

Circuit Court for Allegany County
Case No. C-01-CV-19-000032

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 731

September Term, 2020

DEPARTMENT OF JUVENILE SERVICES

v.

JUSTIN T. HERSHBERGER

Berger,
Gould,
Zic,

JJ.

Opinion by Berger, J.

Filed: June 15, 2021

*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. Md. Rule 1-104.

This case involves an administrative appeal from a decision of an Administrative Law Judge (“ALJ”) of the Maryland Office of Administrative Hearings. The ALJ’s decision related to the termination of Justin T. Hershberger (“Hershberger”) from the Department of Juvenile Services (“Department”) after an accusation of sexual harassment by a fellow employee. The ALJ determined that Hershberger’s termination was warranted and that his due process rights had not been violated.

Hershberger sought judicial review of the ALJ’s decision in the Circuit Court for Allegany County. Hershberger asserted three procedural violations for the circuit court to consider on review, including that he was denied pre-termination due process. On August 13, 2020, the trial court held a hearing to consider Hershberger’s petition. On August 24, 2020, the trial court issued an Order finding that the Department had violated Hershberger’s due process rights by not providing him with proper pre-termination notice and an opportunity to be heard. The Department noted this timely appeal on September 22, 2020.

The Department noted one issue for our review,¹ which we have rephrased as follows:

Whether the Department’s four meetings with Hershberger prior to his termination provided him with the sufficient pre-

¹ The Department’s original question presented is as follows:

Was Mr. Hershberger afforded sufficient pre-termination due process when, over the course of four meetings prior to his termination, he was provided the opportunity to — and did — respond to the specific allegations that were being made against him?

termination due process rights of notice and an opportunity to be heard.

For the reasons stated herein, we shall vacate the judgment and remand the case to the circuit court.

FACTS AND PROCEEDINGS

Hershberger applied for a position with the Department of Juvenile Services for the State of Maryland (the “State”) as a Youth Supervisor I. The Department hired Hershberger on October 15, 2001. By January of 2018, Hershberger had been promoted to the position of Case Management Specialist Supervisor and was assigned to the Green Ridge Youth Center (“Green Ridge”). Kathleen Murray (“Murray”) was employed by the Department as a social worker for two years when she was transferred to Green Ridge in May of 2016.

Hershberger was the third most senior supervisor at Green Ridge, behind only the Superintendent, Judith Hodel (“Hodel”), and the Assistant Superintendent, John Hare (“Hare”). Hershberger was not Murray’s direct supervisor at any time during her employment at Green Ridge. Throughout her time at Green Ridge, Murray contends that she suffered from repeated sexual harassment at the hands of Hershberger. The Department contends that Murray confronted Hershberger on multiple occasions to discuss her discomfort regarding his comments and inappropriate behavior. These conversations often happened in the presence of other co-workers. Murray also confided in some of her co-workers, such as Jeffrey Babich, Valery Latgis, and Amanda Rumer about her discomfort due to the comments by Hershberger. These co-workers, and others, also

witnessed comments and behaviors by Hershberger that made them believe that he was obsessed with Murray and her sexual orientation.

On December 21, 2017, the Director of the Department’s Office of Fair Practices, Charles Proctor (“Proctor”), became aware of the allegations and required Murray to submit the required forms so that he could initiate an investigation. Thereafter, Murray filed an Unfair Management Practices or Harassment Complaint (the “Complaint”) alleging that Hershberger had made ongoing sexual comments regarding her personal life and sexual orientation, beginning approximately one to two months after Murray transferred to Green Ridge. The Department contends that Murray waited so long to file the Complaint because she was scared for her life due to comments made by Hershberger which insinuated that he was watching her and her wife outside of work.

On December 24, 2017, Murray wrote a letter to the Equal Employment Opportunity Commission of the Department providing a summary and timeline detailing all of her allegations of sexual harassment against Hershberger. The timeline included details regarding Hershberger: entering Murray’s office unnecessarily and closing the door; asking Murray to lunch only to ask her inappropriate and invading questions about her personal life; asking Murray intrusive questions about her and her wife’s activities in their hotel room during their honeymoon; making sexual comments about Murray to other co-workers; suggesting pornography for Murray to watch; refusing to look away when Murray had to lift her skirt to inject medication into her upper thigh; using Green Ridge’s camera system to spy on Murray in her own office; and making comments about Murray and her

wife's personal activities which suggested he was watching them outside of work. Specifically, the timeline included details of an incident where another employee, Debbie Frankenberry ("Frankenberry"), was eating a crème-filled doughnut and Hershberger stated: "You should take that over to the T-House (where [Murray's] office is located) and eat that in front of Murray. I bet she'd like that."

After Proctor received the Complaint, he met with and interviewed Murray on December 27, 2017. Proctor did not pursue the investigation any further until January 11, 2018. At that time, Proctor informed John Stevenson ("Stevenson"), the Department's Executive Director, about the Complaint and the nature of the allegations. That same day, Stevenson directed Hodel to transfer Hershberger from Green Ridge to the Department's Cumberland office until the investigation was completed. Stevenson did not tell Hodel the underlying reasoning for the transfer at that time.

On January 16, 2018, the investigation was assigned to the Department's Office of the Inspector General. Jeffrey Kessler ("Kessler") took over the investigation. Stevenson asked Kessler to expedite the investigation due to impending statutory deadlines and to update Stevenson with information as it was received. On January 17, 2018, Kessler obtained and reviewed Murray's written statement. Later that day, Kessler spoke with Murray. Thereafter, Kessler interviewed and obtained statements from Murray and Hershberger's co-workers: Shannon Bowles; Jeffrey Babich; Amanda Rumor; Frankenberry; and Valerie Latgis. Kessler provided Stevenson with an update on the

investigation later that day. The following day, Kessler provided Stevenson with a written preliminary report.

After speaking with Kessler on the evening of January 17, 2018, Stevenson instructed Hodel to hold a mitigation conference with Hershberger the next day. During this conversation, Stevenson explained the nature of Murray's allegations against Hershberger to Hodel.

On January 18, 2018, Hodel held the mitigation conference with Hershberger. The conference lasted approximately thirty to forty minutes. At the conference, Hodel provided Hershberger with a two-page memorandum which outlined that Hershberger was being accused of sexual harassment, creating a hostile work environment, and discrimination based on sexual orientation. The memorandum also explained that Hershberger had violated certain standards of conduct. The memorandum expressly stated that a finding of sexual harassment against Hershberger could lead to his termination. Hershberger signed the memorandum and acknowledged that he had read it.

Hodel provided Hershberger with an opportunity to respond to these allegations at the mitigation conference. Hodel did not provide any specific details or allegations to Hershberger at that time. Hershberger took this opportunity to respond and handwrote a statement stating that he never intended "to make anyone feel uncomfortable," and that he always encouraged teamwork.

After receiving additional information from Kessler, Stevenson contacted Hodel and asked her to convene an additional meeting with Hershberger so that she could ask him

six specific questions. Hodel then called Hershberger and they spoke on the telephone. Hodel asked Hershberger: “Have you ever asked any co-worker about having sex with their spouse or others?” Hodel never mentioned Murray’s name. Hershberger responded by saying that he had a conversation with Murray where she had been discussing having a friend over for a sleepover and he asked what they do at the sleepovers. Hodel then asked: “Have you ever asked anyone at Green Ridge about their sexual orientation?” Hershberger again responded by referencing Murray specifically, stating that he had heard rumors about her sexuality. After Hershberger referenced Murray twice, Hodel stated “I guess you know where this is coming from now.”² Immediately after the second meeting, Hodel typed Hershberger’s responses to the questions and sent them, along with a copy of Hershberger’s handwritten statement, to Stevenson.

Early on January 19, 2018, Kessler met in-person with Hershberger. Kessler began the interview by telling Hershberger that he was investigating allegations that Hershberger had made inappropriate comments and jokes. Kessler told Hershberger that his job was to get Hershberger’s “side of it.” Hershberger responded by stating that he was shocked and that no one had ever complained directly to him. Hershberger generally denied acting inappropriately.

Initially, Kessler brought up Hershberger going into people’s offices and closing the doors. Hershberger acknowledged that he would often go into Murray’s office and close

² Hodel then asked Hershberger the four additional, general questions. Hershberger specifically referenced Murray in his answer to one of the questions.

the door, but he claimed that it was because they were having confidential conversations about juveniles at the facility or because Murray would start conversations with him about personal matters. Hershberger denied ever asking Murray any questions about her sexual orientation or her sexual relationships.

Hershberger discussed the incident regarding Murray's wedding and the conversations between them that ensued. Hershberger contended that Murray was the one who started the conversation about her wedding and showed him photographs from her honeymoon. Hershberger claimed that he said: "Hey, I don't want to see anything graphic now." Hershberger also discussed the incident where Murray and he traveled together, and Murray had to inject herself with medication. Hershberger denied that he refused to look away and taunted Murray. The interview also focused on an incident where Hershberger made remarks about Murray's wife during a lunch outing with fellow co-workers. Hershberger claimed it was Murray's wife who made the inappropriate comment, not him. When Kessler asked him about watching people on the cameras at Green Ridge, Hershberger explained he normally used the cameras to watch juveniles, but sometimes he would use them to "mess with people."

Kessler then brought up the allegation that Hershberger had recommended a sexually graphic movie for Murray to watch. Hershberger told Kessler that Murray and he often discussed different shows on Netflix. He claimed that Murray was the one who suggested they both watch "Orange is the New Black," but when they discussed the show,

the conversations were never inappropriate.³ Hershberger explained that when he was watching a show on Netflix, a movie, labeled as LGBTQI, popped up on the screen as one suggested for him to watch. After watching the movie, Hershberger told Murray that she should watch it because it was a love story similar to her and her wife’s relationship. He insisted he recommended it because of its storyline. At the conclusion of the interview, Hershberger reiterated that he had never asked Murray any inappropriate questions about her sex life or her personal relationships.

Immediately following the interview, Kessler called Stevenson and relayed the contents of the interview and the substance of Hershberger’s responses. Later that day, Kessler interviewed Miles Lawrence, Ashley Booker, and Andrew White, as witnesses to the inappropriate behavior from Hershberger towards Murray. After completing those interviews, Kessler called Stevenson and explained that those witnesses did not add any new evidence, but that they had corroborated the information he had already received.

Later in the day on January 19, 2018, Stevenson called Hodel and directed her to ask Hershberger three additional questions which he had drafted. Hodel complied and interviewed Hershberger again over the telephone. Hodel asked Hershberger if he had ever initiated any inappropriate conversations with anyone at Green Ridge and if anyone had ever told him that they were offended or felt uncomfortable. Hershberger responded negatively to both questions. Finally, Hodel asked Hershberger: “Is there anything else

³ “Orange is the New Black” is a Netflix show focused on a women’s prison, often depicting sexually graphic scenes between women.

you would like to add?” Hershberger responded that everything had been covered and that he was confused why no one ever received a complaint prior to this.

Following the interview, Hodel typed the questions and responses and sent them to Stevenson. Stevenson, along with Deputy Secretary Linda McWilliams then called Hodel to discuss Hershberger’s performance evaluations. Hodel said that his evaluations had been outstanding. When asked if she believed the allegations against Hershberger, Hodel responded “yes,” because during the meetings Hershberger revealed to her that he was aware of all the situations in question without her ever having to mention the specifics.

At this time, on January 19, 2018, Stevenson, along with Deputy Secretary McWilliams, recommended to the Secretary of the Department that Hershberger’s employment be terminated. At the end of the day, Hodel handed Hershberger his notice of termination, which included a three-page description of the allegations against him and other information obtained during the investigation.

On February 2, 2018, Hershberger filed an appeal and grievance with the Department. On February 13, 2018, the Department’s Employee Relationship Unit conducted an appeal conference. Hershberger, who was represented by counsel, denied any wrongdoing on his part and denied making any inappropriate comments to Murray. On March 9, 2018, Hershberger filed an appeal with the Secretary of Budget and Management. On April 6, 2018, a settlement conference was held. The matter was then referred to the Office of Administrative Hearings.

Over the course of five days, the Department presented ten witnesses. All of the witnesses testified consistently with Murray’s statement. Further, Hershberger testified on his own behalf. Hershberger denied acting inappropriately and denied making any inappropriate comments to Murray. In her decision, issued on July 23, 2019, the ALJ found Hershberger to be not credible and concluded that Hershberger engaged in ongoing and continuous sexual harassment of Murray. The ALJ further found that the behavior was so pervasive and severe that it had the effect of unreasonably interfering with Murray’s employment. The ALJ concluded the sanction of termination was an appropriate exercise of discretion. The ALJ also rejected Hershberger’s claim that he had not been afforded constitutional due process. In her decision, the ALJ determined that Hershberger had been provided robust post-termination procedural due process and that the three meetings with Hodel and the interview with Kessler provided Hershberger with meaningful pre-termination due process.

On August 12, 2019, Hershberger filed a Petition for Judicial Review with the Circuit Court for Allegany County. Hershberger alleged that the Department violated his due process rights by not providing sufficient pre-termination notice, that the Department violated the statutory requirements of § 11-106 of the State Personnel and Pensions Article of the Maryland Code (“§ 11-106”), and that the sanction of termination was untimely imposed. The circuit court held a hearing on August 13, 2020. On August 24, 2020, the trial court issued a Memorandum Opinion and Order finding that Hershberger was terminated before Hershberger had sufficient knowledge of the alleged complaint. The

trial court further found that Hershberger was denied due process and found it unnecessary to consider the other issues Hershberger raised in his petition. The Department noted this timely appeal on September 22, 2020.

DISCUSSION

Standard of Review

“Both Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution guarantee that a person will not be deprived of life, liberty, or property without due process of law.” *Regan v. Bd. of Chiropractor Exam’rs*, 120 Md. App. 494, 509 (1998). Whether a party is deprived of due process is a question of law to be reviewed *de novo*. *Id.* (citing *Liberty Nursing Ctr. v. Dep’t of Health & Mental Hygiene*, 330 Md. 433, 443 (1990)). “Consequently, we may substitute our judgment for that of the agency.” *Id.* (internal citations omitted).

On the other hand, to the extent that we review an agency’s factual findings, we may not substitute our own judgment for that of the administrative agency. *Id.* (citing *United Parcel Serv., Inc. v. People’s Couns. For Balt. Cnty.*, 336 Md. 569, 576–77 (1994)). We review the agency’s findings of fact under a clearly erroneous standard to determine if there is substantial evidence to support the agency’s conclusion. *75-80 Props., LLC v. Rale, Inc.*, 470 Md. 598, 621–22 (2020). So long as there is “competent material evidence to support the factual findings of the [ALJ], those findings cannot be held to be clearly erroneous.” *Id.* at 622 (quoting *YIVO Inst. For Jewish Research v. Zaleski*, 386 Md. 654, 663 (2005)).

I. The Department’s four meetings with Hershberger held by both Hodel and Kessler provided sufficient notice and an opportunity to respond to satisfy Hershberger’s pre-termination due process rights.

State employees who can only be terminated for cause, such as Hershberger, are entitled to basic due process requirements before being terminated. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985). Once it is established that an employee is entitled to due process, the question then becomes: “what process was due.” *Linton v. Frederick Cnty. Bd. of Cnty. Comm’rs*, 964 F.2d 1436, 1439 (4th Cir. 1992). “It is fundamental to established principles of due process that, as a prerequisite to an intentional deprivation of a protected property interest, the government must provide some notice and an opportunity for [a] hearing appropriate to the nature of the case.” *Id.*

Before termination, an employee must be given “oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Loudermill, supra*, 470 U.S. at 546. The pre-termination process “need not resolve the propriety of the discharge.” *Linton, supra*, 964 F.2d at 1439. “When post-termination administrative procedures are afforded, such pre[-]termination procedure functions only as ‘an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.’” *Id.* (quoting *Loudermill, supra*, 470 U.S. at 545–46). Nevertheless, the pre-termination hearing need not be elaborate. *Loudermill, supra*, 470 U.S. at 546. Indeed, “[n]otice is sufficient, 1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under

the particular circumstances of the case.” *Linton, supra*, 964 F.2d at 1439 (internal citations and quotations omitted).

The touchstone of the pre-termination hearing is whether it gives the employee a meaningful opportunity to present his side of the story. *Riccio v. Cnty. of Fairfax, Va.*, 907 F.2d 1459, 1463 (1990). It is “merely the employee’s chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted.” *Powell v. Mikulecky*, 891 F.2d 1454, 1458 (10th Cir. 1989). The government employer is not required to “perform all pre[-]termination acts that could benefit the employee subject to discharge.” *Riccio, supra*, 907 F.2d at 1464.

Further, “the existence of post-termination procedures is relevant to the necessary scope of pre[-]termination procedures.” *Loudermill, supra*, 470 U.S. at 547 n.12. This Court has held that “[d]ue process is generally satisfied by a limited pre-termination hearing followed by a more comprehensive post-termination hearing.” *City of Annapolis v. Rowe*, 123 Md. App. 267, 276 (1998) (citing *Gilbert v. Homar*, 520 U.S. 924, 929 (1997)).

In *Linton*, the employee was called into a meeting with his supervisor. *Linton, supra*, 964 F.2d at 1437. At the meeting, Linton was questioned about a site complaint issued by the Maryland Department of Natural Resources for work performed without a permit. *Id.* Linton’s supervisor then handed him a two-page memorandum entitled “Notice of Dismissal.” *Id.* Linton was asked to respond by the next morning whether he would resign or be terminated. *Id.* at 1437–38. On appeal, Linton challenged the sufficiency of his pre-termination due process. *Id.* at 1438. Linton alleged that his due process rights

were violated because, without any warning, he was confronted with a Notice of Dismissal. *Id.*

The Court of Appeals for the Fourth Circuit held that this limited interaction was sufficient to satisfy Linton’s pre-termination due process rights. *Id.* at 1440. The Court found that the explanation given to Linton during the meeting and in the memorandum “satisfied the objective of pre[-]termination process to provide ‘an initial check against mistaken decisions.’” *Id.* (quoting *Loudermill*, 470 U.S. at 545). In its decision, the Court recognized that “[d]ue process does not mandate that all evidence on a charge or even the documentary evidence be provided, only that such descriptive explanation be afforded as to permit [an employee] to identify the conduct giving rise to the dismissal and thereby to enable him to make a response.” *Id.* (citing *Gniotek v. City of Phila.*, 808 F.2d 241, 244 (3d. Cir. 1986)). Critically, the Court noted that there was no evidence in the record “to suggest that Linton expressed a lack of understanding about any of the charges.” *Id.* Further, the Court noted that “full post-termination process was available and relied on to challenge the merits of the [employer’s] decision.” *Id.* at 1441.

Here, Hershberger was afforded the same pre-termination due process, if not more. Hershberger was invited to and participated in four separate meetings with Hodel and Kessler. Although Hodel never specifically told Hershberger that Murray was the one who filed the Complaint, her questions were geared toward sexual harassment and Hershberger’s responses indicated that he was aware of who filed the Complaint and at least some of the specific allegations. Specifically, in the follow-up phone call after the

mitigation conference, Hodel and Hershberger had the following exchange as Hodel noted in the “Addendum to mitigating conference:”

1) Have you ever asked any co[-]worker about having sex with their spouse or others?

Only conversation was with Mrs. Murray as they were talking about her and her wife having friends over for a sleepover. He then asked what they do at a sleepover-have pillow fights?

2) Have you ever asked anyone at Green Ridge about their sexual orientation?

No, because Mrs. Murray offered that information when she first started. He did hear rumors and told her that.

3) Have you ever asked anyone to watch a movie that [had] lesbian pornography in it?

He said something to Mrs. Murray in the admin[istration] building about watching a movie that [he] had watched and told her that she may be interested in it [because] it had a good story to it. Mrs. Murray later told him that she watched the movie and that it was more like pornography but that she could point him towards some movies that he could watch that have a story.

In our view, this exchange between Hodel and Hershberger demonstrate Hershberger’s understanding of the accusations.

Linton was only given one brief meeting and a two-page memorandum with the specific details of the allegations against him. *Id.* at 1437. Hershberger was afforded four meetings and the Department followed up by giving him a detailed memorandum outlining the charges and allegations filed by Murray in her complaint. While the Department did

not discuss every violation with Hershberger prior to his termination, the Department did present him with enough information that he was able to respond and explain his conduct, relating specifically to Murray. *See id.* at 1440.

At one of the later meetings between Hodel and Hershberger, Hodel confirmed Murray’s identity as the complainant. Throughout the questioning and interview, Hershberger responded to Hodel’s general questions by referencing a number of Murray’s accusations specifically. In our view, this refutes any claim that Hershberger misunderstood the charges. *See id.*

Further, Hershberger was afforded additional notice in his interview with Kessler. Kessler went through each of Murray’s accusations one-by-one with Hershberger, allowing him to provide additional facts and context for each claim. This conversation gave Hershberger “sufficient opportunity to respond, and in fact [he] did respond, with reasons why the proposed termination should not be undertaken.” *Id.* at 1441.⁴

In the context of this case where Hershberger was afforded four separate meetings and interviews which allowed him to respond and reference specific allegations of sexual harassment, we conclude that Hershberger received adequate pre-termination due process. Accordingly, the trial court erred in reversing the ALJ’s determination, and instead, should have considered the merits of Hershberger’s other claims he raised in his petition for judicial review.

⁴ Hershberger was afforded robust post-termination procedures to contest his termination. This supports our conclusion that the pre-termination due process Hershberger received was adequate. *See Loudermill, supra*, 470 U.S. at 547 n.12.

II. We need not consider whether the Department followed the requirements of § 11-106 of the State Personnel and Pensions Article of the Maryland Code because the trial court did not consider this issue.

In his petition for judicial review, Hershberger raised two questions in addition to his claim that he was not afforded sufficient due process. Namely, Hershberger asked the trial court to consider whether the Department violated § 11-106 by failing to follow the methodology established therein for imposing sanctions on public employees and whether the Complaint was untimely. In its Memorandum Opinion and Order, the trial court reversed the ALJ's decision only on the issue of due process. Specifically, the trial court stated: "It being the opinion of the Court that Hershberger was denied due process, it becomes unnecessary to consider the other issues raised by [Hershberger]." In his brief, Hershberger addressed the due process issue, but also raised the second issue regarding the Department's alleged violation of the procedures outlined in § 11-106.

Maryland Rule 8-131(a) provides that "[o]rdinarily, [an] appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." There are exceptions to the Rule, such as in the case when deciding such an issue is "necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). We need not decide an issue "if it was not raised and decided by the circuit court." *Granados v. Nadel*, 220 Md. App. 482, 499 (2014). We are ordinarily limited to those issues preserved by the parties. *Id.* The power to decide an issue not decided below is "solely within the [C]ourt's discretion and is in no way mandatory." *White v. State*, 223 Md. App. 353, 402 (2015).

There are no compelling reasons for us to exercise our discretion under Maryland Rule 8-131 and consider an issue not decided by the trial court. Rather, the interests of judicial economy are better served by remanding this case to the trial court to consider the remaining issues Hershberger presented in his petition for judicial review.

**JUDGMENT OF THE CIRCUIT COURT
FOR ALLEGANY COUNTY VACATED.
CASE REMANDED TO THE CIRCUIT
COURT FOR FURTHER PROCEEDINGS
NOT INCONSISTENT WITH THIS
OPINION. COSTS TO BE PAID BY
APPELLEE, JUSTIN T. HERSHBERGER.**