Circuit Court for Carroll County
Case No. 06-C-17-074005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 318

September Term, 2018

WASHINGTON SUBURBAN SANITARY COMMISSION

v.

JAMES EVAN RICHARDS

Fader, C.J.,
Gould,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: August 5, 2019

Appellant, the Washington Suburban Sanitary Commission ("WSSC") (a bi-county, State agency), terminated the employment of its probationary employee, Appellee, James Evan Richards ("Richards"), on 31 January 2017. Richards appealed his termination to Maryland's Office of Administrative Hearings ("OAH"). WSSC filed with the OAH a Motion to Dismiss the appeal, contending that Richards was a probationary employee and did not have a right to appeal. After hearing argument, an OAH administrative law judge ("ALJ") granted WSSC's motion and, accordingly, dismissed the appeal. Richards filed a Petition for Judicial Review in the Circuit Court for Carroll County. The circuit court reversed the decision of the ALJ. WSSC appealed timely to this Court.

WSSC presents a single question for consideration: is a non-merit status employee entitled to appeal a release from employment rendered during his/her period of probation?

For reasons to be explained, we shall reverse the judgment of the circuit court.

FACTUAL BACKGROUND

WSSC hired Richards for the position of Supervisor, Police Operations, on 1 February 2016. Shortly after he was hired, Richards attracted complaints alleging his use of abusive and demeaning language in the course of his job performance. The WSSC Chief of Police initiated an investigation of the complaints against Richards. The investigation concluded that Richards failed to comply with promulgated protocol, failed to comply with a directive from his superior, and made a false statement. He was recommended for release.

His termination became effective on 31 January 2017.[1]

It is not disputed that Richards was a probationary employee at all relevant times.[2] WSSC's personnel policy (promulgated by its General Manager) requires most newly-hired employees, such as Richards, to serve a probationary period of one year.[3] If the employee demonstrates proficiency in his or her assigned duties and responsibilities during his/her probationary period, then that employee enters automatically WSSC's merit system after the probationary year. According to WSSC's interpretation of the employee removal provisions in its State enabling statute and its long-held and consistently applied policy and practice regarding same, only a merit-system employee has appeal rights upon termination from employment; a probationary employee does not.

Nonetheless, Richards appealed his termination to the OAH, claiming his right to do so lay in § 18-123(b) of the Md. Code, Public Utilities and § 4-401 of the Md. Code,

[1] WSSC policy NR-HRM-HR-201-004 states: "at any time during the probationary period, the supervisor may recommend the release of a newly hired probationary employee when the employee's work performance and/or conduct are unsatisfactory."

[2] Richards conceded his status as a "non-merit system employee" at every level of this litigation (including on appeal where that is stated in the "Statement of Question Presented" of his brief). This Court accepts his concession without further analysis or comment.

[3] There was some discussion at oral argument before us, initiated by the panel, regarding whether the probationary aspect of WSSC's merit system was created by regulation or through other agency internal process. Any implications of that inquiry, however, were not raised in the parties' briefs. Consequently, as interested as any member of the panel may have been in this point, we shall not consider the validity *vel non* of the origin of the probationary period provisions promulgated under the WSSC's personnel policy as promulgated by its General Manager.

State Personnel and Pensions.[4] The ALJ determined that WSSC exercised properly its authority to establish internally a merit system and develop a probationary employment component of that system. He reviewed the context of the statutory authority permitting removal of employees and WSSC's promulgated policy adopted in furtherance of that authority. He determined ultimately that Richards, as a probationary employee, was not entitled to appeal his administrative removal. In support of granting the WSSC's Motion to Dismiss, the ALJ wrote:

> Notwithstanding [Richards'] contentions, I agree with the WSSC that [Richards'] appeal must be dismissed because the WSSC's policy prohibits probationary employees from appealing their release. NR-HRM-HR-2015-004 IV.B.5. Nor does the WSSC's enabling statute permit an appeal for non-merit system employees. Under the WSSC's statute, the permanent separation of an employee from WSSC's *merit system* (emphasis supplied) may occur by removal or resignation. Md. Code Pub. Utils. § 18-120(2). The statutory language of section 18-120(2) must be imported in its full context. . . . *When section 18-123(b) of the statute, which provides for an employee's right to appeal a permanent removal is read in conjunction with section 18-120(2), it is clear that the right to appeal vests only with merit system employees* (emphasis added).

Richards petitioned timely the Circuit Court for Carroll County to review the ALJ's

[4] Section 18-123(b) of the Md. Code, Public Utilities will be discussed in some detail *infra*. Section 4-401 of the Md. Code, State Personnel and Pensions states, in pertinent part:

> The Office of Administrative Hearings shall dispose of a case or conduct a hearing and issue a final decision in:
>
> * * *
>
> (4) an appeal under § 18-123 of the Public Utilities Article for the removal of an employee of the Washington Suburban Sanitary Commission.

decision. The circuit court, on 2 March 2018, heard oral argument. On 15 March 2018, it issued a written opinion and an order reversing the ALJ's decision to dismiss Richards' appeal. The circuit court judge, in reaching his decision, reasoned:

> Reading the entire text of Section 18-123 'so that no word, clause, sentence or phrase is rendered superfluous or nugatory,' the Court finds that 'employee' as used in Subsection (b) refers to all employees. Crucial to the Court's finding is the comparison of Subsections (a) and (c). Both subsections discuss permanent removal; however, only Subsection (c) states 'from the merit system.' If the Legislature intended Section 18-123 to only refer to merit system employees, then including merit system in Subsection (c) but not Subsections (a) and (b) would appear to be superfluous and nugatory.

STANDARD OF REVIEW

In the case of an appeal of an agency's dismissal of an employee's appeal of termination of employment on purely legal grounds, our role in reviewing that decision "is limited to determining . . . if the administrative decision is premised on an erroneous conclusion of law." *White v. Workers' Comp. Comm'n*, 161 Md. App. 483, 486, 870 A.2d 1241, 1243 (2005) (internal quotations omitted). In doing so, "[w]e look only at the decision of the agency, and not that of the circuit court." *Id*. at 487, 870 A.2d at 1243. We are constrained ordinarily "to affirm the agency decision only for the reasons given by the agency, but where a pure question of law is involved, we may substitute our judgment for that of the administrative agency." *Id*.

DISCUSSION

I. Relevant Statutory Provisions.

WSSC contends that probationary employees are not entitled to appeal from

terminations effectuated within the first year of employment. In support of this contention, WSSC leans first on its State enabling statute, which states, in pertinent part: "[t]he Commission may establish a merit system that includes all of its employees …" Md. Code, Pub. Util. § 18-107(a).[5] WSSC exercised its statutory power to create and implement an employee merit system, expressed by its General Manager in a Personnel Policy and Benefits Programs manual provided to all employees upon commencement of their employment. The manual provides that "[a]n employee within merit system status has the rights, responsibilities, and benefits realized as a condition of employment including protection from dismissal except for cause." An employee who has not reached merit system status does not have such rights or benefits.[6]

The controversy in this case may be distilled to WSSC's and Richards' clash in their respective interpretations of the employment removal provisions within WSSC's enabling

[5] This section replaced Chapter 733 of the Laws of Maryland (1947), which stated:

> [T]he Washington Suburban Sanitary Commission, created by Chapter 122 of the Acts of the General Assembly of Maryland of 1918, be and is hereby authorized and empowered to create or establish a Merit System or classified service to include all of its employees except the Chief Engineer, Secretary and/or Treasurer, and to make such rules and regulations as are necessary and proper to carry out the provisions of this Act.

1947 Md. Laws 1809-10.

[6] The Personnel Policy and Benefits Programs manual provides two avenues by which to gain merit system status. First, an employee may achieve such status by demonstrating "proficiency in his or her new duties" during an initial one-year probationary period. The other way to achieve such status is by written agreement, which allows the same rights, responsibilities, and benefits except for protection from dismissal.

statute. Section 18-120, titled "Separation of employees from merit system" states: "[a]n employee may be separated from the merit system: (1) temporarily through suspension, layoff, or leave of absence; or (2) permanently through removal or resignation." Md. Code, Pub. Util. § 18-120. Section 18-123, titled "Removal of employees" states:

> (a) An employee may not be permanently removed except for cause and after an opportunity to be heard.
> (b) An employee who is permanently removed may appeal to the Office of Administrative Hearings in accordance with § 4-401 of the State Personnel and Pensions Article.
> (c) An employee may not be permanently removed from the merit system because of religious or political opinions or affiliations.

Md. Code, Pub. Util. § 18-123.[7] The circuit court, erroneously in WSSC's view, determined that the word "employee," as used in § 18-123(b), includes both merit and non-merit system employees. Richards contends that the circuit court was correct because the relevant statutory sections do not exclude expressly probationary employees from seeking administrative or appellate review of adverse personnel actions.

II. Statutory Interpretation.

We are obliged to engage in a statutory interpretation analysis. The Court of Appeals offers directions for engaging in such an analysis:

> The starting point of any statutory analysis is the plain language of the statute viewed in the context of the statutory scheme to which it belongs. We presume, moreover, that the General Assembly intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of the statute, to the extent possible consistent with the statute's object and scope.

[7] Title 18, Subtitle 1 of the Maryland Code, Public Utilities Article will be referred to throughout the rest of this opinion by statutory section only, e.g., § 18-123. Any references to other portions of the Code will include the name, title, and subtitle.

> It is well settled that when a statute's language is 'clear and unambiguous,' we need not look beyond the statute's provisions and our analysis ends. Yet, it is also settled that the purpose of the plain meaning rule is to ascertain and carry out the real legislative intent. What we are engaged in is the divination of legislative purpose or goal. . . . The meaning of the plainest language is controlled by the context in which it appears. To that end, we may find useful the context of a statute, the overall statutory scheme, and the archival legislative history of relevant enactments.

Kranz v. State, 459 Md. 456, 474-75, 187 A.3d 67, 76-77 (2018). Additionally, we "may examine any interpretive regulations promulgated by an administrative agency, giving deference to the agency's [longstanding and consistent] application" of its enabling statute or ordinance. *Smack v. Dep't of Health & Mental Hygiene*, 134 Md. App. 412, 420, 759 A.2d 1209, 1213–14 (2000), *aff'd sub nom. Smack v. Dep't Of Health & Mental Hygiene*, 378 Md. 298, 835 A.2d 1175 (2003).

a. Plain Language.

We begin by considering the plain language of the statute to ascertain if that answers the question before us. WSSC contends that § 18-123(a) provides the context by which we must read § 18-123(b). Subsection (a) provides that "[a]n employee may not be permanently removed except for cause and after an opportunity to be heard." Md. Code, Pub. Util. § 18-123(a). The "for cause" language in this subtitle limits the scope of the type of employee implicated to merit system employees because probationary employees may be removed by recommendation of their supervisor, implying that the removal in the latter category does not have to be for cause.[8] Subsection (b) gives context to the

[8] *See supra* footnote 1.

"opportunity to be heard" language in subsection (a) by providing the avenue to appeal the removal. WSSC posits additionally that subsection (c) lends further support to the construction that subsection (b) applies only to merit-system employees because subsection (c) mentions explicitly the *merit* system.

Richards endeavors to refute WSSC's logic by contending that there is no reason to read § 18-123(b) in conjunction with § 18-120. He points out that neither the title of § 18-123 ("Permanent separations—Removal") nor the language of subsection (b) singles-out merit-system employees. If the Legislature intended to limit appellate rights to merit-system employees only, according to Richards, it would have included the phrase "merit-system employee" in subsection (b), as it did in subsection (c).

At the end of the day, we agree with WSSC and the ALJ's views. It seems clear to us that the ALJ's decision was not premised on an erroneous conclusion of law. We recognize Richards' interpretation of § 18-123, that the Legislature did not include "merit-system employee" or similar language in the title of the section or subsections (a) and (b), as not an unreasonable one. It is also a reasonable interpretation, however, that despite the highlighted omission, the relevant statutory scheme refers implicitly and contextually to merit-system employees only. Probationary employees at WSSC may be removed by recommendation of their supervisor, with or without cause. The removal process of merit-system employees is different, including that those employees have an express right to appeal termination.

Richards seems to gloss over the fact that a plain language statutory analysis is performed in light of the "context of the statutory scheme to which it belongs," *Kranz*, 459

Md. at 474, 187 A.3d at 76 (quoting *Brown v. State*, 454 Md. 546, 551, 165 A.3d 398 (2017)). Richards' interpretation views the language in § 18-123(a) and (b) in isolation, not in the context of the greater statutory scheme.

Although both parties present reasonable interpretations of the statutory language in § 18-123, we cannot say that the ALJ's interpretation of the language was erroneous as a matter of law. We shall look more closely at the overall statutory scheme of Title 18, as we are allowed to do in aid of ascertaining legislative intent.

b. The relevant statutory scheme of Title 18, Subtitle 1 of the Maryland Code, Public Utilities Article.

WSSC seeks to bolster its argument that only a merit-system employee enjoys a right of appeal by parsing the language of other sections of Title 18, Subtitle 1. This line of reasoning begins by linking §§ 18-120 and 18-123(b). Section 18-120 outlines separation of an employee from the merit system. According to WSSC, § 18-120 grants it the authority to separate an employee from the merit system permanently and § 18-123(b) provides limitations on permanent removal from the merit system. Because § 18-120 applies explicitly to the permanent removal of merit-system employees only, the limiting provisions in § 18-123(b), logically, apply only to merit-system employees.

WSSC ranges-out to other subtitles in Title 18 in support of its thesis. The terms "merit-system employee" and "employee" are used, seemingly interchangeably, in other sections of Title 18. For example, § 18-117 provides: "The Commission, by regulation, may provide for the designation by a *merit system employee* of the individual to whom the *employee's* final salary payment, and any payment due for unused annual leave, should be

made on the death of the *employee*." (emphasis added). Additionally, § 18-122 states:

> (a) An *employee* who is laid off because a position has been abolished, discontinued, or vacated because of a change in departmental organization or because of a stoppage or lack of work shall be placed on the eligible list for the classification of position from which the employee is laid off.
> (b) If a vacancy occurs in the *employee's merit system position*, the employee shall be reemployed in preference to any eligible individual who is not an employee of the Commission.

(emphasis added).

According to WSSC, the Legislature's seeming interchangeable use of the term "merit-system employee" and "employee" in these subsections of WSSC's enabling statute demonstrates that it intended the provisions contested here to apply only to merit-system employees.

Richards, in riposte, contends that these provisions in Title 18 are irrelevant to the question of employee appellate rights upon termination. In his view, although elsewhere in Title 18 the use of the term "merit-system employee" denotes clearly the application of a benefit, right, or responsibility to that distinct class of employees, the term "employee," as it appears in Title 18, § 18-123(b), appears to encompass any and all employees of the WSSC.

The use of "merit-system employee" and "employee" in other Title 18 provisions is of some weight in our interpretation of the employment-termination appellate rights of WSSC employees. The Legislature's seeming interchangeable use of the terms tends to support the ALJ's determination that the appealability provisions in § 18-123 apply only to merit-system employees.

c. Archival legislative history.[9]

We look next to the history of the contested aspects of Title 18. The first mention of a merit system appeared in Chapter 733 of the 1947 version of the Session Laws, introduced as House Bill 356. That Chapter stated that its purpose was to "authorize the Washington Suburban Sanitary Commission to establish a Merit System for certain of its employees, and authorizing the adoption of rules and regulations for the administration of the same." 1947 Md. Laws 1809. The Chapter applied expressly to "classified service" employees. Other sections of Chapter 733 established various rights of employees within the "classified service." Section 8 of Chapter 733 corresponds to the current § 18-123. It reads:

> [A]n employee may be permanently separated from the classified service through resignation or removal and may be temporarily separated through lay-off, suspension, or leave of absence . . . No employee may be permanently removed except for cause and after an opportunity to be heard in his own defense. Should the discharged employee desire, he may appeal . . . No employee shall be removed from the classified service because of religious or political affiliations.

1947 Md. Laws 1812.

The General Assembly, in 1971, updated the Washington Suburban Sanitary Code.

[9] Richards posits that the language of § 18-123(b) is plain, so "there is no need for this Court to delve into the legislative history of the statute, nor is there any reason to engage in a review of irrelevant portions of the same statutory title." In determining the meaning of the plainest language, however, we may turn to the context of the statutory scheme in which the language appears. *Kranz*, 459 Md. at 474-75, 187 A.3d at 76-77. It is settled that the legislative history is one of the tools we possess to measure the meaning of the plain language and legislative intent. *Id.*

1971 Md. Laws 368 ("AN ACT to legalize the Washington Suburban Sanitary District Code, being the statutes relating to the Washington Suburban Sanitary District set forth in Articles 16 and 17, respectively, of the Code of Public Local Laws of Maryland, titled, respectively, 'Montgomery County' and 'Prince George's County,' both subtitled 'Washington Suburban Sanitary District,' and making the Code evidence of the law."). The WSSC Code was repealed in 1981 by the General Assembly and moved to Article 67 of the Maryland Code. 1981 Md. Laws 3062 ("FOR the purpose of transferring to the Annotated Code of Maryland the laws relating to the Washington Suburban Sanitary District; repealing a certain prior enactment . . . and transferring The Code of the Washington Suburban Sanitary District . . . to be New Article 67.").

New laws pertaining to the personnel system were enacted in 1982. 1982 Md. Laws 3996. Section 11-9 of Article 67, regarding separations from the classified service, became § 11-109.[10] 1982 Md. Laws 4127. Consistent with other subsections in that title, the language was modified through recodification to reflect a contemporary drafting style and the language was updated. *Id.* The General Assembly did not purport to make any substantive changes to the separation provisions.

[10] The 1982 version of § 11-109(b) provided:

> (b)(1) An employee may not be permanently removed except for cause and after an opportunity to be heard. The discharged employee may appeal to the Secretary of Personnel, whose decision is final.
>
> (2) An employee may not be removed from the classified service because of religious or political opinions or affiliations.

1982 Md. Laws 3996.

The most recent relevant changes by the General Assembly to provisions relevant to WSSC occurred in 2010. The General Assembly passed the current § 18-123 for the purpose "of adding a new division to the Public Utility Companies Article of the Annotated Code of Maryland, to be designated and known as 'Division II. Washington Suburban Sanitary Commission'" and "revising, restating, and recodifying certain laws relating to the Washington Suburban Sanitary Commission[,]" among other reasons. 2010 Md. Laws 179. The changes are described further in the Revisor's Notes to § 18-123: "This section is new language derived without substantive change from former Art. 29, § 11-109(b)."

According to WSSC, "classified service," as used by the Legislature in the historic statutory scheme, is a predecessor analogue to the present day "merit system." Examining the legislative history of § 18-123 from its predecessor in 1947 to its present form, according to WSSC, reveals no intent by the General Assembly to allow non-merit employees to appeal their termination. The changes made over the years were only stylistic, to conform to modern drafting and code revision processes.

The legislative history supports WSSC's contentions and the ALJ's determination. It is reasonable to interpret the "classified service" language in the early versions of WSSC's enabling statute as a progenitor of today's merit system. Chapter 733 of the 1947 Session Laws established a merit system for "certain employees." That Chapter applied to former "classified service" employees. It is reasonable to link today's meaning of the merit system to the 1947 Session Laws use of "classified service" because Chapter 733 established rights for those classified-service employees which evolved over time to be similar to those rights of today's merit-system employees. A review of § 18-123 from its

antecedents to its modern form reveals no substantive changes to the removal provisions evincing the Legislature's intent to give all WSSC employees a right to repeal their removal. Thus, the WSSC's longstanding and consistent interpretation and application of the State enabling statute regarding employee terminations and the creation of a merit system are entitled to considerable weight in our analysis. As such, WSSC's contentions and the ALJ's decision are not premised on an erroneous conclusion of law.

JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO DISMISS RICHARDS' PETITION FOR JUDICIAL REVIEW. COSTS TO BE PAID BY APPELLEE.