UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0633

September Term, 2014

GALLEN G. FLOYD

v.

ANNE ARUNDEL COUNTY, MARYLAND, ET AL.

Graeff,
Berger,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 7, 2015

This appeal arises out of an order of the Circuit Court for Anne Arundel County affirming the decision of the Board of Appeals ("Board") for the Department of Labor, Licensing, and Regulation ("DLLR") denying appellant's, Gallen Floyd's ("Floyd's"), application for unemployment insurance benefits. Floyd contends that the Board's finding that he was terminated because he committed gross misconduct was not supported by substantial evidence. Additionally, Floyd avers the Board erroneously considered hearsay evidence in violation of procedural due process.

On appeal, Floyd presents two issues for our review,[1] which we rephrase and reorder as follows:

1. Whether the Board erred in considering hearsay evidence.

2. Whether the Board's finding of gross misconduct was supported by substantial evidence.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Anne Arundel County.

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[1] The issues, as presented by Floyd, are:

1. Whether reasoning minds reasonably would have reached the factual conclusions reached by the Board of Appeals and affirmed by the Circuit Court, when the record indicates that Appellant did not take any/or sell County owned property-to wit manhole covers.

2. Whether the incongruous hearsay evidence relied on by the Circuit met the procedural due process requirements of reliability and competency.

FACTUAL AND PROCEDURAL BACKGROUND

Between September 15, 1988, and July 18, 2012, Floyd was employed by the Anne Arundel County Department of Public Works ("County"). On July 18, 2012, Floyd was terminated upon allegations of theft of County property. In the years prior to Floyd's termination, the County had been replacing its iron manhole covers with plastic covers. Pursuant to this initiative, iron manhole covers were collected and transferred to a facility in Glen Burnie, Maryland, where they were stored in a basket next to a scrap metal dumpster until they were to be sold as scrap. The proceeds from the sale of iron manhole covers were to be returned to the County. On October 10, 2011, between 100 and 150 iron manhole covers were transported to the Glen Burnie facility. Thereafter, sometime between October 24, 2011, and October 31, 2011, the iron manhole covers disappeared.

On October 28, 2011, the County received a phone call from Detective R.J. Gibson of the Anne Arundel County Police Department to inquire as to whether Floyd or another employee, McKinney, were agents of the County. Detective Gibson further informed the County that Floyd had appeared in the Regional Automated Property Information Database ("RAPID") for selling iron manhole covers for scrap. Following Detective Gibson's telephone call, the County observed that its iron manhole covers were missing.

The RAPID revealed that on May 27, September 13, September 23, and October 26, 2011, Floyd sold manhole covers to the Baltimore Scrap Corporation. Furthermore, scale tickets obtained from the Baltimore Scrap Corporation showed that Floyd transacted with the Baltimore Scrap Corporation for $238.00 on September 13, 2011; $369.60 on

September 23, 2011; and $341.60 on October 25, 2011.[2] These scale tickets bore the signature of Floyd certifying that he had the right to possess and sell the scrap. Moreover, an employee of the Baltimore Scrap Corporation informed law enforcement that Floyd and McKinney had attempted to sell additional manhole covers for scrap on October 28, 2011. On October 28, 2011, however, Floyd and McKinney had been turned away because they lacked documentation demonstrating they were in lawful possession of the covers they intended to sell.[3]

Floyd and McKinney also possessed security access cards to the Glen Burnie facility to grant them access to the facility after hours. Records produced from the electronic gate at the facility indicate that on October 13, 2011, Floyd and McKinney entered the facility just after 9:15 p.m. On October 23, 2011, two days before the October sale, Floyd entered the facility at 8:53 p.m., and again at 10:02 p.m. On October 24, 2011, the day before the October sale, McKinney entered the facility at 10:43 p.m. Finally, Floyd and McKinney

[2] The one day discrepancy between the October transactions was determined to be attributable to a one day delay in entering the transaction in the RAPID.

[3] Generally, those who aim to sell public utility items are required to provide a letter from a business or government entity stating they have permission to sell the item. On October 25, 2011, the Baltimore Scrap Corporation required no such letter from Floyd or McKinney when it purchased manhole covers. On October 27, 2011, Detective Gibson spoke with a representative of the Baltimore Scrap Corporation about Floyd's transactions, at which time Detective Gibson informed the Baltimore Scrap Corporation of the requirement that sellers of public utility items produce a letter before the items could be purchased by the Baltimore Scrap Corporation. The following day, the Baltimore Scrap Corporation refused to transact with Floyd and McKinney because of their failure to produce such a letter.

entered the facility at times between 3:00 a.m. and 4:00 a.m. on October 28, 2011, the morning of the unsuccessful sale. Although neither Floyd nor McKinney had exclusive access to the facility at the above-referenced times, Floyd and McKinney were the only individuals who were not accessing the facility in a paid capacity or for other legitimate work purposes. Critically, records introduced into evidence further reflected that Floyd and McKinney were on leave October 25, 2011 and October 28, 2011.

Floyd and McKinney soon became the subject of a criminal investigation. As part of the investigation, Detective Gibson interviewed McKinney, who informed Detective Gibson that Floyd and McKinney had taken items from the County's dumpster and sold them for scrap. McKinney further testified that after the Baltimore Scrap Corporation refused to transact with them on October 28, 2011, Floyd threw the materials on the side of the road. Thereafter, Detective Gibson interviewed Floyd, who admitted that he had taken water meter frames from the yard three or four times and that he sold the frames to Baltimore Scrap Corporation. As a result of Detective Gibson's criminal investigation and a County personnel investigation, the County concluded the Floyd took and sold County owned property. Accordingly, the County terminated Floyd's employment.

Floyd subsequently filed a request for unemployment insurance benefits with the DLLR. On September 12, 2012, a claims specialist denied Floyd's request for benefits on the basis that Floyd was discharged for circumstances that amount to gross misconduct. Floyd then requested a hearing, which took place on October 15, 2012. On October 15, 2012, the hearing examiner heard testimony from Floyd and Mark Tyler, the County's human

resource manager. The hearing examiner reversed the decision of the claims specialist, finding the evidence insufficient to support a finding of gross misconduct. The County then appealed the hearing examiner's decision to the Board. On March 29, 2013, the Board reversed the hearing examiner's decision and found that Floyd had committed gross misconduct thereby precluding him from receiving unemployment benefits. Thereafter, Floyd appealed the Board's decision in the Circuit Court for Anne Arundel County. The circuit court affirmed the Board's decision.

Floyd then filed this timely appeal. Additional facts will be discussed as necessitated by the issues presented.

STANDARD OF REVIEW

"'When reviewing an administrative agency decision, our role is precisely the same as that of the circuit court.'" *Parham v. Dep't of Labor, Licensing, & Regulation*, 189 Md. App. 604, 612 (2009) (quoting *Tabassi v. Carroll Cnty. Dep't of Soc. Servs.*, 182 Md. App. 80, 85 (2008)). The standard of review in an appeal from the final decision of the Board is set forth in Md. Code (1991, 2008 Repl. Vol.), § 8-5A-12(d) of the Labor and Employment article ("LE"), which provides:

> In a judicial proceeding under this section, findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if:
>
> (1) findings of fact are supported by evidence that is competent, material, and substantial in view of the entire record; and
>
> (2) there is no fraud.

LE § 8-5A-12(d).

"'Under this statute, the reviewing court shall determine only: (1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision.'" *Thomas v. Dep't of Labor, Licensing, & Regulation*, 170 Md. App. 650, 657 (2006) (quoting *Dep't of Labor, Licensing, & Regulation v. Hinder*, 349 Md. 71, 77-78 (1998)). Moreover, "[w]e 'may not reject a decision of the Board supported by substantial evidence unless that decision is wrong as a matter of law.'" *Thomas*, *supra*, 170 Md. App. at 658 (quoting *Hernandez v. Dep't of Labor, Licensing, & Regulation*, 122 Md. App. 19, 23 (1998)).

DISCUSSION

In the case *sub judice*, Floyd avers the Board impermissibly considered hearsay evidence when rendering its decision to deny him unemployment benefits. Additionally, Floyd asserts that the decision to deny him unemployment benefits was not supported by substantial evidence. We shall address these arguments in turn.

I. Hearsay in Administrative Hearings

Floyd contends that notwithstanding the fact the Board is not bound by the general prohibition of hearsay, the admission of hearsay statements against him here violated his procedural due process rights. The County maintains, however, that the issue of admissibility was not properly preserved. Alternatively, the County and the Board argue that the hearsay evidence admitted here satisfies the safeguards imposed by procedural due process requirements.

A. Preservation

When reviewing an agency's conclusion of law, we "may not pass upon for the first time issues not encompassed in the final decision of the administrative agency." *Cross v. Balt. City Police Dep't*, 213 Md. App. 294, 307 (2013). Indeed, "an appellate court will review an adjudicatory agency decision solely on the grounds relied upon by the agency." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001). In the context of judicial review of administrative proceedings regarding the denial of unemployment benefits, we require that the administrative agency be provided the opportunity to decide upon an allegation of error so as to adequately develop the record for appellate review. *Parham*, *supra*, 189 Md. App. 604, 615-16 (2009) ("'ordinarily,' an appellate court will not decide an issue 'unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'" (quoting Md. Rule 8-131(a))).

Further, the fact the error Floyd alleges is one of procedural due process is of no consequence. Indeed, the Court of Appeals has held "'questions, including Constitutional issues, that could have been but were not presented to the administrative agency may not ordinarily be raised for the first time in any action for judicial review.'" *Casey v. Mayor and City Council of Rockville*, 400 Md. 259, 323 (2007) (quoting *Bd. of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 208 (1999)).

In the case *sub judice*, the County introduced seventeen pieces of evidence to be relied upon by the Board when rendering its decision. Floyd failed to object to the introduction of

any of the evidence entered against him so as to give the Board an opportunity to decide upon his objections in the first instance. The failure to adequately preserve these issues impairs our ability to assess the merits of Floyd's arguments on appeal with the benefit of a developed record. We, therefore, hold that Floyd's objections to the hearsay evidence admitted against him were not adequately preserved for judicial review.

B. Admission of Hearsay

Assuming, *arguendo*, the questions here were preserved, we hold the admission of the evidence against Floyd did not offend his procedural due process rights. Sections 8-5A-07(a)(2)(I) and 8-506(a)(2)(I) of the Labor and Employment Law Article provide that neither a special examiner nor the Board of Appeals are bound by "statutory or common law rules of evidence or technical rules of procedure." LE §§ 8-5A-07(a)(2)(I), 8-506(a)(2)(I). Accordingly, while hearsay statements are generally inadmissible in a judicial proceeding, hearsay statements are "not necessarily inadmissible in an administrative proceeding." *Travers v. Balt. Police Dep't*, 115 Md. App. 395, 408 (1997) (citing *Md. Dep't of Human Res. v. Bo Peep Day Nursery*, 317 Md. 573, 595 (1989)). Indeed, if hearsay statements are sufficiently reliable and probative, they may even form the sole basis for the agency's finding. *Travers*, *supra*, 115 Md. App. at 411-13 ("hearsay . . . may form the sole basis for the agency's decision"); *Kade v. Hickey Sch.*, 80 Md. App. 721, 725 (1989) ("hearsay . . . may be the sole basis for a decision of an administrative body").

The general relaxation of rules of evidence in administrative proceedings, however, is limited by the principles of procedural due process embodied in the Fourteenth

Amendment to the Constitution and Article 24 of the Maryland Declaration of Rights. *Travers*, *supra*, 115 Md. App. at 407, 411 ("administrative agenc[y decisions must] . . . comport with the requirements of procedural due process afforded by the Fourteenth Amendment"). Procedural due process requires agencies to "observe basic rules of fairness as to the parties appearing before them." *Id.* Indeed, prior to admitting hearsay statements in an administrative hearing, the agency must carefully consider the statement's reliability and probative value. *Id.* at 413. This inquiry requires an assessment of the nature of the hearsay evidence. *Id.*

> For instance, statements that are sworn under oath, *see Kade*, 80 Md. App. at 726, 566 A.2d at 151, *Eichberg v. Maryland Bd. of Pharmacy*, 50 Md. App. 189, 194, 436 A.2d 525, 529 (1981), or made close in time to the incident, *see Richardson v. Perales*, 402 U.S. 389, 402, 91 S.Ct. 1420, 1427–28, 28 L.Ed.2d 842 (1971), or corroborated, *see Consolidated Edison v. N.L.R.B*, 305 U.S. 197, 230, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District Unemployment Compensation Bd.*, 294 A.2d 177, 179 (D.C.App.1972), ordinarily is presumed to possess a greater caliber of reliability.

Travers, *supra*, 115 Md. App. at 413.

Notably, an assessment of the nature of proffered hearsay is a factorial analysis that requires the Board to engage in an independent, and sometimes tautological, review of each statement offered. Floyd asserts that the evidence admitted against him violates procedural due process because it is contradictory. Contradiction among hearsay statements alone, however, does not necessarily amount to a violation of procedural due process. Indeed, the relevant question is whether a contradiction or other indicia of unreliability is so severe it

amounts to a betrayal of "basic rules of fairness as to the parties appearing before [the administrative agency]." *Id.* at 411.

In the instant case, Floyd argues that the admission of the RAPID, gate access, and investigative reports, as well as Tyler's testimony constitute hearsay that violates his procedural due process rights. We are not persuaded. First, the RAPID report is highly probative as it suggests that Floyd was engaged in the sale of manhole covers on dates that correspond with suspicious visits to the County facility. Floyd argues that it is unclear who maintains RAPID and points to inconsistencies between the database and the scale tickets. The nature of these records, however, do not suggest that they are so unreliable, so as to be inadmissible as a matter of law. Indeed, the records in the database appear to be made within a relatively short period of time after the transaction. Moreover, the evidence adduced at the administrative hearing is devoid of circumstances that suggest the County, Detective Gibson, the Baltimore Scrap Corporation, or anyone had reasons to fabricate the RAPID records. Floyd further points to discrepancies in the ticket numbers in the RAPID and the scale tickets as evidence of the unreliability of these records. In the absence of a fully developed record as to the significance, if any, of these numbers, we are unwilling to conclude that this deviation amounts to a violation of due process.

Secondly, although the gate access reports do not show Floyd had exclusive access to the facility immediately prior to the successful and attempted transactions with the Baltimore Scrap Corporation, the fact that Floyd and McKinney were the only County employees at the facility with no legitimate work purpose is highly probative of Floyd's

participation in gross misconduct. Additionally, Floyd fails to identify any circumstance that suggests the gate access records are inherently unreliable. The mere fact that Floyd can conjure an alternative inference based on the evidence before the administrative agency is insufficient so as to render the evidence inconsistent with procedural due process. As such, the admission of the gate access records was within the discretion of the Board.

Similarly, Detective Gibson's report does not violate due process. To be sure, Detective Gibson's report contains statements that may arguably be inconsistent with other evidence offered. In the absence of a preserved objection that develops the record on this issue, however, we cannot determine the extent to which the evidence is actually and materially inconsistent. We observe, however, that Detective Gibson's report is highly probative as it documents the disappearance and subsequent sale of County property to the Baltimore Scrap Corporation. Additionally, the fact that Detective Gibson's report was prepared for purposes unrelated to Floyd's claim for unemployment benefits weighs in favor of the reliability of his report. The probative value of Detective Gibson's report is further bolstered by the fact that it contains an admission by Floyd that he sold County property, as well as McKinney's statement to the same effect implicating Floyd.

Finally, Floyd objects to the testimony of Tyler because he lacked personal knowledge of the contents of his testimony, and that he was not sufficiently specific in identifying the items Floyd allegedly stole. We reject Floyd's argument that Tyler had insufficient personal knowledge. Indeed, hearsay often, almost inherently, involves relaying the firsthand observations of another. Although Tyler may not have personally observed the conduct that

gave rise to Floyd's termination, the Board did not err in determining that Tyler's position as the County's human resource manager rendered him sufficiently competent to testify as to the evidence admitted through his testimony. Further, we are unpersuaded by Floyd's contention that the failure to specifically identify the precise items Floyd allegedly stole renders Tyler's testimony inadmissible. First, because Floyd failed to preserve this issue on appeal, we have no means by which to assess whether there is a meaningful factual distinction between meter frames, manhole covers, meter lids, or other scrap metal. Additionally, assuming there is a factual distinction between these items, we fail to recognize how this distinction would undermine Tyler's testimony that Floyd violated department policy by failing to use county property, whatever that property may be, exclusively for county business. We, therefore, hold that the Board did not err in admitting Tyler's testimony.

Notwithstanding Floyd's failure to preserve this issue and further develop the record, we are convinced that the admission of these reliable and probative pieces of evidence did not deny Floyd procedural due process. Our holding is further buttressed by the fact that Floyd had an arsenal of procedural devices at his disposal that he could have, but failed to, employ to challenge the County's evidence. Indeed, Floyd could have, but failed to, offer his own evidence into the record, subpoena his own witnesses, adequately cross-examine the County's witness as to the credibility of his testimony, or object to the hearsay statements that he takes issue with in this appeal. In total, Floyd's allegations of error amount to merely a disagreement as to the manner in which the Board weighed evidence and made credibility

determinations in reaching its factual findings. In our view, the hearsay evidence here was sufficiently reliable and probative so as not to violate procedural due process. We, therefore, hold that the Board did not err in admitting hearsay evidence regarding Floyd's request for unemployment benefits.

II. Substantial Evidence Test

Section 8-1002 of the labor and employment article provides, "[a]n individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is gross misconduct in connection with employment." LE § 8-1002(b). Gross misconduct, under this section, is defined as conduct that manifests "deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interest of the employing unit." LE § 8-1002(a)(1)(I). "There are no hard and fast rules for determining what in the particular employment context constitutes 'deliberate and willful' misconduct. . . . '[Rather,] the 'wrongness' of the conduct must be judged in the particular employment context.'" *Dep't of Labor, Licensing, & Regulation v. Muddiman*, 120 Md. App. 725, 738 (1998) (quoting *Hinder*, *supra*, 349 Md. at 85).

We give considerable weight to an agency's factual conclusions and limit our review to "determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law" because of the specialized and particular

nature of these adjudications. *W.R. Grace & Co. v. Swedo*, 439 Md. 441, 453 (2014). Therefore, contrary to Floyd's assertion, the relevant question is not whether the evidence "leaves reasonable minds to wonder if Floyd engaged in conduct which indicates deliberate and willful disregard of standards set by Appellee." Rather, the proper inquiry is "whether a reasoning mind could have made those findings from the evidence adduced." *Dep't of Econ. & Emp't Dev. v. Taylor*, 108 Md. App. 250, 262 (1996), *aff'd, Dep't of Labor, Licensing & Regulation v. Taylor*, 344 Md. 687 (1997). Accordingly, we review this finding "in the light most favorable to the agency and [we] 'should not substitute [our] judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken.'" *Dep't of Econ. & Emp't Dev. v. Hager*, 96 Md. App. 362, 370 (1993) (quoting *Bd. of Educ. v. Paynter*, 303 Md. 22, 35-36 (1985)).

Floyd argues the Board's decision should be reversed because the Board failed to articulate the precise items that he allegedly converted, and there is insufficient evidence to conclude he committed gross misconduct. We are not persuaded. In denying Floyd's request for unemployment benefits, the Board found:

> that the employer had provided sufficient evidence to meet its burden of proof in this matter. The greater weight of the evidence, the claimant's denials notwithstanding, established that the claimant took property which he knew belonged to his employer and sold that property for his own personal gain. This is theft and theft is gross misconduct.

Whether the particular item Floyd converted is properly classified as a manhole cover, meter frame, meter lid, or any other property owned by the county is immaterial to the conclusion that Floyd took property which he knew belonged to his employer.

The finding that Floyd sold County property to the Baltimore Scrap Corporation is substantially supported by the evidence adduced at the administrative hearing, including, but not limited to, Floyd's admission to Detective Gibson that he "had taken water meter frames from the yard three or four times" as well as statements to the same effect made by McKinney to Detective Gibson. Critically, the Board's finding is further supported by the RAPID records, County gate access records, and scale tickets from the Baltimore Scrap Corporation. We do not sit on appeal to determine whether we concur with the weight and credibility afforded to this evidence by the Board, but rather whether the Board's findings were reasonable and supported by substantial evidence. *Parham*, *supra*, 189 Md. App. at 613 ("'In the absence of fraud, our inquiry is whether the findings are supported by substantial evidence and are reasonable, not whether they are right.'" (quoting *Taylor*, *supra*, 108 Md. App. at 261-62)). Here, Tyler's testimony, as well as the evidence admitted on the County's behalf, is sufficient to permit a reasoning mind to reasonably infer that Floyd sold County property and accordingly committed gross misconduct. We, therefore, hold that the Board did not err in finding that Floyd was terminated as a result of gross misconduct.

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