Circuit Court for Prince George's County
Case No. CAL21-02129

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 0481

September Term, 2022

LAVETTA JACKSON

v.

MARYLAND DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Arthur,
Beachley,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: February 27, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

This appeal arises from an administrative law judge's ("ALJ") decision, concluding that the Maryland Department of Housing and Community Development ("DHCD") properly terminated Lavetta Jackson ("Jackson") pursuant to the Code of Maryland Regulations ("COMAR") 17.04.05.03(G)(1). Jackson filed a petition for judicial review in the Circuit Court for Prince George's County, which affirmed the ALJ's decision. Jackson now appeals to this Court. For the following reasons, we shall affirm.

ISSUES PRESENTED FOR REVIEW

Jackson presents the following issues for our review:[1]

I. Whether the ALJ erred in finding no procedural issues meriting reversal of Jackson's termination.

II. Whether the ALJ erred in finding a sufficient substantive basis for terminating Jackson.

FACTUAL AND PROCEDURAL BACKGROUND

With a few exceptions, the parties have adopted the findings of fact made by the ALJ. Accordingly, the following statement of facts is derived from those findings made by the ALJ following the evidentiary hearing. We discuss those contested facts which are relevant as part of our review of the parties' arguments.

[1] Condensed and rephrased from:

I. Whether the termination was untimely filed pursuant to COMAR 17.04.05.03?
II. Whether the Agency failed to afford the Employee a meaningful meeting with the appointing authority as required by COMAR 17.04.05.03?
III. Whether the Agency's failure to comply with COMAR 17.04.05.03G(2) requires reversal of the termination?
IV. Whether the decision of the ALJ on the merits is supported by substantial evidence in light of the record as a whole?

The DHCD is a department of the Maryland State government responsible for implementing programs to increase and preserve affordable housing for working families, senior citizens, low-income populations, and individuals with special needs. During all relevant times, Jackson worked as an "Administrative Specialist II" within the DHCD's Division of Credit Assurance ("DCA"). Jackson's duties included, among other things: maintaining accurate data in several database systems, processing certain emails, setting up new projects, and sending weekly reports to managers and administrators.

On July 3, 2019, Jackson received an unsatisfactory end-cycle appraisal and was placed on a Performance Improvement Plan ("PIP").[2] The PIP incorporated scheduled 90-day and 180-day reviews. Preceding the 90-day review, Jackson's supervisor met with Jackson several times to discuss performance. The supervisor reported that Jackson had set up new projects incorrectly and failed to timely disseminate operating statements and weekly reports.

In October, Jackson's supervisor met with Jackson for the 90-day PIP review. They discussed ongoing deficiencies in Jackson's work and suggestions for improvement.[3] Three weeks later, noting that Jackson's performance had declined, the supervisor issued a

[2] Under section 7-502 of the State Personnel and Pensions Article, employees of the State of Maryland are required to receive written performance appraisals at six-month intervals. Md. Code Ann., State Pers. & Pens. § 7-502(a). To differentiate between Jackson's performance appraisals, we adopt the parties' terminology in their briefs and refer to the appraisal on July 3 as end-cycle and the appraisal on December 20 as mid-cycle.

[3] The PIP indicated two overarching areas of concern with Jackson's performance: new project setup and access database. During the 90-day review, Jackson's supervisor noted an additional area of concern: notifications and tracking.

Memorandum of Counseling to Jackson documenting issues with the set-up of new projects. On December 17, Jackson's supervisor emailed the Director of the DCA: "Based on the unsatisfactory Performance Evaluation [Jackson] is scheduled to receive, . . . I would recommend termination." Three days later, Jackson and the supervisor met for Jackson's mid-cycle performance appraisal. The supervisor's appraisal detailed issues with Jackson's work and concluded that Jackson does "not appear to be capable of performing well in this position under general supervision."

Jackson's supervisor subsequently met with the Director of the DCA and the Director of the Office of Human Resources ("HR") to discuss the process for terminating Jackson.[4] The supervisor and the Director of the DCA then formally requested that Jackson be terminated. Their request was forwarded to additional offices which were required to review and approve termination requests. On December 30, after the relevant offices approved the request, the Director of HR emailed members of several DHCD departments that "[t]here will be a termination on Friday, January 3."

On January 3, Jackson's supervisor met with Jackson for the 180-day PIP review. Notably, Jackson's supervisor indicated that Jackson's performance had remained unsatisfactory. Later that day, Jackson received a Notice of Termination, which explained that, 180 days after being placed on a PIP, Jackson continued to have "ongoing performance issues."

Jackson subsequently filed an appeal with the Secretary of the DHCD to challenge

[4] The Director of HR explained that the Director of the DCA would need to approve a termination request made by the supervisor.

the termination. The matter was forwarded to the Office of Administrative Hearings and an evidentiary hearing was held before the ALJ. Following the hearing the ALJ issued a decision upholding the termination. Jackson filed a petition for judicial review, and the Circuit Court for Prince George's County affirmed the ALJ's decision. This timely appeal followed.

DISCUSSION

In reviewing an administrative agency's decision, this Court's role is "precisely the same as that of the circuit court." *Stover v. Prince George's Cnty.*, 132 Md. App. 373, 380 (2000) (quoting *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303–04 (1994)) (internal quotations omitted). "Our inquiry is whether the administrative agency erred." *Balt. Police Dep't. v. Ellsworth*, 211 Md. App. 198, 207 (2013) (citing *Bayly Crossing, LLC v. Consumer Prot. Div.*, 417 Md. 128, 136 (2010))

"Judicial review of an administrative agency action is narrow." *Stover*, 132 Md. App. at 381 (quoting *United Parcel Serv., Inc. v. People's Couns. for Balt. Cnty.*, 336 Md. 569, 576–77 (1994)) (internal quotations omitted). "[W]e are limited to determining if there is substantial evidence in the record as a whole to support the agency's finding[s] and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 57 (2002) (quoting *Md. Div. of Lab. & Indus. v. Triangle Gen. Contractors, Inc.*, 366 Md. 407, 416 (2001)) (internal quotations omitted); *see Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 297–98 (2015) ("[A]n agency's interpretation of a regulation is a conclusion of law." (quoting *Crofton Convalescent Ctr., Inc. v. Dep't of Health & Mental Hygiene, Nursing*

Home Appeal Bd., 413 Md. 201, 215 (2010)) (internal quotations omitted)). In determining if there is substantial evidence, "[t]he test is reasonableness, not rightness." *Md. Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 120 (2016) (quoting *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979)). We "review the agency's decision in a light most favorable to the agency, since 'decisions of administrative agencies are *prima facie* correct.'" *Md. State Police v. Lindsey*, 318 Md. 325, 334 (1990) (quoting *Bulluck v. Pelham Woods Apartments*, 293 Md. 505, 513 (1978)).

I. THE MARYLAND ADMINISTRATIVE PROCEDURE ACT GOVERNS THE DHCD'S DECISIONS.

When an agency fails to "scrupulously observe rules, regulations or procedures which it has established[,] . . . its action cannot stand and courts will strike it down." *Danaher v. Dept. of Lab., Licensing & Regul.*, 148 Md. App. 139, 174 (2002) (quoting *Smith v. State*, 140 Md. App. 445, 455 (2001)). Specifically, if an agency is governed by the Maryland Administrative Procedure Act ("APA"), then courts may "reverse or modify [an agency] decision if any substantial right of the petitioner may have been prejudiced" as a result of "unlawful procedure." Md. Code Ann., State Gov't § 10-222(h)(3)(iii). In contrast, Maryland agencies outside the APA's governance are regulated by a version of the federal *Accardi* doctrine. *Pollock v. Patuxent Inst. Bd. of Rev.*, 374 Md. 463, 503 (2003). Under the Supreme Court of Maryland's (at the time named the Court of Appeals of Maryland)[5] adoption of the *Accardi* doctrine, a court may vacate and remand an agency

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

decision if (1) the agency violates its own rule, regulation, or procedure, (2) the agency rule or regulation "affects individual rights and obligations" or confers "important procedural benefits," and (3) the petitioner is prejudiced as a result of the violation. *Id.* at 503–04.

The ALJ noted that Jackson's claim was subject to the contested case provisions of the APA.[6] However, Jackson contends that the DHCD's decision should be assessed under the *Accardi* doctrine. We observe that the *Accardi* doctrine does not apply to decisions made by agencies within the scope of the APA. *See Pollock*, 374 Md. at 503. Section 10-203 of the APA, titled "Scope of subtitle," explicitly excludes numerous agencies from the APA's governance; the DHCD is not excluded. Md. Code Ann., State Gov't § 10-203(a); s*ee Walker v. Dept. of Hous. & Cmty. Dev.*, 422 Md. 80, 92 (2011) (accepting that "[t]he parties are in agreement that the Department [of Housing and Community Development] is a State agency to which the APA applies"). Hence, we agree with the ALJ that the APA governs Jackson's claim.

II. JACKSON'S CLAIMS OF UNLAWFUL PROCEDURE DO NOT MERIT REVERSAL OF THE DHCD'S DECISION UNDER THE APA.

Turning to the application of the APA, Jackson contends that the DHCD's termination decision should be reversed because the DHCD failed to adhere to its own regulations under COMAR 17.04.05.03(G) by: (1) not providing 180 days for Jackson's performance to improve between the unsatisfactory end-cycle appraisal and termination,

[6] In sum, the ALJ noted that the APA's contested case provisions, Department of Budget and Management's procedural regulations, and the Office of Administrative Hearings' rules of procedure govern procedure in this case.

(2) not granting Jackson a meaningful opportunity to meet and be heard before termination, and (3) not notifying the Secretary of the DHCD prior to Jackson's termination. We address each of Jackson's claims in turn.

A. Timing of Termination

COMAR 17.04.05.03 governs disciplinary actions related to performance of Maryland government employees in the skilled or professional services. COMAR 17.04.05.03(A). "When an employee has been given an overall rating of 'unsatisfactory' on an annual performance appraisal, . . . the employee has 180 days from issuance of the rating to improve to the level of 'satisfactory.'" COMAR 17.04.05.03(G)(1). Jackson's supervisor rated Jackson's performance as unsatisfactory in the end-cycle performance appraisal issued on July 3. Jackson thus had until the close of business on December 30, 180 days from July 3, to improve performance to a satisfactory level. *See id.*

Jackson contends that the DHCD failed to provide a full 180 days to improve, between the unsatisfactory end-cycle appraisal and termination. Jackson emphasizes that, prior to December 30, the Director of HR sought and received a formal request for Jackson's termination. In response, the DHCD claims that they continued to monitor Jackson's performance through the end of the 180-day period. The DHCD highlights that, prior to Jackson's termination, Jackson's supervisor completed a 180-day evaluation memorandum on December 31 and reviewed it with Jackson on January 3. Moreover, the DHCD emphasizes that their Chief of Staff did not sign the Notice of Termination until January 2 or 3, and Jackson did not receive the notice until January 3.

The numerous emails sent, beginning on December 17, to prepare for Jackson's

termination could be read to corroborate Jackson's contention that the DHCD had already resolved to terminate Jackson before the end of the 180-day period. Even so, there is substantial evidence in the record supporting the ALJ's conclusion that Jackson was permitted 180 days to improve performance. There were many steps involved in the termination, from making a formal request for termination to issuing the Notice of Termination to Jackson. Following the 180-day timeline mandated by COMAR 17.04.05.03(G)(1) and incorporated into the PIP, Jackson and her supervisor met on January 3 for the 180-day performance review.[7] Jackson was informed during the meeting that her performance remained unsatisfactory. The final step in the termination process occurred after the 180-day review, when Jackson received the Notice of Termination.

Preceding the conclusion of the 180-day period, Jackson's regular mid-cycle appraisal meeting was held, and, approximately one week later, Jackson's supervisor submitted a formal request for Jackson's termination.[8] We agree with the ALJ that the Maryland code does not prohibit an agency from evaluating employees outside of the 90-day or 180-day PIP reviews or from reasonably preparing for a probable termination. *See* COMAR 17.04.05.03(G)(1) (contemplating an on-going, incremental process to assess an employee's performance). According to Jackson's supervisor, the termination process

[7] Jackson disputes that the 180-day performance review meeting was incorporated into the PIP. However, the PIP document contained a section titled "PIP Follow-up Discussion Meeting Dates," in which a "180 day" meeting was scheduled for January 3.

[8] Jackson contests that the meeting was for her regular mid-cycle appraisal. However, both Jackson and her supervisor's subsequent emails refer to the meeting as a mid-cycle performance appraisal. Per Jackson's supervisor, the mid-cycle appraisal was a regular annual review.

could have been reversed if Jackson had showed a positive change in performance. Hence, there is substantial evidence in the record supporting the ALJ's determination to uphold Jackson's termination. Jackson's first procedural claim thus fails.

B. Meeting with Appointing Authority or Designee

Relying on COMAR 17.04.05.03(C), Jackson contends that the DHCD's "appointing authority or designee" failed to "[m]eet with the [e]mployee to hear the employee's explanation," prior to discipline "for performance-related reasons." According to Jackson, subsection (C) is equivalent to section 11-106 of the State Personnel and Pensions Article, which we have interpreted as providing Maryland government employees "a meaningful opportunity to respond."[9] *See Danaher*, 148 Md. App. at 170–71 (determining that a meeting "one hour before appellant was terminated" was not meaningful because "the [agency] had already determined to discharge appellant" and "was not interested in ascertaining [appellant's] version of events"). Relying on *Danaher*, Jackson asserts that the 180-day review meeting was not meaningful because it occurred after the DHCD had decided to terminate Jackson.

In response, the DHCD asserts that the provisions of COMAR 17.04.05.03(C) do

[9] Section 11-106(a) provides:

> Before taking any disciplinary action related to employee misconduct, an appointing authority shall:
> (1) investigate the alleged misconduct;
> (2) meet with the employee;
> (3) consider any mitigating circumstances;
> (4) determine the appropriate disciplinary action, if any, to be imposed; and
> (5) give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.

Md. Code Ann., State Pers. & Pens. § 11-106(a).

not apply to terminations under COMAR 17.04.05.03(G). The DHCD explains that subsection (E) specifically exempts cases involving performance appraisals from subsection (C)'s requirements:

> *Except in the case of an annual performance appraisal*, within 30 days after the appointing authority acquires knowledge of performance-related reasons for which disciplinary action may be imposed, the appointing authority shall take each of the actions required in §C of this regulation.

COMAR 17.04.05.03(E) (emphasis added). Additionally, the DHCD asserts that section 11-106 and *Danaher* are inapplicable to the instant case because they address disciplinary action based on misconduct, not performance issues.

Following the well-settled principles of statutory construction, "we look to the regulation's 'plain language [as] the best evidence of its own meaning[,]' and '[w]hen the language is clear and unambiguous, our inquiry ordinarily ends there.'" *Hranicka*, 443 Md. at 298 (quoting *Christopher v. Montgomery Cnty. Dep't of Health & Hum. Servs.*, 381 Md. 188, 209 (2004)). The DHCD was not required to permit Jackson to meet with an appointing authority or designee prior to termination under COMAR 17.04.05.03(G). The language of COMAR 17.04.05.03 subsections (C) and (G) plainly describe separate processes for responding to different performance issues. Subsection (G), titled "Performance Appraisals," describes how to respond to ongoing issues as determined by a performance appraisal. *See* COMAR 17.04.05.03(G) ("When an employee has been given an overall rating of 'unsatisfactory' on an annual performance appraisal . . . "). In contrast, subsection (C) makes no reference to performance appraisals. *See* COMAR 17.04.05.03(C) ("Before an employee in the skilled or professional service may be disciplined for

performance-related reasons . . . "). The subsections describe separate processes to accomplish the same goals: information gathering, notice, meetings, and discipline. *See* COMAR 17.04.05.03(C); *see also* COMAR 17.04.05.03(G). It would thus be misguided to read the divergent actions mandated by the subsections as overlapping.[10] That subsection (C) is not meant to apply to subsection (G) is further evidenced by subsection (E)'s clarifying explanation: "Except in the case of an annual performance appraisal . . . the appointing authority shall take each of the actions required in §C." The plain language is clear—subsection (C)'s requirements do not apply to terminations under subsection (G).[11] Jackson's second procedural claim thus fails.

C. Notification to the Secretary of the DHCD

Jackson contends that the DHCD's termination decision should be reversed for failure to adhere to COMAR 17.04.05.03(G)(2)'s notice requirements. Under subsection (G)(2), "[w]hen an employee is terminated under the provisions of §G(1) of this regulation, the Secretary shall be notified and the appointing authority shall submit to the Secretary a

[10] For example, subsection (C) simply requires meeting with the employee and then determining appropriate discipline. COMAR 17.04.05.03(C). Such general requirements would not satisfy the constraints of subsection (G), which mandates meeting with the employee approximately midway through the 180-day PIP period and terminating the employee if performance remained unsatisfactory. COMAR 17.04.05.03(G).

[11] Even if subsection (C) were applicable, the meaningful meeting that Jackson contends is required under *Danaher* would not apply to Jackson's performance-related termination, because *Danaher* dealt with disciplinary processes related to employee misconduct. 148 Md. App. at 154 ("Section 11-106 of the State Personnel and Pensions Article provides that prior to taking disciplinary action for employee misconduct . . . "). COMAR 17.04.05.04, per its title, addresses "Disciplinary Actions Related to Employee Misconduct," whereas COMAR 17.04.05.03, per its title, addresses "Disciplinary Actions Related to Employee Performance."

copy of each of the [performance appraisal] documents required by State Personnel and Pensions Article, §7-503, Annotated Code of Maryland." The ALJ found it "unknown" whether the Secretary of the DHCD received Jackson's performance appraisal documents prior to Jackson's termination.

Per Jackson, subsection (G)(2) is consistent with section 11-104 of the State Personnel and Pensions Article, under which an employee may only be terminated after "prior approval of the head of the principal unit." Md. Code Ann., State Pers. & Pens. § 11-104(6)(i). In response, the DHCD argues that subsection (G)(2) requires termination of the employee if their performance remains unsatisfactory by the end of the 180-day improvement period. The DHCD emphasizes that section 2-108 of the Housing and Community Development Article authorizes the agency's Secretary to delegate their power to approve termination of employees.[12] Md. Code Ann., Hous. & Cmty. Dev. § 2-108(b). The ALJ agreed that the Secretary's approval was not required and concluded that Jackson was thus not prejudiced by the DHCD's failure to properly notify the Secretary.

We agree with the ALJ that the Secretary's approval is not a prerequisite to an employee's termination under subsection (G). We disagree with Jackson that subsection (G) is consistent with State Personnel and Pensions Article, section 11-104(6)(i). While section 11-104(6)(i) expressly requires approval of the Secretary prior to an employee's termination, subsection (G) includes no such requirement. To the contrary, subsection (G)(1) authorizes an employee's termination simply upon failure to improve performance.

[12] The ALJ found that the Secretary had delegated the personnel duties to the DHCD's Chief of Staff.

COMAR 17.04.05.03(G)(1) ("Failure to meet standards at the end of the 180-day period *shall* result in the employee's termination." (emphasis added)). Subsection (G)(2) solely requires notifying the Secretary of the termination and submitting related documents; any language regarding the Secretary's approval is absent. *See* COMAR 17.04.05.03(G)(2). Therefore, even though the record does not reflect that the DHCD complied with subsection (G)(2) as to notification, (G)(2) does not require the Secretary's approval prior to termination, and, thus, Jackson was not prejudiced by the absence of a higher-level review. Jackson's third procedural claim thus fails under the APA.[13]

III. SUBSTANTIAL EVIDENCE ESTABLISHES THAT JACKSON FAILED TO SUFFICIENTLY IMPROVE PERFORMANCE PRIOR TO TERMINATION.

The ALJ found that Jackson failed to meet the requisite performance standards by the end of the performance improvement period. Jackson, however, contends that the ALJ's determination was conclusory and ignored Jackson's improved performance during the two months, November and December, preceding the end of the 180-day period. In response, the DHCD maintains that there was substantial evidence in the record as a whole to support the ALJ's conclusion. We agree with the DHCD.

There is substantial evidence in the record demonstrating that Jackson's performance did not sufficiently improve during the 180-day period. Jackson's supervisor testified that there were "significant errors that continued throughout [Jackson's]

[13] The parties also disagree about whether COMAR 17.04.05.03(G)(2) requires the Secretary's notification before or after an employee's termination. However, there was no issue raised that a lack of notification, absent the Secretary's approval, prejudiced Jackson. Therefore, because we have determined that subsection (G) does not require the Secretary's approval, the timing of the Secretary's notification is not determinative here.

performance improvement plan." An employee lead, who sat with Jackson and observed her work during the entirety of the performance improvement period, testified that Jackson was observed to consistently make mistakes.[14] The lead did not observe Jackson's performance improve while on the PIP. An HR representative, who regularly joined performance meetings between Jackson and Jackson's supervisor, also testified that Jackson's performance did not significantly improve. Per the Director of HR, Jackson's performance remained at an unsatisfactory level, and even "after December 20th . . . further mistakes were being made."

Several exhibits introduced during the administrative hearing also confirm Jackson's insufficient improvement during the performance improvement period. To be sure, portions of the supervisor's emails commended Jackson's improved performance in certain areas. However, the majority of the exhibits detailed Jackson's continuous struggles with sending weekly reports and setting up new projects, Jackson's most important task. In October, Jackson was informed that her performance had actually declined since the start of the 180-day period. Jackson's performance remained unsatisfactory in formal performance reviews in October, December, and January.[15] The 180-day review on January 3 referenced numerous performance issues occurring after October. Based on the evidence in the record, a reasoning mind could determine that Jackson failed to sufficiently

[14] The employee lead explained that Jackson was observed and assisted with work, provided training, and provided answers to any questions posed.

[15] Jackson disagrees that the October meeting was a formal performance review. However, Jackson's supervisor testified that the meeting was for the 90-day performance review scheduled in the PIP.

improve her performance prior to termination. We find no error in such a conclusion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.