not involve an analysis of "good cause."