Circuit Court for Baltimore County
Case No. C-03-CV-19-003990

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 185

September Term, 2021

EMANUEL NWAEKE

v.

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

Fader, C.J.,
Arthur,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: March 2, 2022

Emanuel Nwaeke, the appellant, was a correctional officer with the Department of Public Safety and Correctional Services (the "Department"), the appellee. Following a workplace incident in which Mr. Nwaeke was accused of intentionally rubbing his genital area against the buttocks of a female co-worker, the Department twice brought disciplinary charges against him. Both times, a hearing board convened pursuant to the Correctional Officers' Bill of Rights, Md. Code Ann., Corr. Servs. §§ 10-901 – 10-913 (2017 Repl.; 2021 Supp.) ("COBR"), found Mr. Nwaeke not guilty. In between the two COBR hearings, Mr. Nwaeke pleaded guilty to a criminal charge of second-degree assault arising from the incident.

Following the second COBR proceeding, the Maryland Correctional Training Commission (the "Commission") initiated a proceeding to determine whether Mr. Nwaeke still met the minimum standards for certification as a correctional officer. The Commission ultimately determined that he did not meet those standards and revoked his certification. Because he could not continue to work as a correctional officer without certification from the Commission, Mr. Nwaeke was terminated from his position. Mr. Nwaeke sought judicial review of the Commission's decision, and the Circuit Court for Baltimore County affirmed.

Mr. Nwaeke contends that the Commission's decision must be reversed because: (1) the Commission lacked jurisdiction to revoke his certification because the COBR provides the exclusive mechanism to resolve disciplinary charges against correctional officers; (2) the not guilty verdicts of the two COBR hearing panels precluded the Commission from reaching a different conclusion about his guilt in the underlying incident;

and (3) the Commission misapplied its regulations. We conclude that the Commission had jurisdiction, was not bound by the decisions of the COBR hearing panels, and did not misapply its regulations. Accordingly, we will affirm.

BACKGROUND

The Underlying Incident

The incident underlying this appeal occurred in November 2016, while Mr. Nwaeke was working for the Department as a correctional officer at the Maryland Correctional Institution for Women in Jessup. Captain Candice Thorne was using the microwave in an employee break room when Mr. Nwaeke entered the room. After the two had a brief exchange about her using the microwave ahead of him, Cpt. Thorne left the break room and entered the hallway, which was "a little over 5 feet" wide. Cpt. Thorne then walked to a sanitation closet to speak with an officer who was standing in the closet. At that point, Cpt. Thorne was facing the closet with her back to the hallway when, she contends, Mr. Nwaeke, who had left the break room, approached her and rubbed his genitals across her buttocks. Cpt. Thorne reacted by "push[ing] away" from Mr. Nwaeke and saying, "don't touch me like that." In response, Mr. Nwaeke was "laughing . . . finding it funny." Following the encounter, Cpt. Thorne reported the incident internally and sought criminal charges with the District Court Commissioner.

District Court Criminal Proceedings

Mr. Nwaeke was charged with second-degree assault and fourth-degree sexual offense. In September 2017, he was tried and convicted of both charges in the District

Court of Maryland for Anne Arundel County. He then filed a de novo appeal in the Circuit Court for Anne Arundel County.

The 2018 COBR Hearing

While the criminal charges against Mr. Nwaeke were pending, the Department brought disciplinary charges pursuant to the COBR. The Department alleged that by "intentionally touch[ing] [Cpt. Thorne's] buttocks with his genital area," Mr. Nwaeke had violated nine of its standards of conduct: conduct unbecoming an employee, offensive action toward other employees, assault, unsatisfactory performance, two charges of sexual harassment and other discrimination, two charges of insubordination, and violation of state law based on assault.

In February 2018, about five months after the trial in the District Court, a hearing board was convened pursuant to the COBR to consider the charges against Mr. Nwaeke. Cpt. Thorne and two other witnesses testified on behalf of the Department. Neither of the other witnesses had observed any contact between Cpt. Thorne and Mr. Nwaeke, although both had observed Cpt. Thorne's reaction immediately following the incident and one recalled seeing Mr. Nwaeke laughing. Mr. Nwaeke, whose appeal of his criminal convictions was pending, did not testify.

In a written decision issued after the hearing, the hearing board found the Department's evidence insufficient to establish that Mr. Nwaeke had acted intentionally. Observing that the Department's investigatory file was missing, that there was no record of Mr. Nwaeke's interrogation, and that the Department had not offered testimony from "the only other person who allegedly witnessed the actual contact"—an inmate who had

been present at the time—the hearing board concluded that the incident may "possibly hav[e] been the result of mistaken perception." The hearing board "struggled with the issue of intent" and, ultimately, declared that it "was not convinced that sufficient compelling evidence was presented in order for it to conclude that the contact was intentional."

In a separate charging document also considered by the same hearing board, the Department accused Mr. Nwaeke of violating State law as evidenced by his District Court conviction. The hearing board declined to give the conviction preclusive effect on the ground that it was on appeal, and, therefore, concluded that the Department had not carried its burden. In a footnote, the hearing board observed that the Department could raise that ground for disciplinary action again after the circuit court appeal concluded.

The Guilty Plea in Circuit Court

In June 2018, Mr. Nwaeke appeared before the Circuit Court for Anne Arundel County for a de novo trial on the second-degree assault and fourth-degree sex offense charges. Before trial, Mr. Nwaeke pleaded guilty to the second-degree assault charge and the State dismissed the sex offense charge. The court sentenced Mr. Nwaeke to two years' imprisonment, all suspended, and one year of supervised probation, with the condition that Mr. Nwaeke have no contact with Cpt. Thorne.

The 2019 COBR Hearing

After the circuit court proceeding, the Department again brought disciplinary charges against Mr. Nwaeke, this time based on his guilty plea. The Department alleged that because Mr. Nwaeke had been convicted of second-degree assault, he had violated two

of the Department's standards of conduct: (1) that an employee may not violate a state law and (2) conduct unbecoming an employee.

At a hearing held in March 2019 before a second COBR hearing board, the Department elicited testimony from the Assistant State's Attorney who prosecuted Mr. Nwaeke's criminal case, who explained the circumstances of the plea deal to which Mr. Nwaeke had agreed and played a recording of the plea hearing. The Department did not present any other evidence of the underlying conduct. Testifying on his own behalf, Mr. Nwaeke denied having any intentional contact with Cpt. Thorne and maintained that he had accepted the plea agreement not because of any wrongdoing, but because he believed he would receive a harsher sentence if he did not.

In a written decision issued on March 22, 2019, the hearing board concluded that Mr. Nwaeke's guilty plea and resulting conviction did not violate the standards of conduct. The hearing board determined that Mr. Nwaeke's acceptance of the plea deal did not place the Department in a negative light because, based on the trial court's representations regarding the potential consequences of proceeding with a trial, "many people in Officer Nwaeke's shoes would have responded with a guilty plea as well." The hearing board therefore did not believe that the plea agreement reflected an actual admission of guilt by Mr. Nwaeke and, to the contrary, viewed his "unequivocal denial [of] the underlying factual allegation . . . as credible and persuasive." The hearing board therefore found Mr. Nwaeke not guilty of the Department's charges.

The Commission Hearing

In May 2019, the Commission initiated an investigation into potential "derogatory information" it had received from the Department about Mr. Nwaeke. The Commission sent a notice to Mr. Nwaeke to inform him that it would hold a hearing concerning "the status of your certification as a correctional officer," that "[t]he purpose of the decertification hearing is to determine whether revocation of your correctional certification is justified," and that it had authority to revoke his certification if it found violations of the Commission's standards.

The Commission's hearing took place on July 16, 2019. At the outset of the hearing, the Commission described its purpose as "determin[ing] whether Officer Nwaeke failed to comply with the Commission's standards for certification as a correctional officer and whether . . . his certification should be revoked." During the hearing, the Commission's staff called Cpt. Thorne, a lieutenant who had witnessed the incident, and the prosecutor from Mr. Nwaeke's criminal case. Mr. Nwaeke testified on his own behalf and offered into evidence the recording of his circuit court plea hearing and the two hearing board decisions. The Commission also received into evidence documentation prepared by Cpt. Thorne and other witnesses following the incident and photographs of the area where the incident occurred.

In a written decision issued in September 2019, the Commission found, among other things, that Mr. Nwaeke had "made intentional, nonconsensual, and offensive contact with" Cpt. Thorne; that he had faced criminal charges as a result of that contact; that he had pleaded guilty to second-degree assault; and that his guilty plea was "knowing, voluntary,

and freely given." Based on those findings, the Commission was "convinced that the 'derogatory information' presented substantially demonstrat[ed] that Officer Nwaeke has failed to maintain 'good moral character and reputation' and/or that he has failed to 'display the suitable behavior necessary to perform the duties for his mandated position' as a correctional officer." The Commission explained that its conclusion was based on the "consistent and compelling testimony" of Cpt. Thorne and other corroborating evidence. The Commission stated that it did not find Mr. Nwaeke's testimony "reasonable, credible, [or] compelling" and found "the sexual nature of the contact was also of great concern[.]" Accordingly, the Commission concluded that Mr. Nwaeke no longer met the standards required for certification as a correctional officer and revoked his certification.

The Petition for Judicial Review

Mr. Nwaeke filed a petition for judicial review in the Circuit Court for Baltimore County. During a hearing on the petition in March 2021, Mr. Nwaeke contended that the Commission lacked the authority to decertify him for a "disciplinary matter" because the COBR provides "the exclusive means of disciplining a correctional officer for any alleged misconduct." Mr. Nwaeke also argued that the Commission should have been barred by collateral estoppel from taking action against him based on the determinations of the two COBR hearing boards. The Department responded that the Commission has separate authority to revoke a correctional officer's certification when he or she "no longer meets

the standards" required by the Commission and that Mr. Nwaeke had waived his collateral estoppel argument because he did not raise it before the Commission.

The circuit court affirmed the Commission's decision to revoke Mr. Nwaeke's certification. Following the entry of a written order, Mr. Nwaeke timely appealed.

DISCUSSION

In considering an appeal of an administrative agency's decision, "this Court reviews the agency's decision, not the circuit court's decision." *Belfiore v. Merch. Link, LLC*, 236 Md. App. 32, 43 (2018) (quoting *Long Green Valley Ass'n v. Prigel Fam. Creamery*, 206 Md. App. 264, 273-74 (2012)). "[O]ur primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious." *Rojas v. Bd. of Liquor License Comm'rs for Baltimore City*, 230 Md. App. 472, 481 (2016) (quoting *Matthews v. Hous. Auth. of Baltimore City*, 216 Md. App. 572, 582 (2014)). Although we must "accord deference to [an agency's] interpretation of a statute that it administers," we "may always determine whether the administrative agency made an error of law." *Consumer Prot. Div. v. George*, 383 Md. 505, 512 (2004) (internal quotation marks omitted) (quoting *Watkins v. Dep't of Pub. Safety & Corr. Servs.*, 377 Md. 34, 46 (2003)). Because the appeal before us "presents a purely legal question," our standard of review is without deference. *See Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 122 (2002); *see also Md. Real Estate Comm'n v. Garceau*, 234 Md. App. 324, 349-50 (2017) ("[W]here an administrative agency's decision is based on an error of law, we owe the agency's decision no deference." (quoting *Bereano v. State Ethics Comm'n*, 403 Md. 716, 756 (2008))).

I. THE COMMISSION PROPERLY EXERCISED ITS JURISDICTION IN REVOKING MR. NWAEKE'S CERTIFICATION.

Mr. Nwaeke's primary argument on appeal is that the Commission lacked jurisdiction "to investigate and terminate [him] for misconduct" because the COBR provides the exclusive process for investigating and punishing an allegation of misconduct by a correctional officer. Relying on this Court's opinion in *Miller v. Department of Public Safety & Correctional Services*, 228 Md. App. 439 (2016), the Department responds that the Commission acted pursuant to its "independent authority" when it revoked Mr. Nwaeke's certification. We agree with the Department and conclude that, based on *Miller*, the Commission's revocation of Mr. Nwaeke's certification was a proper exercise of its jurisdiction.

A. The Commission's Statutory and Regulatory Framework

Sections 8-201 through 8-210 of the Correctional Services Article establish the Commission and enumerate its powers and duties. As delineated in the statute, the General Assembly created the Commission because of its findings, among other things, that "there is a need to improve the administration of the correctional system to better protect the health, safety, and welfare of the public"; that "the ultimate goal of the correctional system is to make the community safer"; and that the correctional system requires "qualified staff to perform the many tasks to be done." Corr. Servs. § 8-202. Although housed in the Department, *id.* § 8-203, the Commission's membership includes: the Secretary of the Department; the Secretary of the Department of Juvenile Services; a representative of the Department designated by its Secretary; a representative of the Department of Juvenile

Services designated by its Secretary; a Deputy Secretary of Public Safety and Correctional Services; the president of the Maryland Correctional Administrators Association; the president of the Maryland Sheriffs Association; the president of the Maryland Criminal Justice Association; a representative of the Federal Bureau of Prisons designated by its Director; the Attorney General of Maryland; the president of a Maryland university or college with a correctional education curriculum appointed by the Maryland Higher Education Commission; one union-selected correctional officer; and four correctional officers appointed by the Governor, at least one of whom must come from outside the Department,[1] *id.* § 8-204.

The Commission is expressly authorized to take a number of actions concerning the training of correctional officers, including the power to approve, certify, and inspect correctional training schools, *id.* § 8-208(a)(1)-(2), and to "certify . . . correctional officers who have satisfactorily completed training programs," *id.* § 8-208(a)(7). The Commission may also "perform any other act that is necessary or appropriate to carry out this subtitle,"

[1] Commission members identified in the transcript as being present for Mr. Nwaeke's hearing included: Robert L. Green, Secretary of the Department and Commission Chair; LaMonte E. Cook, Director of Corrections for Queen Anne's County and Commission Vice Chair; Zenita Hurley, Assistant Attorney General representing Maryland Attorney General Brian Frosh; J. Michael Zeigler, Deputy Secretary of Operations for the Department; Christopher S. Duffy, Correctional Officer of the Maryland Correctional Institute, Hagerstown; Carolyn J. Scruggs, Deputy Commissioner of the Division of Corrections; Ivonne Gutiérrez, President of the Maryland Criminal Justice Association; Lynette E. Holmes, Deputy Secretary of Support Services for the Department of Juvenile Services; Wallis Q. Norman, Deputy Secretary of Operations for the Department of Juvenile Services; Dr. Beverly O'Bryant of Coppin State University; Captain Daniel Lasher of the Allegany County Sheriff's Office; and Albert L. Liebno, Jr., Acting Executive Director of the Maryland Police and Correctional Training Commissions.

id. § 8-208(a)(15), and is expressly authorized "to adopt regulations necessary to carry out this subtitle," *id.* § 8-208(a)(9).

Section 8-209(a) of the Correctional Services Article provides that "[a]n individual may not be given or accept a probationary or permanent appointment as correctional officer . . . unless the individual satisfactorily meets minimum qualifications established by the Commission." One such qualification is the completion of a background check and criminal history records check, Corr. Servs. § 8-209.1; COMAR 12.10.01.04(D), the purpose of which is, among other things, to determine if the individual "[i]s of good moral character and reputation" and "[d]isplays the suitable behavior necessary to perform the duties of the mandated position," COMAR 12.10.01.05(A)(1). To make such a determination, the Commission is tasked with considering any "derogatory information," which is defined as "negative information developed during a background investigation or reported to a correctional unit that may adversely affect the ability of an individual to perform the duties of a mandated position." COMAR 12.10.01.01(B)(16)(a). Such information is required to be provided to the Commission, COMAR 12.10.01.05(A)(9)(a), which may "refuse to certify an applicant . . . based upon [the] derogatory information," COMAR 12.10.01.05(A)(9) & (B)(5).

A certification from the Commission is valid for a period determined by the Commission or until the occurrence of one of four contingencies, including, as relevant here, if the employee "[d]oes not meet the Commission's standards."[2] COMAR

[2] COMAR 12.10.01.20 expressly precludes certification of a correctional officer with certain felony or misdemeanor convictions. Because Mr. Nwaeke did not receive any

12.10.01.06(B). Correctional Services § 8-209.2 provides the Commission with express authority to revoke a correctional officer's certification "in conjunction with disciplinary action taken under Title 11 of the State Personnel and Pensions Article," and permits the Office of Administrative Hearings, if it rescinds or modifies any such disciplinary action, to reinstate certification "with no further examination or condition."

Although the statute does not expressly identify the Commission's authority to revoke a correctional officer's certification other than in conjunction with separate disciplinary action, this Court addressed that issue at length in *Miller*. Because we ultimately consider *Miller* dispositive of Mr. Nwaeke's appeal, we will discuss it in some detail. Ms. Miller was a correctional officer who had been certified by the Commission. *Miller*, 228 Md. App. at 442. After the warden of the facility where Ms. Miller worked discovered that she had been involved in a sexual relationship with an inmate, the warden terminated her employment. *Id.* Following her successful appeal of that disciplinary action on procedural grounds, Ms. Miller was reinstated to her position. *Id.* During a subsequent recertification process, the Commission learned that she had failed to disclose a prior job on her application and refused to recertify her on that basis. *Id.* at 443. That decision was also reversed by an administrative law judge, who found the Commission's decision to be pretextual, and Ms. Miller was again reinstated. *Id.* After the second reinstatement, the

incarceration time for his second-degree assault conviction, he was not subject to the automatic disqualification of COMAR 12.10.01.20. *See, e.g.*, *Dep't of Pub. Safety & Corr. Servs. v. Donahue*, 400 Md. 510, 538 (2007). However, subsection C of that regulation provides that "[t]he Commission may reject the appointment of an individual with a criminal record not covered by this regulation."

Commission held a hearing "to determine if Miller's certification should be revoked due to her alleged sexual relationship with an inmate," the same allegation that had been the basis for the original disciplinary action. *Id.* The Commission concluded that Ms. Miller had engaged in that conduct and revoked her certification on that basis. *Id.* at 443-44.

On appeal, Ms. Miller contended that the Commission lacked authority to revoke her certification at a time when "there was no disciplinary action taken by the Warden[.]" *Id.* at 448. Before reaching that question, this Court explained that there are two chains of command within the Department "through which a correctional officer may lose [the officer's] position":

> [T]wo units [of the Department] . . . participate in the certification, supervision, and termination of correctional officers. Those units are (1) the [Commission] and (2) the Operations unit.
>
> While the Commission comprises the entirety of its unit, the Operations unit further divides. At the top of the Operations unit is the Commissioner of Correction. Below the Commissioner of Correction is the Warden of each facility. . . . The powers of a Warden are limited to the specific facility that the Warden supervises. If a correctional officer is accused of misconduct, the Warden, as the appointing authority for that facility, is tasked with investigating the alleged misconduct, meeting with the employee, and determining the appropriate disciplinary action. The Warden may take a number of disciplinary actions including a written reprimand, suspension without pay, up to termination of employment. A correctional officer's certification, which is issued by the Commission, is no longer valid upon termination by a Warden. . . .
>
> When a correctional officer is hired, he or she must "meet[ ] minimum qualifications established by the Commission" and apply for certification. Correctional officers must obtain certification from the Commission within one year of appointment. The Commission also has the power to revoke a certification.

Id. at 444-45 (internal citations omitted).

In analyzing Ms. Miller's contention that the Commission could revoke certification only in connection with disciplinary action, this Court observed that "it is vital to remember the function of the Commission," which is to "ensur[e] that each correctional officer is prepared for his or her duties." *Id.* at 447. For that reason, the Commission's power to revoke an officer's certification is not limited to disciplinary actions, and "the Commission may also act independently to revoke a certification and to fulfill its mandate to assure that all correctional officers are fit and prepared for their duties." *Id.* at 449. Accordingly, there are two paths that may lead to a correctional officer's termination: (1) "[t]he correctional officer may be directly terminated through a disciplinary action by the Warden of the institution at which he or she is employed"; or (2) "the Commission may revoke the correctional officer's certification, the result of which is that the officer may no longer perform his or her job functions and must be terminated." *Id.* at 445. Moreover, we observed that "although compl[e]mentary" to a warden's disciplinary procedures, the Commission uses "a separate process involving separate procedures." *Id.* at 449. We ultimately upheld the Commission's revocation of Ms. Miller's certification. *Id.* at 451.

B. The Commission Was Authorized to Revoke Mr. Nwaeke's Certification.

The primary question before us is whether it was within the Commission's authority to even consider revoking Mr. Nwaeke's certification. Mr. Nwaeke makes two arguments in support of his contention that it was not. First, he contends that the Commission is not empowered to revoke a correctional officer's certification on a basis other than failure to complete necessary training. At least to the extent that contention is intended to stand

independent of his second argument, it is incompatible with *Miller*, which is binding authority. Here, as in *Miller*, the Commission considered "derogatory information" received from the Department, which is a basis on which the Commission may refuse to certify an applicant pursuant to COMAR 12.10.01.05(A)(9) & (B)(5). And here, as in *Miller*, the Commission decided to revoke Mr. Nwaeke's certification upon concluding, based on that derogatory information, that Mr. Nwaeke no longer "me[]t the Commission's standards." *See* COMAR 12.10.01.06(B).

Second, Mr. Nwaeke contends that the COBR, which did not become effective until after the events at issue in *Miller*,[3] now provides the exclusive process for investigating disciplinary infractions by correctional officers. Thus, he argues, the Commission lacks the authority to revoke certification for a reason that could support disciplinary action unless discipline is imposed pursuant to the COBR. Because the COBR hearing boards did not impose discipline, he contends that the Commission was powerless to revoke his certification.

[3] Before the effective date of the COBR on October 1, 2010, Title 11 of the State Personnel and Pensions Article governed disciplinary proceedings for all state correctional officers. *Baltimore City Det. Ctr. v. Foy*, 461 Md. 627, 632 (2018). That title still governs disciplinary proceedings of correctional officers who have received charges that recommend discipline other than "termination, demotion, or suspension without pay of 10 days or greater," and such officers "may appeal only under § 11-109 of the State Personnel and Pensions Article." Corr. Servs. § 10-909(d). Correctional officers who receive disciplinary charges that recommend discipline of termination, demotion, or suspension without pay of ten days or greater have the option to appeal under either § 11-109 of the State Personnel and Pensions Article or § 10-909 of the COBR. *Id.* § 10-909(c).

Enacted in 2010, the COBR was modeled after the Law Enforcement Officers' Bill of Rights, which guaranteed certain procedural safeguards to law enforcement officers.[4] *Kearney v. France*, 222 Md. App. 542, 544 (2015). The statute identifies its purpose as "to establish exclusive procedures for the investigation and discipline of a correctional officer for alleged misconduct." Corr. Servs. § 10-902; *see Foy*, 461 Md. at 632. Under the COBR, correctional officers who have received disciplinary charges are entitled to procedural protections during an "investigation or interrogation . . . for a reason that may lead to disciplinary action, demotion, or dismissal[.]" *Id.* § 10-905(a). Such protections include, among other things, that an officer under investigation or interrogation receive written notice of the "nature of the investigation," that an interrogation take place at a certain location and include "personal necessities and rest periods," and that the officer has a right to counsel. *Id.* at 10-905(c), (g), (i). In addition, the COBR: sets forth the procedures for an officer to apply for a show cause order, *id.* § 10-906; establishes a limitations period governing when disciplinary charges may be brought, *id.* § 10-907; sets forth procedures for hearing boards to consider and resolve disciplinary charges, *id.* §§ 10-909 – 10-910; provides for appeals rights, *id.* § 10-911; and provides for the expungement of records, *id.* § 10-912.[5]

[4] The Law Enforcement Officers' Bill of Rights provides "certain procedural safeguards[, including notice and an opportunity to be heard,] to law enforcement officers during any investigation . . . that could lead to disciplinary action, demotion, or dismissal." *Foy*, 461 Md. at 632 n.2 (internal quotation marks omitted) (quoting *Coleman*, 369 Md. at 122).

[5] Echoing Correctional Services § 8-209.2, the COBR also provides expressly that the Commission "may revoke the certification of a correctional officer in conjunction with

We do not discern any inconsistency between the COBR and the statutory authority conferred on the Commission and addressed in *Miller*. The COBR's statement of purpose identifies it as providing the "exclusive procedures for the investigation and discipline of a correctional officer for alleged misconduct." Corr. Servs. § 10-902; *see also Foy*, 461 Md. at 632-34 (describing the COBR's "straightforward" disciplinary process). As previously discussed, however, the Commission's revocation procedures are not disciplinary in nature nor are they dependent on disciplinary action. To the contrary, as described in *Miller*, those procedures permit "the Commission . . . [to] act independently to revoke a certification and to fulfill its mandate to assure that all correctional officers are fit and prepared for their duties." 228 Md. App. at 449. Indeed, the Commission is not empowered to take any disciplinary action at all; it cannot suspend, demote, or even terminate an employee. Its authority with respect to individual correctional officers is limited to certification decisions.

To be sure, certification decisions can turn on facts that could also be the basis for disciplinary action, as happened here. But that does not convert the Commission's process into a disciplinary process for alleged misconduct that must give way to the COBR process. Nor has Mr. Nwaeke identified any authority, statutory provision, or legislative history suggesting that the General Assembly intended the COBR to supplant the Commission's ability to revoke the certification of a correctional officer as a qualification issue, rather

disciplinary action taken under this subtitle," and that a hearing board that rescinds or modifies a disciplinary action "may reinstate the correctional officer's certification with no further examination or condition." Corr. Servs. § 10-910(c)(1).

than as a disciplinary matter. We appreciate that these two processes both can result in the termination of a correctional officer—directly, under the COBR, or as the necessary consequence of revocation of certification by the Commission—but that does not authorize this Court to diminish the scope of the Commission's authority absent an indication that the General Assembly intended that result.

In sum, as established in *Miller*, the Commission had the authority to revoke Mr. Nwaeke's certification based on its assessment that he did not "meet the Commission's standards," COMAR 12.10.01.06(B), and the COBR does not preclude the Commission from exercising that authority.

II. MR. NWAEKE'S COLLATERAL ESTOPPEL ARGUMENT WAS WAIVED.

Mr. Nwaeke contends that the Commission should have been barred by collateral estoppel "from concluding that Officer Nwaeke was guilty of infractions for which he had been exonerated." The Department asserts that Mr. Nwaeke waived the argument by failing to raise it before the Commission. We agree with the Department.

"[A] court ordinarily may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency." *Willow Grove Citizens Ass'n v. County Council of Prince George's County*, 235 Md. App. 162, 174 (2017) (quoting *Zakwieia v. Baltimore County, Bd. of Educ.*, 231 Md. App. 644, 649-50 (2017)); *see Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 4 (2001) ("A court will review an adjudicatory agency decision solely on the grounds relied upon by the agency." (quoting *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001))). Our review is "restricted to the record made before the administrative agency."

Campbell, 364 Md. at 123. Here, Mr. Nwaeke did not argue that collateral estoppel barred the Commission from reassessing factual determinations already reached by the COBR hearing boards and, therefore, he may not raise that defense on judicial review.

In arguing to the contrary, Mr. Nwaeke points to his counsel's argument at the outset of the Commission hearing that the case against him should be dismissed. Specifically, his counsel asserted that notwithstanding the decision in *Miller*, the Commission could not revoke the certification on its own accord because "there [wa]s no disciplinary action . . . against [Mr. Nwaeke]" pending at that time, Mr. Nwaeke "was found not guilty by [the Board] twice," and "the analogous facts are not the same [as in *Miller*]." The Commission denied the motion "based on the [*Miller*] opinion." Mr. Nwaeke's motion was not based on the collateral estoppel effect of the COBR hearing board decisions. Instead, it was a version of the argument we addressed above in Section I of this opinion, that the Commission lacked jurisdiction to revoke his certification except in conjunction with disciplinary action taken through the COBR hearing board process. Mr. Nwaeke is thus precluded from arguing collateral estoppel here.

Even if we were to find that Mr. Nwaeke's collateral estoppel challenge was not waived, however, we would nonetheless conclude that it would not prevail. "The doctrine of collateral estoppel provides that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Garrity v. Bd. of Plumbing*, 447 Md. 359, 368 (2016) (quoting *Cosby v. Dep't of Hum. Res*., 425 Md. 629, 639 (2012)). Collateral

estoppel "protect[s] litigants from the burden of relitigating an identical issue" and "promot[es] judicial economy by preventing needless litigation."[6] *Garrity*, 447 Md. at 368 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)) (alteration in *Garrity*).

Four factors must be met before collateral estoppel can be applied: (1) the issue decided in the prior adjudication must be identical with the one presented in the current action; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party or in privity with a party to the prior adjudication; and (4) the party against whom the plea is asserted must be given a fair opportunity to be heard on the issue. *Garrity*, 447 Md. at 369.

Here, the parties do not dispute that the prior disciplinary decisions constituted final decisions on the merits, *see Dep't of Health & Mental Hygiene v. Rynarzewski*, 164 Md. App. 252, 254 (2005) (where an agency did not file a petition for judicial review from an administrative ruling, concluding that the ruling was final), or that the parties to the prior proceeding both had the opportunity to be heard. Even if we were to assume, for the sake of argument, that the issues in the two sets of proceedings were identical, we would conclude that the factor requiring that "the party against whom the plea is asserted must be a party or in privity with a party to the prior adjudication" is not met. Privity refers to

[6] The parties do not dispute that collateral estoppel may apply to a decision of an administrative agency. "A final decision of an administrative agency can have a preclusive effect when (1) the agency decision is based on a quasi-judicial process; (2) the issue presented to the fact finder in the second proceeding was fully litigated before the agency in the first proceeding; and (3) the resolution of that issue was necessary to the disposition of the first proceeding." *Motor Vehicle Admin. v. Geppert*, 470 Md. 28, 57 (2020), *cert. denied sub nom. Geppert v. Maryland Motor Vehicle Admin.*, 141 S. Ct. 1390 (2021).

"[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest[.]" *Bank of New York Mellon v. Georg*, 456 Md. 616, 657 (2017) (quoting "Privity," *Black's Law Dictionary* (10th ed. 2014)). In determining whether privity exists for purposes of collateral estoppel, courts "focus[] on whether the interests of the party against whom estoppel is sought were fully represented, with the same incentives, by another party in the prior matter." *Georg*, 456 Md. at 658 (quoting *Mathews v. Casidy Turley Md., Inc.*, 435 Md. 584, 628 (2013)). That involves examining "the procedural rights of the party against whom the doctrine is to be invoked" and whether that party "share[s] the same incentive [as the prior party] in [its] separate litigation attempts." *Georg*, 456 Md. at 658-59 (quoting *Warner v. German*, 100 Md. App. 512, 520-21 (1994)).

Mr. Nwaeke observes that the Commission is part of the same Department that unsuccessfully pursued disciplinary charges against him before the two COBR hearing boards and argues that it is therefore appropriately bound by the result. Although he is correct that the General Assembly located the Commission as a unit of the Department, and that some Commission members are Department personnel, we do not think it is either the same party as the Department or in privity with it for purposes of collateral estoppel for two reasons. First, the Commission is not part of the ordinary hierarchy within the Department. Indeed, as discussed above, its membership includes several individuals from outside the Department entirely, and even its correctional officer members are: (1) not all Department correctional officers; and (2) selected by the Governor or a union, not the Secretary. Corr. Servs. § 8-204. Second, also as discussed above, the Commission and the

Department have "different statutory areas of responsibility, which they exercise independently of each other." *See Wash. Suburban Sanitary Comm'n v. TKU Assocs.*, 281 Md. 1, 19-20 (1977) (concluding that a county, county council, and planning commission lacked privity because, among other things, "[e]ach has its own sphere of governmental authority" and "[e]ach is a separate and independent unit").[7]

III. THE COMMISSION DID NOT MISAPPLY ITS REGULATIONS.

Mr. Nwaeke also argues that the Commission "misinterpreted and misapplied the term 'derogatory information.'" The essence of his argument is that because the COBR hearing boards concluded that he had not violated any applicable standards of conduct, the information provided to the Commission about his conduct could not properly be considered "derogatory." We disagree. During the hearing, the Commission considered extensive testimony and evidence upon which it based its decision that negative information existed that would adversely affect Mr. Nwaeke's ability to perform his duties, which satisfied the regulatory definition of "derogatory information." *See* COMAR 12.10.01.01A(15). We discern no legal error in the Commission's application of the term "derogatory information." *See Belfiore v. Merch. Link, LLC*, 236 Md. App. 32, 43 (2018)

[7] Mr. Nwaeke appears to contend that privity is no longer required in light of the Court of Appeals' recognition of offensive nonmutual collateral estoppel in *Garrity*, 447 Md. at 368-69. To the contrary, that doctrine permits the use of collateral estoppel *by* an entity that was not necessarily in privity with a party to a prior proceeding, not *against* such an entity. As the Court explained, the use of offensive nonmutual collateral estoppel occurs "when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against a different party." *Id.* at 370 (quoting *Shader v. Hampton Improvement Ass'n, Inc.*, 443 Md. 148, 162-63 (2015)).

("[W]e will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists.").

In sum, we hold that the Commission did not act outside of its jurisdiction in revoking Mr. Nwaeke's certification as a correctional officer, that he waived his contention that collateral estoppel barred the Commission's action, and that the Commission did not misapply its regulations. Accordingly, we will affirm the judgment of the circuit court.

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