Circuit Court for Anne Arundel County
Case No. C-02-CV-16-002203

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 329

September Term, 2017

JULIAN P. WALTERS

v.

THE CITY OF ANNAPOLIS

Kehoe,
Beachley,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: June 6, 2018

*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. *See* Md. Rule 1-104.

This is an appeal from a judgment of the Circuit Court for Anne Arundel County, the Honorable Alison L. Asti presiding, which affirmed the decision of the City of Annapolis Civil Service Board to terminate the employment of Julian P. Walters as Harbormaster. Mr. Walters raises three issues on appeal:

> 1. Did the handling of this matter by the City of Annapolis and the City of Annapolis Civil Service Board violate Walters's right to due process of law?
>
> 2. Was the City of Annapolis Civil Service Board's decision to uphold a decision to discharge Walters as the City of Annapolis Harbormaster supported by competent, material, and substantial evidence?
>
> 3. Was termination an arbitrary and capricious penalty in light of the nature of Walters's offense and past services to the City?

We will affirm the Board's decision.

Background

In 2008, Walters was hired as the City's Harbormaster. His duties included collecting fees for temporary use of City-owned docks, mooring pilings, and launching ramps. Some of these fees were paid in cash and, for that purpose, the Harbormaster maintained a "change bank," which was maintained in three safes: two dock assistants' safes at the City Dock and Truxton Park, as well as the Watch Commander's safe, located in the Harbormaster's office. The practice was that the three safes would collectively contain $4,000, of which $3,400 was kept in the Watch Commander's safe. Any excess over $4,000 was to be deposited on a daily basis at a bank in a City account. The three safes were subject to continuous video surveillance. Walters had the ability to remotely access the surveillance tapes and could "bookmark" portions of the surveillance tapes for future

review and use. Walters was aware that the parts of the tapes that weren't bookmarked were recorded-over on a 28 day cycle.

When Walters became Harbormaster, the day-to-day responsibility and custodianship of the change bank was handled by an administrative assistant in the Harbormaster's Office. This individual retired in 2014. At that time, Walters was the Acting Director of the City Department of Recreation and Parks and William Brookes, the Deputy Harbormaster, was Acting Harbormaster. On July 1, 2014, the custody of the change bank was transferred to Brookes. On that date, the balance in the change bank was $4,000. Walters wrote a memorandum to the City Finance Director, informing him that custody and responsibility of the change bank was transferred to Brookes.

Brookes was on leave from January 2016 through March 7, 2016.[1] Neither Brookes nor Walters made arrangements for custody of the change bank during Brookes's absence. On February 8, 2016, Walters was asked by a docking assistant to make change for a large denomination bill. Walters opened the Watch Commander's safe and immediately realized that there was a substantial shortage. Walters did not count the currency in the safe but instead contacted Brookes, who informed him that he had taken several large bills to the bank to make change and would return with the money shortly. Walters told Brookes to return with the money as soon as possible. Walters did nothing further until February 26th,

[1] Brookes did not testify at the hearing, and we do not know what his version of the events might be.

when he asked Brookes whether the money had been returned and was told that it had not been. Walters again urged Brookes to return the money but did nothing further, even after Brookes returned from leave. On March 29, 2016, over three weeks after Brookes's return from leave, Walters again asked Brookes if he had returned the money and was told no. On the same day, Walters asked two docking assistants to count the money in the safe; they found there was a significant shortfall. Walters again contacted Brookes, who stated that he had returned the money on March 7th.

On March 30th, Walters reported the shortage to Michael Morris, the Director of the City's Parks and Recreation Department, and Walters's superior. On March 31st, Walters contacted the Annapolis Police Department. This was fifty-one days after he first became aware of the cash shortfall. The police conducted an investigation. One of the detectives testified at the Board hearing that, as part of the investigation, officers conducted an audit of activity on the account. Although they were hampered by the fact that security tapes for some of the critical periods had been recorded-over, the police established that there had been unauthorized withdrawals from the safe beginning in approximately October of 2014, and that the shortfalls increased as time went on. The detective testified that the department's investigation indicated that the total cumulative shortfall as of March 31 was $3,490. Walters did not challenge this testimony in front of the board nor does he challenge it on appeal.

On April 6, 2016, Morris delivered a written notice to Walters that terminated his employment with the City. The notice stated in pertinent part:

> This action is being taken with regard to the substantial sum of cash that is missing from the Watchcommander's secured safe. On March 30, 2016 you reported to me that there appeared to be the sum of $3,440 missing from the safe. You advised me that you became aware of this matter on February 8, 2016 when you opened the change bank cash box in the Watchcommander's safe and noticed that there was a significant shortage of cash in the box. While you did contact Deputy Harbormaster Bill Brookes in an attempt to resolve the discrepancy that day you still did not report the incident or insure an audit of the records to comply with the City's Financial Policy. The Police investigation into the matter and evidence shows that, at a minimum, there has been inaccurate recordkeeping since July of 2014 and the recordkeeping that had been made has shown a declining balance in the contents of the change bank cash box.
>
> * * *
>
> Your termination is in accordance with one or more of the following City of Annapolis Codes and the Rules and Regulations of the Personnel System:
>
> **City Code** Section 3.16.120 B
>
> 1. Incompetence, incapacity or inefficiency in performance of duties,
>
> 2. Violation of law, official rules, regulations or orders, or failure to obey any lawful or reasonable direction when the action amounts to insubordination or serious breach in discipline;
>
> * * *
>
> 4. Willful or repeated negligence in performing duties;
>
> Under the terms of the Personnel Rules and Regulations, Code of Conduct 7-5-D, you have committed the following offenses:
>
> Group III:
>
> 1. Serious neglect in the performance of assigned duties.
>
> * * *
>
> 8. Serious incompetence or inefficiency in the performance of assigned duties.
>
> In your position as Harbormaster, it is both your responsibility and authority to promptly handle issues that are a violation of policy, potentially illegal and possibly criminal. You should be able to make initial judgments that allow for quick action and proper investigation. You were entrusted to ensure the assets of

> the City were properly secured, accounted for and deposited. In addition, you were responsible for implementing the City's policies as it affects your operation and the handling of monies or other receipts by the Harbormaster's Division. The seriousness of your delay in action to address the missing money has impacted the investigation, recovery and resolution of this issue.

The City's personnel policies permitted a terminated employee to seek review of the decision by an informal hearing with the employee's supervisor, or a formal adversarial hearing before the Civil Service Board, or both. Walters first elected to have an informal hearing with Morris, which was unsuccessful, and then a formal hearing before the Board. After a two day evidentiary hearing, the Board affirmed Walters's termination in a written decision. The Board stated in pertinent part:

> Failure to monitor and audit the Change Bank and to audit the log accounts for that bank from July 1, 2014 to March 29, 2016 constitutes incompetence or, at best, inefficiency in the performance of the Harbormaster's duties. It further demonstrates a violation of the City's Financial Policy which resulted in a loss of $3,500.00 of public funds during that period. Failure to report the cash shortage on or immediately after February 8, 2016 is a more egregious violation which adversely impacted the criminal investigation and possible recovery of the missing funds. That delay resulted in the loss of any possible videotaped evidence due to the 28 day lifespan of the tapes before they were recorded over. Also as a result of the delay, it was not possible for City officials or the police to timely question Brookes or bank employees at Wells Fargo regarding [Brookes's] statement to [Walters] that he had left the large denomination bills at the bank. Regardless of his reasons, [Walters's] failure to timely report constitutes willful and serious neglect in the performance of his duties and conduct detrimental to the efficiency of the service. Notwithstanding [Walters's] length and quality of City employment, his actions or lack of actions are Group III offenses which warrant his dismissal.

Walters filed a petition for judicial review. The circuit court affirmed the Board's decision.

Analysis

In a judicial review proceeding, the issue before an appellate court "is not whether the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010) (citations, internal quotation marks, and brackets omitted). For that reason, we "look through" the circuit court's decision, in order to "evaluate the decision of the agency" itself. *People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 66 (2008).

Reviewing courts accept an agency's factual findings if they are supported by substantial evidence, that is, there is relevant evidence in the record that logically supports the agency's factual conclusions. *Bayly Crossing*, 417 Md. at 139. A reviewing court is not bound by the agency's legal conclusions, although some deference should be accorded to an agency interpretation of a statute, ordinance, or regulation that falls within its delegated responsibilities. *See, e.g. Young v. Anne Arundel County*, 146 Md. App. 526, 568-69 (2002). Often an agency's decision will involve application of the law to the evidence. If the agency has correctly identified the applicable legal standard, reviewing courts defer to the agency's application of the law to the facts before it, as long as the findings are supported by substantial evidence. *See, e.g., Baltimore Lutheran High School Assoc. v. Employment Security Admin.*, 302 Md. 649, 662 (1985).

1. There were no due process violations.

Walters asserts that his right to due process was violated by the City in three ways.

First, he points out that the first day of his two day hearing before the Board was held in a room without air conditioning, conditions that the Board Chair described as "sweltering." Electric fans were deployed in an attempt to make the room less uncomfortable and Walters claims that the noise of the fans caused members of the Board to comment that they had not heard portions of the testimony. Walters is correct; at times during the hearing, members of the Board did state that they were having trouble hearing a witness. Walters identifies five such occasions; in each of them, the transcript indicates that the witness repeated the answer at the request of the Board. Walters did not object to the fans during the hearing and, in any event, we can see no prejudice because a board member asks a witness to repeat an answer. As regards Walters's additional argument regarding the climatic conditions in the hearing room, we are unpersuaded on this record (even with the Chair's observation that it was "sweltering") that the conditions rose to the dimensions of a constitutional violation.

Second, Walters asserts that his informal hearing before Morris was a "sham" because Morris conceded that he would not have rescinded the decision to terminate without first consulting the City's Department of Human Resources and other City officials. This argument is not persuasive because the hearing that counted, for purposes of a procedural due process analysis, was the hearing before the Board. *See Matthews v. Eldridge,* 424 U.S.

319, 334 (1976); *Maryland Racing Commission v. Belotti*, 130 Md. App. 23, 55–56 (1999) ("'The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."' (quoting *Opp Cotton Mills v. Administrator of the Wage and Hour Div.*, 312 U.S. 126, 152-53 (1941))).

Third, Walters contends that the Board hearing was unfair because he wanted to call two former City employees, Brian Woodward, a former director of the Recreation and Parks Department, and Paul Rensted, a former director of the City's Department of Human Resources, but that they were unable to testify because the Acting City Attorney refused to grant them immunity to testify pursuant to Annapolis City Code § 2.08.040C. There are several problems with this contention.

Initially, Walters does not direct us to anything in the record that supports his contention that the Board was made aware that Woodward was unwilling to testify unless he received "immunity" from the Acting City Attorney. Nor did he proffer to the Board what the substance of Woodward's testimony would be if he did testify. As a result, these contentions are not a basis for appellate relief. *See, e.g., Halici v. City of Gaithersburg,* 180 Md. App. 238, 248–49 (2008) ("Ordinarily, a court reviewing the decision of an administrative agency may not pass upon issues presented to it for the first time on judicial review. . . .") (quotation marks omitted); *Muhammad v. State*, 177 Md. App. 188, 281 (2007) ("A claim that the exclusion of evidence constitutes reversible error is generally not

preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony.").

Our analysis as to Rensted is different. There are no preservation concerns because Walters raised the "immunity" issue with the Board and made a proffer of Rensted's anticipated testimony. If he testified, Rensted would have stated that, at some point in the past, several docking assistants signed a petition to remove Walters as Harbormaster and to replace him with Brookes. It's not clear what Rensted concluded as a result of his inquiry other than that Brookes was more popular with the docking assistants than was Walters. We do not see how Walters was prejudiced by Rensted's failure to testify because substantially similar evidence was presented to the Board through other means and the Board's finding on the issue was favorable to Walters.

Rensted's testimony would have been a link in a chain of evidence to support Walters's contention that his handling of the missing money issue was influenced by his concerns about his relationship with his assistants. The record contains past job reviews stating that Walters needed to do a better job of "team building" with his subordinates. Walters testified to the Board that he didn't pursue the missing money issue with Brookes because of those reviews. The Board concluded that Walters may have deferred confronting Brookes because of the latter's popularity with the docking assistants, as disclosed by the petition. We see no prejudice.

The City asserts that the argument is unpersuasive for a different reason, and we agree. The local statute in question, § 2.08.040.C, is part of the City's Ethics Code. There is nothing in the Ethics Code that gives the City Attorney the authority to grant "immunity" from the provisions of the Code. To the extent that a former employee is unsure of the proper interpretation of a provision of the Ethics Code, he or she may seek an opinion from the City's Ethics Commission. *See* City Code § 2.08.030.C.2. Thus, assuming that the statute applies at all,[2] the proper avenue for Rensted and Woodward would have been to ask the City Ethics Commission for an opinion.

2. The Board's decision was neither arbitrary nor capricious.

Walters next argues that the Board's decision was arbitrary and capricious because there was a disconnect between the charges and the Board's findings. This contention is not persuasive.

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[2] Section 2.08.040.C states (emphasis added):

> Post-employment limitations and restrictions. 1. A former official or employee may not **assist or represent** any party other than the City in a case, contract, or other specific matter involving the City, **for compensation**, if that matter is one in which the former official or employee significantly participated as an official or employee. 2. For a period of one year after an elected official leaves office, the former official may not assist or represent another party, for compensation, in a matter that is the subject of legislative action.

There is nothing in the record that suggests that Rensted was asking to be compensated for testifying as a fact witness. How the statute would apply in situations where a former City employee is to testify without compensation as a fact witness is unclear.

Morris's termination letter was the charging document. It cites to § 3.16.120.B of the City Code, which states in pertinent part that an employee can be disciplined for "incompetence, incapacity or inefficiency in performance of duties," which include "serious neglect in the performance of assigned duties."

The letter then states:

> In your position as harbormaster, it is both your responsibility and authority to promptly handle matters that are a violation of policy, potentially illegal and possibly criminal. You should be able to make initial judgments that allow for quick action and proper investigation. You were entrusted to ensure the assets of the City were properly secured, accounted for, and deposited. . . . The seriousness of your delay in action to address the missing money has impacted the investigation, recovery and resolution of this issues.

In its findings, the Board concluded that Walters's:

> failure to monitor and audit the Change Bank and to audit the log accounts for that bank from July 1, 2014 to March 29, 2016 constitutes incompetence or, at best inefficiency in the performance of the Harbormaster's duties. . . .

and that:

> As a result of the delay, it was not possible for City officials or the police to timely question Brookes or the bank employees. . . . [Walters's] failure to timely report constitutes willful and serious neglect in the performance of his duties and conduct detrimental to the efficiency of the service.

The wording in Morris's letter is not identical to the Board's findings, but the differences are not substantive. There was no discrepancy between the asserted basis for termination, i.e., incompetence, and the Board's finding: "incompetence or at best inefficiency" in the performance of the Harbormaster's duties.

Walters next contends that the City was guilty of spoliation of evidence because a City employee deleted the text messages from his City-issued mobile telephone. He asserts that there were exculpatory text messages stored on the device, and that these messages were deleted even though he had informed an investigating police officer that there was potentially exculpatory information on the phone. He contends that, in civil cases, there is a presumption that destruction of evidence indicates that the party believes that the evidence will be harmful to it, and that deleting the text messages from the cell phone "was a clear violation of due process of law." Again, this argument is not persuasive.

In civil cases, the doctrine of spoliation **permits**, but does not **require**, a fact-finder to infer that the missing evidence would be unfavorable to the spoliator. However, spoliation is "not in itself amount to substantive proof of a fact essential to his opponent's cause." *Anderson v. Litzenberg*, 115 Md. App. 549, 560 (1997). In other words, Walters was free to argue to the Board that information contained in the mobile phone would have assisted him, but the Board was not required to accept the argument, much less to reverse the City's decision to terminate him for that reason.

Walters provides no authority for his contention that the spoliation issue somehow rises to the level of a deprivation of his constitutional rights. Therefore, he has waived his argument. *See, e.g., Ochoa v. Dep't of Pub. Safety & Corr. Servs.,* 430 Md. 315, 328 (2013); *Klauenberg v. State,* 355 Md. 528, 552 (1999).

3. The penalty imposed by the Board was neither extreme nor egregious.

Walters's final argument is that the Board's decision to uphold his termination was arbitrary and capricious because:

> it was totally clear that, if [he] was guilty of an offense at all, this was his first one in over a decade of service to the City. Unquestionably, a lesser penalty, e.g., a reprimand or a suspension, was available.

We agree with Walters that the Board had a spectrum of sanctions available to it; however, courts typically do not interfere with an administrative agency's choice of sanction. *See Maryland Aviation Admin. v. Noland*, 386 Md. 556, 581 (2005) ("A reviewing court is not authorized to overturn a lawful and authorized sanction unless the disproportionality of the sanction or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary or capricious." (Citation and quotation marks omitted)).

We do not view the Board's sanction as extreme or egregious. The evidence before the Board established that Walters learned that there was a significant amount of money missing from the change bank on February 2, 2016. Inexplicably, he made no attempt to count the money that was in the safe at that time. He did not notify the police or anyone else in City government of the discrepancy. He contacted Brookes, and was told by the latter that he had taken a few large denomination bills to the bank for change. He didn't follow up on the matter effectively and only notified his supervisor fifty-one days later. In the intervening period, surveillance tapes that could have assisted the police in its

investigation were recorded-over, as Walters knew they would be. Under the circumstances, termination of employment was neither extreme nor egregious.

THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.