Circuit Court for Prince George's County
Case No. CAL 15-00809

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 764

September Term, 2016

SAMUEL MOKI

v.

PRINCE GEORGE'S COUNTY
DEPARTMENT OF THE ENVIRONMENT

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*Woodward,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: August 22, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Samuel Moki, PhD, appellant, challenges a decision of the Prince George's County Personnel Board ("the Board") upholding his dismissal from his position as Associate Director of the Environmental Services Group of the Prince George's County Department of the Environment ("DOE"),[1] appellee. That decision was affirmed on judicial review by the Circuit Court for Prince George's County. On appeal, Dr. Moki presents four issues,[2] which we have condensed and rephrased as two questions:

> I. Was the Board's determination that Dr. Moki committed gross negligence and was properly dismissed for a conduct-based violation of the Prince George's County Personnel Code legally correct and supported by substantial evidence in the record?
>
> II. Was the Board's application of its procedural rules arbitrary and capricious?

Discerning no error, we shall uphold the decision of the Board and thus affirm the judgment of the circuit court.

[1] This agency previously was known as the Department of Environmental Resources. We refer to it by its current name.

[2] The issues, as posed by Dr. Moki, are:

> 1. Whether the Personnel Board erred in not establishing which civil law or statute was violated by Dr. Moki.
> 2. Whether the Personnel Board's interpretation of "gross negligence" was in accordance with the law.
> 3. Whether the Personnel Board's findings of fact supported a conclusion of gross negligence.
> 4. Whether the Personnel Board's application of procedural rules was arbitrary and capricious.

BACKGROUND

Dr. Moki, who has a PhD in political science, was hired as a Special Assistant to the Director of DOE in December 2006. By April 2007, he was the acting Associate Director of the Department of Environmental Resources. In October 2007, he was promoted to Associate Director of the Environmental Services Group at DOE. Associate Directors are the highest non-appointed positions in DOE.

Central to Dr. Moki's job was ensuring compliance with State and federal environmental mandates governing stormwater. Stormwater "consists of the rain and snowmelt that filters though the soil and courses over surfaces—collecting pollutants along the way—before passing through the municipal storm sewer systems and into waterbodies." *Maryland Dep't of the Env't. v. Anacostia Riverkeeper*, 447 Md. 88, 97 (2016) (footnote omitted). The Court of Appeals recently explained the interplay of federal, state, and local regulation of stormwater:

> In the quest to conserve a vital resource – the nation's waters – Congress has enlisted the federal, state, and local governments under the Clean Water Act ("the Act") [, 33 U.S.C. §1251 - §1388,] in a regulatory approach sometimes called "cooperative federalism." This effort involves a type of regulation that takes the form of a "permit" issued by a federal agency (or a state agency with federal oversight) at specified intervals to the regulated entity. Such permits authorize discharges of pollution into waterways, which the Act otherwise prohibits. When the targeted pollution is in stormwater, the permittee – *i.e.*, the regulated entity – is often a local government.

Md. Dep't of the Env't v. Cty. Comm'rs of Carroll Cty., __ Md. __, Nos. 5 & 7, Sept. Term. 2018, slip op. at 1 (filed Aug. 6, 2019) (footnote omitted).

The Act makes the discharge of pollutants into navigable waters illegal unless that discharge is subject to a permit. *Id*. at 4. The United States Environmental Protection Agency ("EPA") delegates permitting authority to the Maryland Department of the Environment ("MDE"). *Id.* One such permit issued by MDE to local governments is the Municipal Separate Storm Sewer System ("MS4") permit, which regulates "a network of conveyances (including storm drains, gutters, and other drainage systems) designed to carry only stormwater . . . ." *Id*. at 8.

At all relevant times, Dr. Moki was the point of contact at DOE for the MS4 permit program and was charged with ensuring compliance by Prince George's County ("the County") with its provisions. Under his supervision, the DOE Environmental Services Group would submit an annual report to MDE that comprehensively detailed how the County was implementing the MS4 permit program. MDE then would review the annual report and provide detailed feedback.

By letter dated January 3, 2008, MDE informed DOE that it had completed its review of the County's 2006 MS4 annual report.[3] Although the MDE commended the County's efforts, it emphasized "long-standing deficiencies regarding basic reporting elements" and identified four areas where improvement was needed: "[1] establish[ing] an effective preventative maintenance program for stormwater management facilities, [2] address[ing] permitting and pollution prevention plan development requirements for County-owned and municipal facilities, . . . [3] develop[ing] a restoration strategy to meet

[3] This annual report predated Dr. Moki's tenure as Associate Director.

the impervious surface treatment goals [and] . . . [4] hasten[ing the County's] efforts toward watershed restoration project implementation." In April 2008, when Dr. Moki was Associate Director, he was notified of this letter.

By letter dated June 17, 2009, comprising MDE's review of the 2007 and 2008 MS4 annual reports, which were prepared under Dr. Moki's supervision, MDE advised that the County was in violation of "numerous . . . permit conditions" and that the violations "need[ed] to be addressed immediately." The letter specified that the County was in violation of reporting requirements and needed to "establish an effective preventative maintenance program for private stormwater management facilities and address erosion and sediment control program deficiencies." If the County did not progress toward compliance, MDE could impose civil penalties of up to $5,000 per day with a $50,000 maximum under Maryland law, and $27,500 a day under the Act, in addition to other sanctions permitted by law.

In 2011, MDE and the County negotiated a settlement agreement to resolve violations of State law relative to water management and discharge of pollutants. The agreement, executed on January 3, 2012, provided, in pertinent part, that in exchange for MDE's agreement to not litigate the alleged violations, the County would pay a $10,250 penalty and complete an "approved Supplemental Environmental Project . . . valued at $92,250."

Meanwhile, in March 2011, the EPA commenced an audit of the County's MS4 permit program. By letter dated October 18, 2012 and addressed to Dr. Moki, the EPA

gave notice to the DOE that its audit had revealed that the County was not in compliance with the MS4 permit and directed it to show cause why it should not be subject to a civil penalty of up to $177,500 under the Act. The letter specified four violations of the MS4 permit.

Dr. Moki presented the EPA show cause letter to his appointing authority, Adam Ortiz, Director of DOE.[4] Ortiz immediately contacted Brad Seaman and Carla Reid, then Chief Administrative Officer and Deputy Chief Administrative Officer, respectively, at the County Executive's Office, to advise them of the show cause letter. After an initial response to the EPA was completed, in January 2013, Ortiz delegated to Larry Coffman, the Deputy Director of DOE,[5] the responsibility for investigating the deficiencies in the MS4 program. Coffman concluded that the root cause of the show cause letter was mismanagement of the County's MS4 permit program.

Consequently, by letter dated March 14, 2013, Ortiz notified Dr. Moki that he was the subject of an internal investigation pursuant to § 16-193 of the Prince George's County Code (hereinafter "PGCC"), which governs conduct-based disciplinary actions against County employees.[6] The letter directed Dr. Moki to appear for an investigatory

[4] Ortiz had only just been appointed as Director of DOE in October 2012.

[5] Coffman worked for DOE from 1986 through 2004, for most of that time serving in the same position as Dr. Moki. He returned to DOE in December 2012 as the Deputy Director.

[6] PGCC § 16-193(a) provides, in pertinent part, that an appointing authority:

interview on March 25, 2013, pursuant to PGCC § 16-241.[7]

By letter dated December 2, 2013, Ortiz proposed dismissing Dr. Moki for "gross negligence and mismanagement of the MS4 permit program" pursuant to PGCC § 16-193. The letter notified Dr. Moki of four grounds for his dismissal:

> 1. You conducted a series of acts which have clearly caused a continuing, disruptive effect on the efficient and safe operations of the Department and County as a whole;
>
> 2. You conducted a series of acts which call into serious question your trustworthiness and integrity in the continued performance of duties and responsibilities;
>
> 3. You conducted a series of acts which have a harmful or injurious effect on the general public; and
>
> 4. You conducted a series of acts which have demonstrated adverse effects on the general public's confidence and/or trust in the operation of the Department and the County as a whole.

Ortiz further specified that Dr. Moki's conduct was "grossly negligent and

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> may initiate and take . . . [certain enumerated] disciplinary actions . . . [against] any employee . . . [who] has committed an act or acts which constitute a violation(s) or failure(s) to comply with any duty, obligation, or requirement imposing a standard of conduct or behavior on such employee by virtue of the provisions of any criminal or civil law or statute or any rule or regulation authorized and promulgated pursuant thereto, provided any such violation(s) or act(s) of noncompliance:
>
> (1) Bears a demonstrable relationship to the nature of the duties and responsibilities of the employee's position; and,
>
> (2) Constitutes a willful, indifferent, or grossly negligent act or commission by such employee.

Dismissal is one of the authorized disciplinary actions. PGCC § 16-193(b)(7).

[7] That section sets out the rules governing investigative interviews "for conduct-related disciplinary action[s]."

indifferent" in the following ways:

> 1. Failing to adequately staff or fund basic planning, inspection, enforcement, construction, and reporting and technology improvements to fix the ongoing violations to meet basic MS4 permit requirements, despite the fact that the stormwater fund maintained a very large fund balance throughout your tenure;
>
> 2. Failing to effectively coordinate inter-departmental responsibilities to ensure permit compliance;
>
> 3. Failing to properly reveal to the EPA and State of Maryland the County's inability or unwillingness [ ] to comply with the MS4 permit;
>
> 4. Failing to retrofit approximately 2,000 acres of impervious surfaces required in the MS4 permit; and
>
> 5. Failing to address the restoration of 11 impaired water bodies as required by our MS4 permit.

Ortiz stated that, because of Dr. Moki's "gross mismanagement of the MS4 program[,]" the EPA had estimated that the costs of bringing the County into compliance would be approximately $7.4 million, including "$6.95 million [ ] for program compliance expenditures and $0.465 million for an environmental mitigation project." Further, according to Ortiz, the non-compliance had caused a loss of public trust and confidence "in the County's ability to meet its obligations to abide by the law and to protect public health, safety and welfare," putting it at risk of being sued and undermining "its ability to win grants." Ortiz closed by stating that, considering "the scope and magnitude" of Dr. Moki's conduct that was "contrary to meeting [his] duties and responsibilities, and the County's obligations under the law[,]" Ortiz was recommending that Dr. Moki be removed from his position and separated from County

employment.

After considering Dr. Moki's written response challenging his proposed dismissal, Ortiz terminated Dr. Moki effective February 7, 2014. Five days later, Dr. Moki appealed his dismissal to the Board.

The Board held a three-day hearing in June and July 2014. It heard testimony from Coffman, Ortiz, Sarah Bouldin-Carr, who was DOE's Deputy Director until December 2012, Dr. Moki, and two other DOE employees. We shall discuss some of their testimony, *infra*.

On January 7, 2015, the Board issued a thirty-one-page Decision and Order upholding the decision to dismiss Dr. Moki. The Board reasoned that, under PGCC § 16-193, Ortiz, as Dr. Moki's appointing authority, had the burden to show that Dr. Moki's "conduct failed to comply with the duties and obligations of his position as established by any civil law or statute, that the violation bears a demonstrable relationship to his position and that his conduct was willful or grossly negligent." The Board concluded that the County had shown that Dr. Moki failed to comply with § 16-108(b) of the Personnel Code, which sets out the "general responsibilities, guidelines, and principles in order to maintain public trust and carry out agency missions" that County employees must adhere to, including "productive discharge of duties"; "maintaining integrity in carrying out duties"; "exercis[ing] continued diligence in the performance of properly assigned duties, tasks and responsibilities"; "demonstrat[ing] willingness to perform these duties in a satisfactory manner"; and "carry[ing] out in an efficient, effective, and timely manner any

lawful order or directive rendered by an employee[']s appointing authority or supervisor and any assignment which is within the scope of the employee[']s applicable class specification[.]" (Quoting PGCC § 16-108(b)) (emphasis omitted). Specifically, the Board found that (1) Dr. Moki had "failed to manage the County's MS4 permit for several years"; (2) "his repeated failure to discharge his duties . . . demonstrated his unwillingness to perform his duties"; (3) "[h]is consistent failure to productively discharge his duties" resulted in the County being found in violation of the Act by MDE and the EPA; and (4) his conduct was "willful and grossly negligent." The Board further found that Dr. Moki made false statements about the reasons for his failure to manage the MS4 permit program, "call[ing] into question his trustworthiness, integrity and honesty."

Having concluded that the County had met its burden of proving sanctionable conduct under PGCC § 16-193, the Board turned to the appropriateness of the sanction of dismissal. After reviewing the pertinent statutory criteria, the Board determined that Dr. Moki's "protracted poor conduct . . . and his dishonesty" were serious enough to warrant dismissal.

Dr. Moki timely petitioned for judicial review in the circuit court. Following a hearing, the circuit court upheld the decision of the Board. This timely appeal followed. We shall include additional facts as necessary to our discussion of the issues.

STANDARD OF REVIEW

"When reviewing an administrative decision, we assume the same role as the Circuit Court . . . and limit our review to the agency's decision." *McClanahan v.*

Washington Cty. Dep't of Soc. Servs., 445 Md. 691, 699 (2015) (internal quotation marks omitted). We "will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists." *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 274 (2012) (internal quotation marks omitted). In other words, we "determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious." *Id.* (internal quotation marks omitted).

When an appellant challenges factual findings made by the agency, "[w]e are limited to evaluating whether there is substantial evidence in the record as a whole to support the agency's findings[.]" *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 210, *cert. denied,* 460 Md. 21 (2018). "In a review for substantial evidence, we ask whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Anacostia Riverkeeper*, 447 Md. at 120 (internal quotation marks omitted). "We [ ] accord deference to the agency's fact-finding and drawing of inferences when the record supports them." *Id.* (internal quotation marks omitted). As to legal conclusions, "we accord some deference to an agency's legal interpretation of the statute it administers or of its own regulations. Even if we grant some deference to the agency's legal interpretations, we must correct a legal conclusion that is erroneous." *McClanahan*, 445 Md. at 700 (internal quotation marks and citation omitted).

DISCUSSION

I.

As discussed, Dr. Moki was terminated pursuant to PGCC § 16-193. That section permits an appointing authority to

> initiate and take . . . [certain enumerated] disciplinary actions . . . [against] any employee … [who] has committed an act or acts which constitute a violation(s) or failure(s) to comply with any duty, obligation, or requirement imposing a standard of conduct or behavior on such employee by virtue of the provisions of any criminal or civil law or statute or any rule or regulation authorized and promulgated pursuant thereto, provided any such violation(s) or act(s) of noncompliance:
>
> (1) Bears a demonstrable relationship to the nature of the duties and responsibilities of the employee's position; and,
>
> (2) Constitutes a willful, indifferent, or grossly negligent act or commission by such employee.

PGCC § 16-193(a). In the final agency decision, the Board distilled from this provision, in relevant part, a three-prong test that the County had to satisfy: "[1] that Dr. Moki's conduct failed to comply with the duties and obligations of his position as established by any civil law or statute, [2] that the violation bears a demonstrable relationship to his position[,] and [3] that his conduct was willful or grossly negligent." Dr. Moki contends that the County did not carry its burden under any prong of that test. He further asserts, more generally, that certain of the Board's factual findings were unsupported by substantial evidence. We address each contention in turn.

a.

Under the first prong of the test, the Board found that Dr. Moki failed to comply with the duties and obligations imposed upon him by PGCC § 16-108(b), which governs the general responsibilities for all County employees:

> (b) In addition to such specific responsibilities as are otherwise assigned under the provisions of this Subtitle, **all employees are expected to adhere to the following general responsibilities, guidelines, and principles in order to maintain public trust and carry out agency missions**:
>
> > (1) To comply with and adhere to, the provisions of this Subtitle, any personnel procedures developed, approved and issued pursuant hereto, and any supplemental personnel operating procedures and reasonable rules of conduct and behavior as may be promulgated by an employee's appointing authority pursuant to Section 16-107(a)(4), above, including, but not limited to, timely reporting to work, **productive discharge of duties**, proper leave use, **maintaining integrity in carrying out duties**, and refraining from improper use of drugs or alcohol;
> >
> > (2) To exercise continued **diligence in the performance of properly assigned duties, tasks, and responsibilities** and to **demonstrate willingness to perform these duties** in a satisfactory manner;
> >
> > (3) To carry out in an efficient, effective, and timely manner any lawful order or directive rendered by an employee's appointing authority or supervisor and any assignment which is within the scope of the employee's applicable class specification . . . .

(Emphasis added). The Board made specific findings that Dr. Moki repeatedly failed to productively discharge his duties, demonstrated an unwillingness to perform his duties, and "flagrantly disregarded his duties[.]" The Board further found that Dr. Moki did not maintain integrity in carrying out his duties.

In Dr. Moki's view, because the County did not identify PGCC § 16-108(b) during the three-day administrative hearing or in its post-hearing memorandum, the Board acted arbitrarily and capriciously by relying upon that section to conclude that the County satisfied its burden under the first prong of the test. Having failed to satisfy the first prong, Dr. Moki further contends that the County could not have satisfied the second prong, which requires proof that the failure to comply with the statute or rule bore "a demonstrable relationship to his position."

The County responds that the central focus of the three-day hearing was upon the nature of Dr. Moki's duties as Associate Director of the Environmental Services Group and his performance or failure to perform those duties, which necessarily invoked the rules and regulations governing County employees' fulfillment of their job responsibilities. The County maintains that the failure to identify the specific provision of the Personnel Code that makes plain that a County employee must carry out his or her duties diligently, productively, and with integrity is "inconsequential" because the Board's role in reviewing an appeal from an adverse employment action is to assess "whether there is any reasonable basis to support the action taken by the official." (quoting PGCC § 16-203(a)(8)(A)) (emphasis omitted). We agree.

The testimony and evidence showed that Dr. Moki had a duty to manage the federally mandated MS4 permit program. During his investigatory interview, Dr. Moki acknowledged that he was responsible for the management of the MS4 permit program, and responded affirmatively when asked whether he "directly supervise[ed] [DOE's] staff

responsible for implementation of the MS4 permit program[.]" Dr. Moki further testified at the Board hearing that a component of his position was to manage the MS4 permit program, that he was "the point of contact for the EPA and [MDE] when it came to the MS-4 permit[,]" and that he oversaw sixty people at DOE. As a County employee, he thus was required to carry out these significant duties subject to the requirements set forth in PGCC § 16-108(b).

We accord a degree of deference to the Board's interpretation of the County Personnel Code, and we perceive no legal error in its conclusion that the evidence, discussed in more detail, *infra*, that Dr. Moki willfully failed to carry out his duties in managing the MS4 permit program, satisfied the County's burden to show that Dr. Moki did not comply with the duties and obligations of his position as established by "any criminal or civil law or statute," namely PGCC § 16-108(b). Moreover, the duties and obligations imposed by PGCC § 16-108(b) clearly bear a demonstrable relationship to Dr. Moki's position, thus satisfying the second prong of the test.

b.

Turning to the third prong, Dr. Moki challenges the Board's determination that he was grossly negligent. He contends that the Board committed legal error by not "clearly defin[ing] the standard for [conduct that is] 'willful or grossly negligent[.]'" Dr. Moki argues, moreover, that had the Board applied the proper legal standard, its relevant factual findings would have been insufficient to support the legal conclusion that he was grossly negligent. He also challenges the basis for some of those underlying findings.

The County responds that the Board's decision makes clear that it understood the legal standard for gross negligence and properly applied that standard to the facts before it. The County maintains that there was substantial evidence in the record supporting all of the Board's findings regarding Dr. Moki's failure to perform his job duties and that this evidence was legally sufficient to support the Board's conclusion that he was grossly negligent. Again, we agree.

The Personnel Code does not define "grossly negligent" as the term is used in PGCC § 16-193(a). The General Provisions subtitle of the PGCC provides, however, that "**[**w]ords and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases and others that have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such meaning." PGCC § 1-102(a)(40) (emphasis omitted). Thus, as the parties agree, the term "grossly negligent" must be given its meaning as construed under Maryland law.

This Court and the Court of Appeals often have had occasion to construe the term "gross negligence" in cases decided under the Maryland Tort Claims Act ("MTCA").[8] In the seminal case of *Barbre v. Pope*, 402 Md. 157, 187 (2007), the Court of Appeals

[8] Although Maryland ordinarily waives its sovereign immunity with respect to claims against it arising from tortious conduct by a State employee acting within the scope of his or her duties, it "does not waive its sovereign immunity . . . when a 'state personnel' acts with malice or *gross negligence*." *Barbre v. Pope*, 402 Md. 157, 174-75 (2007) (emphasis added). Thus, whether the State is immune from liability (and, conversely, whether the State employee is not immune from liability) often turns upon an assessment of whether tortious conduct amounted to simple negligence or gross negligence.

observed that "a fine line exists between allegations of negligence and gross negligence." Gross negligence is "something *more* than simple negligence, and likely more akin to reckless conduct[.]" *Id*. (quoting *Taylor v. Harford Cty. Dep't of Soc. Servs*., 384 Md. 213, 229 (2004) (emphasis in *Taylor*)). More precisely, gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Id*. (quoting *Liscombe v. Potomac Edison Co*., 303 Md. 619, 635 (1985)). *See also Gross Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[G]ross negligence" is "[a] lack of even slight diligence or care. The difference between *gross negligence* and *ordinary negligence* is one of degree and not of quality." (emphasis in original)).

Very recently, in *Stracke v. Estate of Butler*, __ Md. __, No. 64, Sept. Term 2018, slip op. at *12-13 (filed Aug. 16, 2019), the Court of Appeals held that the estate of a deceased man who died from cardiac arrest had presented insufficient evidence as a matter of law to generate a jury issue as to whether the paramedics who assessed him and transported him to the hospital were grossly negligent. In so holding, the Court reiterated the standard enunciated in *Barbre* and emphasized that "[g]ross negligence is not just big negligence." *Id*. at *11, 12, 18 (quoting *Thomas v. State*, 237 Md. App. 527, 537 (2018), *rev'd*, __ Md. __, No. 33, Sept. Term 2018 (filed June 24, 2019)). For the issue of gross negligence to be submitted to a jury, the Court reasoned that the plaintiff must adduce evidence that the defendant made a "deliberate choice" not to act or acted with "utter

indifference to [another's] rights and well-being." *Id*. at *18. The Court determined that evidence that the paramedics had not followed protocols for emergency medical services providers when responding to a patient with suspected cardiac arrest was insufficient to satisfy this threshold. *Id.* at *16-17. The Court focused upon the significant policy implications if the propriety of a first responder's judgment about the "assessment and treatment of patients" was submitted to a jury any time there was evidence supporting a finding of simple evidence. *Id*. at *19. It concluded that to permit a jury to "engage in a *post hoc*, hindsight assessment of the first responders' conduct" would have a "chilling effect[.]"[9]

In the case at bar, the Board's decision reflects that it applied the appropriate standard in determining whether Dr. Moki's conduct amounted to gross negligence. The Board made explicit findings, including, among others, that "Dr. Moki was responsible for managing the County's MS4 permit to ensure that the conditions of the permit were not violated and that the County did not violate the Clean Water Act [CWA]"; that Dr. Moki was "fully aware of the deficiencies in the [MS4] program dating back to 2007"; that he "flagrantly disregarded his duties and in so doing he disregarded federal and state law"; that he "made false statements of a material nature regarding the management of

[9] Three members of the Court dissented. *Stracke v. Estate of Butler*, __ Md. __, No. 64, Sept. Term 2018 (filed Aug. 16, 2019) (Wilner, J., dissenting, joined by Barbera, C.J., and McDonald, J). The dissenting judges reasoned that "ascertaining which side of the line the facts fall on" when gross negligence is alleged is properly a jury question and that the Majority had failed to appraise the facts in a light most favorable to the plaintiff. *Id*. at *17, 20 (Wilner, J., dissenting).

the MS4 program"; that he "intentionally failed to perform his duties"; and that his "repeated failure to manage the County's MS4 permit was willful." In its opinion, the Board made additional relevant findings as follows:

> **[Dr. Moki's] repeated failures to comply with the conditions of the County's MS4 permit as mandated by EPA and MDE even after the violations were brought to his attention demonstrates his unwillingness to conduct himself as [ ] the Associate Director of [DOE].** . . . **His failure to manage the MS4 program resulted in the County having to pay a fine to MDE, had a disruptive effect on the efficient operations of the [DOE]** and other agencies by necessitating a mobilization of county resources to address the EPA Order to Show Cause that would not have been necessary if Dr. Moki had been managing the program since his appointment. **His repeated failure to manage the MS4 permit had a harmful effect on the general public.** The CWA was enacted to improve the quality of the nation's water supplies. The County's failure to abide by the MS4 permit mandated by CWA contributes to poor water quality and is adverse to environmental stewardship. . . .
>
> Dr. Moki being untruthful to his supervisors regarding the reasons for the County's violations by telling them that [DOE] did not have the budget for hiring and that his requests for additional funding for [DOE] were denied when he knew that [DOE] had funds in Enterprise Funds 49 for the MS4 program constitutes significant violations of his employment with the County. **The dishonesty about the budget was a significant violation of his employment by itself because his conduct calls into serious question the appellant's trustworthiness and integrity in the continued performance of his assigned duties and responsibilities as the Associate Director of [DOE] with [DOE] as the lead agency for ensuring compliance with all MS4 programs.**

(Emphasis added).

The above findings reflect that the Board understood gross negligence to require more than mere inadvertence and that it found that Dr. Moki acted with "utter indifference" to his duties and the significant consequences for the County if it failed to meet the MS4 program requirements. *Stracke*, slip. op. at * 18. We perceive no legal

error by the Board in its application of the standard for gross negligence.

We now turn to the related issue of whether substantial evidence in the record supported the Board's findings. Dr. Moki specifically challenges the Board's findings that he "intentionally failed to perform his duties," that he did "nothing to abate the violations in the MS4 program," and that he was "deliberately untruthful." We conclude that all of these findings are supported by substantial evidence in the record, and, taken together, rise to the level of gross negligence. We explain.

Coffman testified at length about his investigation into the basis for the EPA show-cause letter, which ultimately became an investigation into mismanagement of the MS4 program under Dr. Moki "[b]ecause of the brea[d]th and depth of the deficiencies [discovered] in the [MS4] program[.]" Significantly, Coffman was the former Associate Director of the Environmental Services Group for many years and was intimately familiar with the job responsibilities and the MS4 permit program. He testified that a "key responsibility" of the Associate Director was to "coordinate and collaborate" with the other County agencies to ensure compliance with the permit.

Coffman explained that "the four violations that appeared [in the EPA show cause letter] are the same violations, same issues that were raised before to [DOE], and that there was ample opportunity to come in compliance. But despite all those opportunities, the County did not come in compliance[.]" Dr. Moki received notice of these issues when he received a letter from MDE dated January 3, 2008, and another letter from MDE dated June 17, 2009. Those four violations were:

> the failure to establish effective maintenance program for private stormwater management facilities; failure to address the permit and pollution prevention programs for County-owned facilities; [ ] a failure to develop a restoration strategy to meet . . . the impervious acre requirement[10]; and failure to develop [ ] a quality assurance program that would effectively track the data and provide accurate reporting of the MS4 activities.

There was ample evidence that Dr. Moki had knowledge of his responsibilities and was in charge of the MS4 program. Coffman testified that Dr. Moki "had every opportunity to [address the issues], he had ample budget, he had ample resources." During his tenure as Associate Director, Dr. Moki had access to a "separate enterprise fund" that was "not connected to the [County's] general fund" and was dedicated to stormwater related issues. The enterprise fund was supported through special tax revenues, in addition to "fees, fines, [and] grants." The fund had a balance of approximately $40 million in fiscal year 2009, with an unspent remainder of over $5 million, including more than $1.1 million allocated for consultants. For Fiscal Years 2009 through 2012, the total fund balance never fell below $40 million. According to Coffman, Dr. Moki "controlled [that] budget [and] had contractors available to him" to carry out his duties. Coffman testified that there were "three consultants that were directly contracted with the [DOE] and about 10 contractors available through the Department of Public Works" who were available to "help meet the requirements of the program." Despite these resources, Coffman found that Dr. Moki took "no action to correct . . . deficiencies [in the MS4 permit program]." To give examples, Coffman

[10] This requirement also was referred to as "retrofitting."

testified that DOE had completed only ten percent of the required retrofits of "uncontrolled areas of the County[.]" DOE also had not performed "detailed assessments of all watersheds in [the County] . . . at all." Coffman further testified that, when he interviewed staff subordinate to Dr. Moki as part of his investigation, they reported having made recommendations to Dr. Moki "to bring the program back into compliance[.]" There was no evidence, however, that Dr. Moki had made "an effort . . . to move forward with compliance."

Sarah Bouldin-Carr, former Deputy Director of DOE and Dr. Moki's direct supervisor during most of the relevant time period, testified that she recalled that, although there were budgetary restrictions on the use of general funds in the County, these restrictions did not apply to the enterprise fund.

Ortiz testified that, not only did the investigation reveal that Dr. Moki had the resources to address the MS4 program issues, but that he "was dishonest about" whether he had attempted to utilize those resources:

> **During the investigation [Dr. Moki] told us over and over that he asked for the money, he wanted the money, he asked for the personnel, he wanted to hire more people, but that Sarah Bouldin-Carr and Charlie Wilson, [ ] his two supervisors, wouldn't let him do it, wouldn't let him hire other people, when none of that proved to be true at all, he already had the resources.**
>
> He also said that there was a prohibition on spending, that [ ] Tom Himler, in the budget office, said that, you know, "Can't spend any more money, have to cut it back." There's no record anywhere of any directive of that kind. And, in fact, our other fund - - we have a solid-waste fund that we run the landfill and our recycling from, they spent all their money, they had no prohibition.

> I - - so - - **so then we have an honesty issue**, **that he was dishonest and not trustworthy.** And furthermore, the investigation also showed that during that time he was not honest with his supervisors, he told them that he was doing everything he could to be in compliance from this 2008 letter, . . .
>
> And also he was dishonest in the MS4 reports to the State and to the EPA where he was saying that he was doing all this work. He said year, after year, after year that he was doing all this work, coming into compliance, and he was running a great program, none of that proved to be true. **So he was dishonest at the time to the supervisors, and to our regulators, and then during our investigation he was dishonest to us saying the total opposite.**
>
> **Back then he was saying, "I'm on it, I'm on it, no problem, we're - - we're good." Now he says, "Oh, no, I tried, but my bosses didn't let me do it," so another deception** to cover up his negligence in putting contractors and other resources to work to come into compliance with these four items, so to me that's grave. **You know, this is already a big deal, this is [ ] a federal mandate, this is the most important thing that he does, and he not only didn't do it, he knew what he had to do in the 2008 letter, he had the resources to do it, millions of dollars of resources to do it, didn't do it, and then lied about it.**

(Emphasis added).

In reliance upon the testimony and other documentary evidence, the Board made the following pertinent findings of fact:

> 8. Dr. Moki directly supervised [DOE's] staff responsible for implementation of the County's MS4 permit program for [the] County. Dr. Moki was coordinating agency for the other agencies within County government that had reporting obligations for MS4 permit. Any reports involving the MS4 program were sent to the Director of [DOE] with Dr. Moki's approval. Dr. Moki was responsible for any errors in the report. Dr. Moki was aware that the MS4 program was a federal mandate with which he had to comply.
>
> * * *
>
> 25. . . . Dr. Moki as administrator of the County's M[S]4 permit did nothing

to abate the violations.

* * *

34. . . . . Dr. Moki had funds available to address the deficiencies noted by MDE and known by Dr. Moki. Dr. Moki did not use these funds to address the deficiencies which led to the EPA Show Cause Order.

* * *

38. Coffman . . . found [in his investigation] that some aspects of the [MS4] permit program were not staffed or not performed at all.

* * *

50. Dr. Moki was dishonest and not trustworthy in the investigation conducted by Mr. Coffman.

51. During his tenure, Dr. Moki did accomplish initiatives on behalf of the County, some of which were in furtherance of the . . . Act but not in the areas that prompted the MDE to fine the County and for EPA to issue a show cause order.

Dr. Moki points to conflicting evidence in the record, much of it drawn from his testimony before the Board. As a rule, however, "[w]e appraise an agency's fact finding in the light most favorable to the agency, and this deference extends to subsequent inferences drawn from that fact finding, so long as supported by the record." *Schwartz v. Md. Dep't of Nat. Res*., 385 Md. 534, 554 (2005). It is "the province of the agency to resolve conflicting evidence" and when "inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Id*. (internal quotation marks omitted). Likewise, we defer to the agency's assessment of the credibility of the witnesses. *Id*. Dr. Moki's challenges to specific factual findings all turn upon the Board's weighing of conflicting testimony and/or the inferences to be drawn from that

testimony.[11] Viewing the fact finding in the light most favorable to the Board, we conclude that all of the findings are supported by substantial evidence in the record.

The Board clearly credited the testimony of Coffman, Ortiz, and Bouldin-Carr and found Dr. Moki's testimony to be self-serving and, at times, misleading. The testimony from the DOE witnesses supported the Board's findings that Dr. Moki failed to take any action to bring the County into compliance with the state and federal mandates flowing from the Act despite his knowledge of the deficiencies and the availability of resources for him to do so. His role in the DOE was the "focal point" for management of the MS4 permit program for the County. His complete failure to act amounted to an abdication of his significant responsibilities, and demonstrated the "lack of even slight diligence or care." *Gross Negligence*, BLACK'S LAW DICTIONARY (11th ed. 2019). As the Court of Appeals recently reiterated, there is a "fine line" between simple negligence and gross negligence. *Stracke*, slip. op. at *11 (quoting *Barbre*, 402 Md. at 187). We are satisfied that the Board's findings, which are supported by substantial evidence, are sufficient to sustain its conclusion that Dr. Moki's conduct fell on the gross negligence side of that

[11] For example, Dr. Moki argues that the Board's finding that he "did nothing to abate the violations in the MS4 program" was inconsistent with "the wealth of evidence showing that Dr. Moki did in fact initiate and implement several good faith projects aimed towards meeting permit compliance." As discussed, however, Coffman testified that his investigation found that Dr. Moki took no action to correct the deficiencies. The Board was permitted to rely upon Coffman's testimony in that regard.

line.[12, 13]

II.

Dr. Moki maintains that the Board's application of its procedural rules was arbitrary and capricious, thus prejudicing him. We address each alleged procedural violation in turn.

a.

First, Dr. Moki contends that the Board erred by not making any findings in its decision relative to an issue that was raised during the three-day hearing on multiple occasions: whether the DOE improperly proceeded under PGCC § 16-193, governing conduct-based discipline, as opposed to proceeding under PGCC § 16-194, governing performance-based discipline.[14] It is clear from the Board's decision that it rejected Dr. Moki's argument that the evidence did not support conduct-based discipline under PGCC

[12] We note that, unlike *Stracke*, where the strong public policy in favor of immunity for first responders weighed against permitting a jury to decide that issue in close cases based upon 20/20 hindsight, here a Personnel Board charged with interpreting employment regulations was uniquely qualified to assess whether Dr. Moki's conduct rose to the level of gross negligence.

[13] Dr. Moki does not directly challenge the imposition of the sanction of dismissal under PGCC § 16-193. We note that the Board properly analyzed the criteria for imposing that sanction and did not act arbitrarily or capriciously in upholding the decision to dismiss Dr. Moki.

[14] Unlike the conduct-based disciplinary provision, dismissal is an authorized sanction for a performance-related disciplinary action only if the employee's "appointing authority or supervisor . . . has made a reasonable effort to counsel the employee with respect to the employee's performance and has afforded the employee a reasonable opportunity to take remedial actions with respect thereto[.]" PGCC § 16-194(c)(1)(A).

§ 16-193. As discussed, we have concluded that the Board's findings and its ultimate conclusion that Dr. Moki's conduct was grossly negligent, which supported conduct-based discipline, was not clearly erroneous and was supported by substantial evidence in the record. For that reason, any failure to address Dr. Moki's issue regarding PGCC § 16-194 could not have prejudiced Dr. Moki.

b.

Dr. Moki next argues that "[t]he Board did not follow a consistent procedure for the admissibility of . . . evidence." "[I]t is well-settled that administrative agencies are not bound by technical common law rules of evidence." *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 379 (internal quotation marks omitted), *cert. denied*, 434 Md. 314 (2013). "[H]earsay statements are admissible in an administrative proceeding[.]" *Travers v. Balt. Police Dep't*, 115 Md. App. 395, 412 (1997). "[This] Court countenances the relaxation of evidentiary rules so long as they are not applied in an arbitrary or oppressive manner that deprives a party of his or her right to a fair hearing." *Id*.

Consistent with these general rules, the Board's "Rules of Evidence" provide that it had the discretion to "admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs" and to "exclude incompetent, irrelevant, immaterial and unduly repetitious evidence." Prince George's Cty. Personnel Bd., *Rules of Administrative Procedure*, Rule 4(A).

The examples cited by Dr. Moki of the Board's "inconsistent" application of its

rules do not bear out his assertion. The Board considered the reliability and probative value of hearsay evidence and other evidence and, at times, admitted or excluded such evidence over the objection of Dr. Moki's counsel and, at times, admitted or excluded such evidence over the objection of the County attorney. The only hearsay ruling adverse to Dr. Moki that is specifically identified in his brief involves the Board's exclusion of his testimony about an article from the Baltimore Sun that he had found while searching the internet during his tenure as Associate Director. According to Dr. Moki, he learned from the article that the EPA was "starting to ramp up its approach toward . . . counties in compliance with the . . . Act[.]" The Board sustained the County attorney's objections to that evidence on the basis that it was hearsay and was not "competent evidence." The Board did not abuse its broad discretion in so ruling. Even if the Board had abused its discretion, however, Dr. Moki does not explain how he was prejudiced by the Board's ruling. *See Washington Suburban Sanitary Comm'n v. Lafarge N. Am., Inc*., 443 Md. 265, 289 (2015) ("[i]t is the policy of [the Maryland appellate courts] not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error.") (alteration in original) (internal quotation marks omitted). Dr. Moki likewise has failed to show that the Board's other evidentiary rulings were applied in "an arbitrary or oppressive manner" or that he was deprived of a fair trial. *Travers*, 115 Md. App. at 412.

c.

Finally, Dr. Moki contends that an off-the-record conversation between the parties and the Board in which the Board "signal[ed] to the DOE that it may not have met its

burden of establishing grossly negligent conduct under § 16-193" was highly unusual and unfair. We determine that this argument has been waived.

> At the end of the second day of the hearing, the following colloquy ensued:
>
> [BOARD'S COUNSEL]: After having had an opportunity to speak with counsel for the [County] and counsel for [Dr. Moki], the . . . substance of that discussion being that there is some concern that the County has not carried its burden pursuant to Personnel Code Section 16-193, conduct related to disciplinary actions, Section A[(1) & (2)], specifically Section 2, there was some discussion with regard to whether a - - a directed verdict was appropriate at this point.
>
> The parties have been unable to reach an agreement to whether procedurally that would be appropriate, and with the goal of preserving the record by both parties, the - - **the parties have agreed that the matter should be moved - - that both parties will move forward with their case, and that [Dr. Moki] will present his case-in-chief, and that the County will have an opportunity to cross examine the remaining witnesses, and to call rebuttal witnesses with the goal of preserving the record,** as - - as well as continuing with their endeavor to - - to satisfy the Code Section 16-193.
>
> . . . [I]s what I stated accurate for the most part?
>
> [COUNTY'S COUNSEL]: That's true and accurate.
>
> [BOARD'S COUNSEL]: And Counsel for [Dr. Moki], is that true and accurate?
>
> [DR. MOKI'S COUNSEL]: **That is accurate.**
>
> [BOARD'S COUNSEL]: I'd like to [give] both the counsel for the [County] and [Dr. Moki] an opportunity to put anything else on the record that they think I might have left out. Counsel for [Dr. Moki]?
>
> [DR. MOKI'S COUNSEL]: I believe you've put everything on the record.
>
> [COUNTY'S COUNSEL]: No reason to supplement, thank you.

(Emphasis added).

By affirmatively agreeing that the County could continue the hearing and that he would not move for a directed verdict, Dr. Moki has waived this issue for appellate review. *See Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("Waiver is conduct from which it may be inferred reasonably an express or implied 'intentional relinquishment' of a known right."). On that basis, we decline to consider this issue.

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