UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1566

September Term, 2014

RONNIE LEWIS

v.

MARYLAND DEPARTMENT OF HUMAN RESOURCES, et al.

Wright,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: November 16, 2015

* 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.

Ronnie Lewis appeals from a decision of the Circuit Court for Baltimore City affirming his termination from the Baltimore City Department of Social Services ("DSS"). Mr. Lewis was terminated for violating several DSS policies when he failed either to note the whereabouts of a child assigned to his caseload when the child left the assigned placement, or to initiate the required steps under the applicable policy. On appeal, he contends that both DSS and the Administrative Law Judge ("ALJ") in the Office of Administrative Hearings ("OAH") proceedings committed errors that warrant either reversal or remand of the circuit court's affirmance. We disagree and affirm.

I. BACKGROUND

Mr. Lewis was employed by DSS as a social worker in its Adult, Family & Children Services Division from July 1992 until he was terminated in June 2012. As a caseworker, Mr. Lewis was tasked with "provid[ing] families/individuals with appropriate agency services to identify and resolve issues/concerns, both personal and environmental which threaten their functioning, unity or independence." Among other duties, he was required to "[m]aintain[] up-to-date case records and service documentation in MD CHESSIE,[1]" and "[a]dhere[] to all policies, procedures and mandates as specified by State, local and Federal guidelines."

[1] The Maryland's Children's Electronic Social Services Information Exchange, abbreviated as MD CHESSIE, is DSS's automated information system; it stores and manages a variety of data related to case management, intake, financial management, and investigations, and aids DSS by enhancing data accessibility.

DSS is responsible for every child under its care; it is considered the legal parent for children in the foster program. A child is only put in an out-of-home placement after DSS has (1) removed the child from the home of his or her caregiver, and (2) has acquired legal responsibility for the child. COMAR 07.02.11.05(A). Once the child has been placed in out-of-home care, the child is legally considered in DSS's out-of-home placement program, and DSS must "[p]rovide short-term 24-hour a day care and supportive services for [the child] who is in the custody or guardianship of [DSS]." COMAR 07.02.11.01(A).

DSS has enacted several policies aimed at protecting and providing for the safety of the youth under its care, many directly mandated by COMAR 07.02.11. Among these policies are the Runaways Policy and the Kinship Provider Policy, which are required by COMAR 07.02.11.18 and 07.02.11.26, respectively. Under the latter, DSS favors placement with relatives over other placements, but caseworkers still must follow several rules and guidelines before placing a foster child with kin. These guidelines are essential; DSS's Placement Protocol explains that its purpose "is to ensure that children in out-of-home care are placed into settings that meet the regulatory requirements in the State of Maryland and that meet their [*sic*] individualized needs of each child."

The Placement Protocol warns that "[t]he consequences [to] any [DSS] employee who chooses not to comply with this protocol will be severe." If any child under DSS's supervision "has been gone from his/her placement without explanation or authorization for more than 24 hours," the permanency worker assigned to the child's case is required to follow the steps in the Runaways Policy. These steps include immediately contacting his supervisor and filing a Missing Persons Report and a warrant with the Police Department

within 12 hours of notification. The 24-hour and 12-hour deadlines and other specific requirements are mandated by DSS policy, but are based on COMAR 07.02.11.18:

> A. When [DSS] is informed that a [*sic*] out-of-home placement child is missing, abducted, or has not returned home at a prearranged time, the [DSS] caseworker shall:
>
> (1) Notify the:
>
> (a) Local law enforcement and obtain a complaint number.
>
> * * *
>
> (4) Consult with the local law enforcement regarding the procedure to be followed to return the child and whether [DSS] or local law enforcement will pick up the child;
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> * * *
>
> (6) Document the child's runaway or missing status with a begin and end date in the child's whereabouts section on the case plan.

COMAR 07.02.11.18(A)(1), (4), and (6). Compliance with these rules is measured by MD CHESSIE entries and case file reviews.

In December 2012, Mr. Lewis was assigned as E.H.'s[2] permanency worker. During the time he worked on E.H.'s case, E.H. moved back and forth between two kin placements: one with his Stepmother and the other with his Sister.[3] Sister testified that when E.H.

[2] As he was a minor at the time of the incident, we refer to the child as "E.H."

[3] In the interest of confidentiality, we omit the initials of E.H.'s relatives.

entered the foster system, he was initially placed with Stepmother, but he moved in with her on February 27, 2012.

On May 23, 2012, Mr. Lewis visited Sister's home to take E.H. to a dentist appointment. When he arrived, he was informed that she had asked E.H. to leave, and that he no longer lived at her residence. Mr. Lewis noted in CHESSIE that E.H. had left the placement, but failed to record E.H.'s current location or notify his supervisor, Randall Myers. His notation in CHESSIE, entered on May 23, read: "[Sister], caretaker, reported that [E.H.] is very disrespectful and that he does not like to follow directions. She reported that as of 5/23/12 he does not live there."

Mr. Myers discovered the situation on May 29, 2012, when he received the Contact Verification Form that Sister had signed that indicated E.H. no longer resided in her home. Mr. Myers assumed Mr. Lewis had already begun the steps required under the Runaways Policy, which in fact he had not.

On May 31, 2012, Baltimore police arrested E.H. The police contacted Mr. Myers to advise him of E.H.'s arrest, and he in turn informed Tia Blue, the Acting Unit Manager of the Permanency Unit. Once she knew that E.H.'s current residency information was missing from CHESSIE, and that "a subordinate worker within her chain of command, failed to timely report that a youth assigned to his caseload was missing from his assigned kin placement," Ms. Blue immediately requested an investigation of the incident. Fred Watkins was assigned as the investigator.

Mr. Watkins conducted a three-day investigation, and interviewed Ms. Blue, Mr. Myers, and Mr. Lewis. Based on the interviews, and Mr. Lewis's disciplinary record, which included four letters of counseling, two reprimands, and three suspensions, Mr. Watkins recommended that Mr. Lewis be terminated. Mr. Lewis was officially terminated on June 28, 2012 for violating COMAR 17.04.05.03B(1), 17.04.05.04B(1), (3), (12), and (15).[4] DSS justified the termination by noting that "[t]hrough Mr. Lewis' negligence,

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[4] The relevant portions of COMAR provide *first* that incompetence can form the basis of termination:

> B. The appointing authority may discipline an employee for reasons related to the employee's performance. These reasons include but are not limited to:
>
> > (1) That the employee is incompetent or inefficient in the performance of the employee's duty.

COMAR 17.04.05.03(B)(1), and, *second*, that more specific types of conduct can constitute the basis for discipline:

> B. An employee may be disciplined for engaging in any of the following actions:
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> > (1) Being negligent in the performance of duties;
> >
> > * * *
> >
> > (3) Being guilty of conduct that has brought or, if publicized, would bring the State into disrepute;
> >
> > * * *
> >
> > (12) Violating a lawful order or failing to obey a lawful order given by a superior, or engaging in conduct, violating a lawful order, or failing to obey a lawful order which amounts to insubordination; (continued…)

[DSS] did not know the whereabouts of a committed youth from May 23 to May 31, 2012," and that because of his disregard for DSS policies, there were "serious concerns and hesitation surrounding the agency's ability to place any level of trust in him in the future to adequately, earnestly and honestly perform the functions of his job."

Mr. Lewis appealed DSS's decision to the Secretary of the Department of Human Resources ("DHR"). In the appeal, he attempted to mitigate the incident, as he had during Mr. Watkins's investigation, by asserting that he knew E.H.'s location during the entire period in question. He argued that he was in phone contact with E.H., and therefore "he was not required to follow [DSS] protocol for missing children." In addition, he faulted Mr. Watkins's investigation for failing to interview Stepmother, Sister, and E.H., all of whom, he asserted, could have corroborated that he knew at all times where E.H. was. Further, he contended that "he was assigned other tedious duties by his supervisor so he did not have enough time to enter the information about the youth's new possible whereabouts into CHESSIE."

DHR disagreed, and on August 14, 2012, it upheld Mr. Lewis's termination. It found that DSS successfully showed "by a preponderance of the evidence that the termination was an appropriate disciplinary action." DHR neither believed that Mr. Lewis knew the

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* * *

> (15) Committing another act, not previously specified, when there is a connection between the employee's activities and an identifiable detriment to the State.

COMAR 17.04.05.04(B)(1), (3), (12), and (15).

whereabouts of E.H. nor believed that Mr. Lewis would have met his essential reporting duties if he had:

> Mr. Lewis contends he was aware about the whereabouts of the youth, so his only mistake was failure to document that information into CHESSIE. However, apart from self testimony Mr. Lewis did not provide evidence to support his contention. It is also difficult to believe that an employee with several years of experience could not make the proper determination as it pertains to the status of the youth, whether missing or not. Further, no matter the status, the case file was incomplete and the Agency was unaware of the child's whereabouts, all because Mr. Lewis failed to fulfill his duty as the custodian of the file, to maintain and keep it up to date.

Mr. Lewis appealed the decision to the Secretary of the Department of Budget and Management, who delegated the case to the OAH on September 12, 2012, under Md. Code (1993, 2009 Repl. Vol.) § 11-110 of the State Personnel and Pensions Article ("SPP"). The ALJ initially dismissed the case on DSS's motion, but Mr. Lewis appealed the dismissal to the Circuit Court for Baltimore City, which reversed and remanded the case for a hearing on the merits. A two-day hearing was held on December 4 and 5, 2013, and the ALJ affirmed Mr. Lewis's termination on February 6, 2014. Under Md. Code (1984, 2014 Repl. Vol.) § 10-222 of the State Government Article ("SG"), Mr. Lewis appealed that decision to the Circuit Court for Baltimore City on March 1, 2014. The circuit court held a hearing on July 16, 2014, and affirmed the termination:

> [DSS] conducted an adequate investigation of [Mr. Lewis]'s conduct, [finding] that [Mr. Lewis]'s knowledge of EH's whereabouts is not imputed to [DSS] in the context of his disciplinary action, that there is substantial evidence in the record to support the [ALJ]'s factual findings, [and] that these factual findings properly supported the [ALJ]'s conclusion.

On September 23, 2014, Mr. Lewis filed a notice of appeal to this Court under SG § 10-223. He also submitted a Request for Writ of *Certiorari* to the Court of Appeals, which was denied.

II. DISCUSSION

Mr. Lewis presents seven questions for our review.[5] We have reordered them for ease of analysis, and separated them into three overarching categories: *first*, the

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[5] Mr. Lewis listed the following questions in his brief:

> A. Is the requirement in Md. Ann. Code, State Personnel & Pensions § 11-106 that termination of a state employee be preceded by an "investigation" left unsatisfied when the designated investigator fails to interview the three witnesses who could have conclusively disproved a critical part of the termination's justification?
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> B. Where an agency's interpretation of an internal policy manual, adopted only as a litigating position, leads to absurd results, is that interpretation unentitled to deference on administrative or judicial review?
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> C. In a challenge to a State employee's termination, is the adjudicator barred from denying the employee the opportunity to discover records establishing discipline for similarly situated employees?
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> D. Where the notice of termination of a State employee specifies as grounds therefor the violation of only one policy, is it a violation of his due process rights for the State during the employee's appeal, without prior notice, to defend, and of the Office of Administrative Hearings to sustain its actions on the basis of purported violations of additional policies?

(continued…)

interpretation and application of DSS policies, *second*, alleged procedural deficiencies during the DSS investigation and OAH hearing, and *third*, whether the ALJ's decision was supported by substantial evidence.

Our scope of review is limited by statute and highly deferential:

> (h) Decision. — In a proceeding under this section, the court may:
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> * * *

> E. Where agency protocols specify that progressive discipline is called for with respect to violations of those protocols, and there is no evidence that there had been previous violations of those protocols, and no evidence the agency considered either whether there had been violations of those specific protocols in the past or whether the alleged first breaches of those protocols were sufficiently grave to justify termination nonetheless, could the termination be sustained on administrative review?
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> F. Where a State employee is terminated for having failed to perform certain tasks, and in his defense he raises the issue that owing to competing work obligations he was given no opportunity to perform the tasks, where the adjudicator failed to identify any moment when the time to perform the work would have been available, but nonetheless sustains the agency's claim that the employee had been derelict in his duties, has the adjudicator failed to resolve a critical issue?
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> G. Where some of the supposed previous discipline of a State employee relied upon in determining that he should be terminated could be shown not to have occurred or not to have been discipline, and other supposed previous discipline of that employee could not be satisfactorily shown to have occurred, is the termination unsustainable because not supported [*sic*] by substantial evidence?

> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
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> (i) is unconstitutional;
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> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
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> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
>
> (vi) is arbitrary or capricious.

SG § 10-222(h)(3)(i-vi). The decision that we review is not the decision of the circuit court, but the decision of the ALJ. "Even though our mandates in administrative law cases remand, affirm, reverse, or modify the circuit court's judgment, we are reviewing the agency's decision, not that of the circuit court." *Bond v. Dept. of Public Safety and Corr. Servs.*, 161 Md. App. 112, 122 (2005) (citing *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 57 (2002)). Under SG § 10-222(a), an aggrieved party can seek judicial review from a final administrative decision. The final decision here is not the decision of DSS or DHR, but rather the decision of the ALJ. SPP § 11-110(d)(3) ("The decision of the Office of Administrative Hearings is the final administrative decision.").

There are two separate circumstances in which a court may be called upon to review the decisions of an administrative agency. The *first* is when the agency, acting in its "quasi-judicial" capacity, adjudicates an individual's personal rights. The *second* occurs when the

agency adopts regulations under its "quasi-legislative" capacity. *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 527 (2004); *see also Fogle v. H & G Rest., Inc.*, 337 Md. 441 (1995). We do not apply the same scope of review in both circumstances. We review with the greatest deference where an agency is acting in a "quasi-legislative" capacity, "within the boundaries of its rule-making authority. It is thus not the function of the courts to pass upon the wisdom of the regulation, or to approve or disapprove it, if it does not exceed constitutional limits." *Fogle*, 337 Md. at 454-55 (citations and internal quotations omitted).

Where the agency is acting under its "quasi-judicial" authority, though, we apply one of three standards of review. All legal questions are reviewed *de novo*; we retain the authority, under SG § 10-222(h)(3)(i-iv), "to correct *all* [] errors of law." *Spencer*, 380 Md. at 529 (emphasis in original). Findings of fact are reviewed under a "substantial evidence" standard: "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 530 (2003) (quoting *Jordan v. Hebbville*, 369 Md. 439, 450 (2002)). Discretionary decisions are reviewed under an "arbitrary or capricious" standard, "a standard more deferential than either the *de novo* review afforded an agency's legal conclusions or the substantial evidence review afforded an agency's factual findings." *Spencer*, 380 Md. at 529.

There are good reasons for us to review agency decisions deferentially, and we must be careful, when reviewing administrative decisions, to refrain from inappropriately assuming the duties of the executive and substituting our judgments for his. "'[A]gencies and [] courts each have their own, separate, constitutionally-erected fortress of power and responsibility in the relationship each has to the activities delegated by the Legislature to

administrative agencies.'" *Bell Atlantic v. Intercom*, 366 Md. 1, 22 (2001) (quoting *Dep't of Nat. Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 221 (1975)); *see also Sadler*, 378 Md. at 530 ("[J]udicial review of the actions of an administrative agency is restricted primarily because of the fundamental doctrine of separation of powers.").

The question, therefore, is under which category we must review each of Mr. Lewis's issues. He urges us to consider all of the issues *de novo*. We do not agree, and address the scope of review of each issue individually below.

A. Interpretation and Application of DSS Policies

1. We defer to the agency's interpretation of its own regulations.

Mr. Lewis urges us to question DSS's interpretation of its Runaways Policy, Placement Policy, and Kin Provider Policy *de novo*. He contends that the Court of Appeals's decision in *Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437 (1997), prevents judicial deference to agency regulation interpretations when "the interpretation pressed by the agency is simply a litigating position." We disagree. Here, there are no competing interpretations of the same regulation in the record, and it is not unclear, as it was in *Marriott*, "which construction of the statute should be considered the agency's interpretation." *Id.* at 449. The "confusion within the agency" was an important analytical dispute in *Marriott*, as the Motor Vehicle Administration ("MVA") had interpreted a statute, not an administrative regulation. *Id.* Although administrative interpretations of statutes are also accorded deference, the "considerable weight" accorded is only given when the "administrative interpretation has been made known to the legislature." *Falik v. Prince George's Hosp.*, 322 Md. 409, 416 (1991). There is no

indication in the record, and none has been asserted by Mr. Lewis, that there are competing interpretations within DSS over the applicability of any of the three contested policies. "[A]gency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency." *Md. Transp. Auth. v. King*, 369 Md. 274, 289 (2002) (citing *Md. Comm'n on Human Relations v. Bethlehem Steel*, 295 Md. 586, 592-93 (1983)). Agencies are in a superior position to know and express their intent through their own policies and regulations, and so we review DSS's interpretations with the deference owed to a government agency acting appropriately within its "quasi-legislative" capacity. *King*, 369 Md. at 288 ("[A] great deal of deference is owed an administrative agency's interpretation of its own regulation.").

Mr. Lewis contends that DSS's interpretation of the Runaways Policy "leads to absurd results." Specifically, he takes issue with DSS's assertion that he should have proceeded with the Runaways Policy requirements even though he was aware of E.H.'s whereabouts and implementing the policy would have resulted in "a wholly unnecessary and counterindicated [*sic*] police search for him."

But we fail to see how DSS's interpretation would produce such absurd results. The record reveals two appropriate responses that Mr. Lewis should have undertaken under DSS policies: (1) if Mr. Lewis didn't know E.H.'s whereabouts, he should have followed the Runaways Policy, or (2) if Mr. Lewis did know E.H.'s whereabouts, he should have followed the appropriate provisions of the Kin Placement Policy. He did neither of these things, leaving E.H., so far as the agency knew, missing for eight days.

2. DSS did not violate Mr. Lewis's due process rights.

Mr. Lewis contends next that DSS violated his due process rights when it charged him with breaching multiple policies, but his Notice of Termination specified a single policy violation. The record does not support his contention. Mr. Lewis cherry-picks citations out of context: in his brief, he alleges that "the Notice of Termination justified Mr. Lewis's termination on the basis that he did not comply with '[DSS] Standard Operating Procedure, entitled, 'Runaways,'' [*sic*] in that he did not 'notify his supervisor' and 'did not file a missing person report.'" He claims too that "nowhere is Mr. Lewis intelligibly charged with any violation of the Kinship Provider Policy," and thus that DSS violated his due process rights when it brought up this argument at the disciplinary action appeal conference.

The full quote Mr. Lewis excerpts reads, "[a]ccording to [DSS] Standard Operating Procedure, entitled, 'Runaways', Mr. Lewis was required to notify his supervisor and the child's BCDSS Legal Services attorney that the youth was missing." To be sure, and as the Notice of Termination states, Mr. Lewis was faulted for having violated the Runaways Policy. However, under the heading "Explanation for Termination," the Notice goes on to explain why Mr. Lewis's mitigation of allegedly knowing E.H.'s whereabouts did not warrant lesser disciplinary measures:

> [DSS] is responsible for knowing the whereabouts of all committed children and achieves that responsibility through established protocols that every caseworker is tasked with following. Through Mr. Lewis' negligence, [DSS] did not know the whereabouts of a committed youth from May 23 to May 31, 2012. Mr. Lewis mitigated that he knew the youth's

> whereabouts on May 22nd and it was his intent to visit the home where the youth was staying.
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> * * *
>
> *If Mr. Lewis was aware of the youth's whereabouts, he should have included that in his narration and conducted a home assessment to ensure that the youth was in a safe environment, which he failed to do.*

(Emphasis added.) It's true that the Notice did not refer to the Kinship Provider Policy in so many words. Nevertheless, the Notice's explanation of Mr. Lewis's alleged misconduct contained ample reference to the policy, especially for an "employee with several years of experience," and explained in appropriate detail why Mr. Lewis was being terminated.

3. DSS is not barred from terminating Mr. Lewis because of the "progressive discipline" requirement.

Mr. Lewis then contends that DSS failed to comply with the disciplinary requirements of both policies, which state that "[t]he consequences to any [DSS] employee who chooses not to comply with this protocol will be progressive discipline." He argues that none of the prior discipline cited by DSS arose from violations of either of the contested policies, and therefore DSS should not have applied the harshest consequence for his first-time offense. DSS is not so constrained. To the contrary, DSS can terminate employees for first-time offenses. But even if it couldn't, substantial evidence supports DSS's assertion that Mr. Lewis was not a first-time offender.

Mr. Lewis admits that "it is possible to terminate at a first offense for sufficiently egregious behavior." Neither policy specifically prohibits termination for first-time offenses, and Mr. Lewis has cited no legal authority to support the contention that DSS

lacks discretion to terminate in certain circumstances. Likewise, the policies contain no language limiting DSS from considering past discipline unrelated to the current offense when applying "progressive discipline," and Mr. Lewis offers no relevant authority. In deciding to terminate Mr. Lewis, DSS acted in a "quasi-judicial" capacity. However, this is a discretionary decision that we review only to determine if it was "arbitrary or capricious." *Spencer*, 380 Md. at 529. And in this case DSS did not act arbitrarily or capriciously in deciding either (1) that the severity of Mr. Lewis's behavior warranted the harshest consequence, regardless of whether he had previously violated the particular policies implicated on this occasion, or (2) that Mr. Lewis's other policy violations created a pattern of behavior that exempted Mr. Lewis from the "first-time offender" category in any event.

Mr. Watkins testified that his decision to recommend Mr. Lewis for termination was based on Mr. Lewis's failure to improve in spite of earlier incidents and progressive discipline:

> In the instant case, for this outcome, we have a disciplinary history that shows no matter when discipline was imposed, what discipline was imposed, or how often discipline was imposed, the performance behavior never changed. It never changed. So, the ultimate outcome of the appointing authority resulted in the termination of employment.

Mr. Lewis's interpretation would require us to interpret the "progressive discipline" clause to limit DSS from terminating an employee even if that employee had previously violated every single other policy DSS has implemented, purely because the employee was a first-time offender for that particular policy. We disagree that the agency's discretion is

so circumscribed. DSS explained that Mr. Lewis was terminated for failing to make timely CHESSIE entries, as well as violation of the two policies, and that his previous disciplinary record shows a history of record-keeping failures. Its explanation adequately articulates the reasons for choosing to terminate Mr. Lewis rather than applying lesser discipline, and the discipline was not arbitrary.

B. Alleged Procedural Deficiencies During the DSS Investigation and OAH Hearing

1. DSS completed an adequate investigation as required under SPP § 11-106(a)(1).

We review *de novo* the question of whether or not DSS satisfied its obligation under SPP § 11-106(a)(1) to investigate the allegations against Mr. Lewis, and afford no deference to the ALJ's finding that the investigation met that standard. Mr. Lewis contends that Mr. Watkins failed to contact any of the three people he mentioned that could corroborate his knowledge of E.H.'s whereabouts, *i.e.*, Stepmother, Sister, or E.H. Instead, he argues, "Mr. Watkins simply presumed that Mr. Lewis did not know E.H.'s whereabouts and that Mr. Lewis was lying." He contends that this failure renders Mr. Watkins's investigation and DSS's stated rationalization for his termination inadequate, and he cites *United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665 (1984), for the proposition that we can only affirm on judicial review the decision of an administrative agency on the basis of its stated rationale.

We agree that the requirement for an adequate investigation is an important procedural safeguard. The statute makes clear that the investigation is not optional: "[b]efore taking any disciplinary action related to employee misconduct, an appointing

authority *shall*: (1) investigate the alleged misconduct." SPP § 11-106(a) (emphasis added). The statute is intended to "avoid the imposition of discipline based on unsubstantiated accusations" by requiring "that an employee's misconduct be investigated." *Md. Reception, Diagnostic & Classification Ctr. v. Watson*, 144 Md. App. 684, 693 (2002). And we have reversed or remanded terminations grounded in inadequate investigations. In *Danaher v. Dep't of Labor, Licensing & Regulation*, 148 Md. App. 139 (2002), we remanded for further investigation when we found that an employee's removal had not been prefaced with a sufficient investigation. We held that an investigation under SPP § 11-106(a)(1) requires a "'careful search' or a 'systematic inquiry.'" *Id.* at 169. In that case, we concluded that the investigator failed to interview key individuals, instead relying on unverified and uncorroborated memorandums and written testimony. *Id.* at 168.

But one factual difference distinguishes *Danaher* from this case: the particular individuals the investigators failed to interview. In *Danaher*, the overlooked individuals were key to the story—one of them was the only individual making factual allegations about the impropriety of the subject employee's conduct. *Id.* In contrast, the three individuals in this case were not vital to the failures on which DSS grounded its decision to terminate Mr. Lewis. Based on his investigation, Mr. Watkins recommended that Mr. Lewis be terminated "for his continued willful failure to comply with child welfare [standard operating procedures] designed and implemented to protect the vulnerable population of children and youth reliant upon agency protection and services." This evaluation was based solely on Mr. Lewis's alleged negligence in "fail[ing] to ensure the safety of" E.H. "after learning [he] had left the placement."

Mr. Lewis mischaracterizes Mr. Watkins's investigation report when he asserts that Mr. Watkins made the conclusion "that Mr. Lewis was lying when he said that he knew where E.H. was staying [. . . which] obviously would be likely to influence a decision to terminate Mr. Lewis." Mr. Watkins's conclusion was predicated not on Mr. Lewis's lack of *knowledge*, but rather on his lack of *action*. As Mr. Watkins notes from the follow-up interview with Ms. Blue, the key issue was not necessarily whether Mr. Lewis knew or did not know where E.H. was, but that he had failed to act on the knowledge that he had:

> During Mr. Lewis' mitigation conference, he asserted that the youth was not missing, and he knew the youth was living with another relative. This Officer contacted Ms. Blue for clarification. Ms. Blue explained that if Mr. Lewis knew the child was residing with a different family member, filing the missing person's report would have been sufficient, and he would not have had to take the steps identified in the Kin Placement policy (Attachment C). Ms. Blue explained that if Mr. Lewis knew the child was at the home of another relative, Mr. Lewis should have done CPS and criminal history clearances, a home assessment and had the placement approved by his supervisor.
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> * * *
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> Ms. Blue stated that the reality in this case is that *Mr. Lewis did nothing when he learned the youth had left the assigned placement* on May 23rd. Ms. Blue expressed concern that from May 23 to May 31, 2012, *the agency did not know the whereabouts of the youth*, and a missing person report had not been filed.
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> * * *
>
> The investigation disclosed from May 23 to May 31, 2012, a youth assigned to Mr. Lewis' caseload had left the assigned placement, and the youth's whereabouts were unknown. Through the evidence *and Mr. Lewis' own admission*, he did not follow the prescribed protocol for serving and protecting

> the agency's very vulnerable child population. Through his conduct, Mr. Lewis knowingly jeopardized the well-being and safety of a vulnerable youth assigned to his caseload.

(Emphasis added.) Furthermore, the official Notice of Termination may have noted that DSS did not believe Mr. Lewis knew E.H.'s whereabouts, but stated, in the alternative, that even if he did know, he was negligent in failing to note it:

> Through Mr. Lewis' negligence, [DSS] did not know the whereabouts of a committed youth from May 23 to May 31, 2012. Mr. Lewis mitigated that he knew the youth's whereabouts on May 22nd and it was his intent to visit the home where the youth was staying. It is reasonable to believe that Mr. Lewis did not know the youth's whereabouts. Mr. Lewis narrated the youth was no longer at the assigned placement. Mr. Lewis did not narrate where the child was staying. *If Mr. Lewis was aware of the youth's whereabouts, he should have included that in his narration and conducted a home assessment to ensure that the youth was in a safe environment, which he failed to do*.

(Emphasis added.) The key point here is that even assuming that *Mr. Lewis* knew the whereabouts of E.H., he did not appropriately act on the knowledge and inform *DSS*. The two vital pieces—(1) that DSS had no records to show where E.H. was, and (2) that Mr. Lewis did not follow DSS procedure after being informed of E.H.'s removal from placement—were fully supported by the three people Mr. Watkins interviewed: Mr. Lewis, Ms. Blue, and Mr. Myers. We are prepared to assume that Stepmother, Sister, and E.H. would have testified to Mr. Watkins that Mr. Lewis knew E.H.'s whereabouts during the contested period. But that testimony could not have helped Mr. Lewis's cause, and its absence did not render DSS's investigation inadequate.

2. The ALJ had the discretion to deny Mr. Lewis's discovery request.

Mr. Lewis cites *Maryland Aviation Admin. v. Noland*, 386 Md. 556 (2005), and argues that we should review *de novo* the ALJ's ruling denying his motion to compel "records establishing discipline for similarly situated employees." He admits that "the ALJ's ruling denying the discovery would ordinarily be reviewed on an abuse of discretion standard." Nevertheless, he argues that *Noland*, read in conjunction with *Harvey v. Marshall*, 389 Md. 243 (2005), *required* the ALJ to grant this request. Under *Noland*, he says, an aggrieved party carries both the burden of production and the burden of persuasion when asserting that a disciplinary sanction was arbitrary or capricious, and this burden can only be adequately met if the aggrieved party has sufficient access to discovery. He cites *Harvey* for the proposition that "an agency action . . . may be deemed 'arbitrary or capricious' if similarly situated individuals are treated differently without a rational basis for such deviation." 389 Md. at 304. Thus, read together, Mr. Lewis contends that he must have access to the records of "similarly situated individuals" if he is expected to meet his burden in asserting that the sanctions DSS applied in his case were arbitrary or capricious.

We disagree. His reliance on *Noland* is misguided, because at its heart *Noland* overturned our decision in *Md. State Ret. Agency v. Delambo*, 109 Md. App. 683 (1996), and eliminated the requirement that agencies must justify the application of a disciplinary sanction with reasons or findings of fact. *Noland*, 386 Md. at 581. We presume that "the agency's decision is *prima facie* correct and [] valid" unless "the party challenging the sanction [is able] to persuade the reviewing court that the agency abused [its] discretion

and that the decision was 'so extreme and egregious' that it constituted 'arbitrary or capricious' agency action." *Id.* (citation omitted). Mr. Lewis seeks to extend this holding by excerpting a small piece of the Court of Appeals's holding and reading into it a blanket provision allowing all possible discovery that an aggrieved party may seek in the name of proving that the disciplinary decision was arbitrary and capricious. But *Noland* does not suggest that we should apply such broad discovery rights, nor does *Harvey* speak to the bounds of discovery.

Mr. Lewis fails to point to any statute or case that even indicates *any* right to pre-hearing discovery above and beyond the discovery rights in COMAR 28.02.01.13, much less the broad right he reads from *Noland*. We have previously found that "there is no broad constitutional right to pre-hearing discovery in administrative proceedings and that any general right to such discovery must come from the statutes or rules governing these proceedings." *Replacement Rent-A-Car, Inc. v. Smith*, 99 Md. App. 588, 593 (1994). There is no indication under COMAR 28.02.01.13 that the ALJ's ruling amounted to procedural error, and therefore we review on abuse of discretion.

A party can request discovery under COMAR 28.02.01.13 that is relevant and not privileged, and a judge may reasonably limit the scope of a party's requested discovery or can prohibit specific discovery requests.[6] In denying Mr. Lewis's discovery request, the

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[6] COMAR 28.02.01.13 provides:

> A. By written request [. . .] a party may require another party to produce [. . .] any file, memorandum, correspondence,

(continued…)

ALJ noted that the requested documents would not allow Mr. Lewis to compare "apples to apples":

> My reaction to these kind of things is this, that everybody's different.
>
> * * *
>
> I don't have any idea or wouldn't, even if it would be helpful, if the policy were implemented 20 times, people were disciplined for it, I wouldn't know the disciplinary status of each one, how many times they had been in trouble, whether they had been a good employee, a bad employee, whether this was aggravated, not aggravated. Everybody's—everybody's situation is different. So, when you start trying to—I think when you start trying to compare disciplines to say he was and he wasn't or she was or she wasn't, you don't know all the facts.

The ALJ refused Mr. Lewis's discovery request because he did not believe the particular documents requested would be probative or relevant on their own. He did not preclude Mr. Lewis from seeking other documents through discovery, or from eliciting other evidence to rebut the presumption that his termination was not arbitrary. Moreover,

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> document, object, or tangible item, including electronically stored information, that is:
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> (1) Relevant to the subject matter of the case; and
>
> (2) Not privileged.
>
> * * *
>
> C. On motion by the parties or on the judge's own initiative, the judge may enter an order establishing reasonable limits on the scope of discovery and/or prohibiting specific discovery.

the request was overbroad and speculative in scope—it was not intended to support a claim of discrimination, but instead to go looking for discrimination he hoped to find and allege. We see nothing arbitrary, capricious, or unreasonable in the ALJ's decision not to allow a fishing expedition.

3. The ALJ adequately considered Mr. Lewis's defense of "competing work obligations."

Mr. Lewis asserts next that he did not have time to make the required entries into CHESSIE because of competing work obligations. He notes, correctly, that it is not our duty to determine whether his contention has merit; rather, he argues that the ALJ did not sufficiently address the issue, and should have either reversed or remanded after finding that "Mr. Lewis was not in violation of the rules, which must be construed as not penalizing reasonable responses to 'Hobson's Choice' dilemmas."

We review Mr. Lewis's challenge under the substantial evidence standard. "'It is well-settled in this State that it is the function of an administrative agency to make factual findings and to draw inferences from the facts found,'" *Fowler v. Motor Vehicle Admin.*, 394 Md. 331, 342 (2006) (quoting *Motor Vehicle Admin. v. Karwacki*, 340 Md. 271, 280 (1995)), and we limit our review to determining solely "whether there is substantial evidence in the record to support the agency's decision," which requires "'relevant evidence [that a] reasonable mind might accept as adequate to support a conclusion.'" *Fowler*, 394 at 342 (quoting *Caucus v. Maryland Securities*, 320 Md. 313, 324 (1990)).

The ALJ dismissed Mr. Lewis's argument quickly, in spite of the lengthy statements Mr. Lewis made regarding his whereabouts every day between the date he should have

entered the information on CHESSIE and the day Ms. Blue was informed E.H. was not at the approved placement. He noted that the required reporting would not have been a lengthy task:

> [Mr. Lewis]'s assertion that he did not have time to make the CHESSIE entries did not relieve him of the reporting obligation, as it would have taken no more than one sentence to indicate that E.H. was no longer in his assigned placement. None of the CHESSIE reports in evidence are so lengthy they support an excuse of no time to update the system.

The ALJ also noted that on the day Mr. Lewis was required to update E.H.'s whereabouts in CHESSIE, he had the time to make an entry:

> The investigator pointed out to [Mr. Lewis] that his May 23 detailed contact report he entered into CHESSIE only reported that E.H.'s sister stated E.H. no longer lived with her. It did not report where E.H. had gone. When this was brought to [Mr. Lewis]'s attention he claimed he did not have the time to type that in the narration.

Mr. Lewis contends, and the ALJ noted in his decision, that at the point when he notated the contact report into CHESSIE, he knew the whereabouts of E.H. Sister testified that "[w]hen [Mr. Lewis] came to her home on May 23, she told him that she had put E.H. out. Further, she testified that she told [Mr. Lewis] that he had gone to live with [Step-mother]." Mr. Lewis contends that the ALJ should have "identif[ied] when Mr. Lewis could have put that sentence in," but it is not the ALJ's job to define exactly what day, what hour, which minute Mr. Lewis could have typed a sentence into CHESSIE. Even though the ALJ did not directly state it, a reasonable mind could conclude that Mr. Lewis, knowing E.H.'s whereabouts at the time he entered the contact report into CHESSIE, could have added a single additional sentence to indicate where he was (or, in light of his claim

that he was not able to access the system, made a phone call to his supervisor for the information to be put in).

Furthermore, Mr. Lewis admits in his brief that he had the time to do so on May 23. Momentarily forgetting that he was terminated both for failing to report and failing to follow the correct procedures under the Kin Provider Policy, he notes that his obligations on that day "precluded Mr. Lewis from doing more than entering information in the database." DSS faults him for failing to do just that: enter information into the database.

C. Mr. Lewis's termination was supported by substantial evidence.

Last, Mr. Lewis claims that the ALJ's decision was not supported by substantial evidence, seemingly because the ALJ relied on the history of prior discipline. He faults Mr. Watkins's report for including letters of counseling as "discipline," although counseling letters do not constitute discipline under SPP § 11-107(a), and other various disciplinary actions, including reprimands and suspensions, which he claims may or may not have been appealed and rescinded. He claims that it is "axiomatic" that rescinded disciplinary actions cannot be held against employees (citing as authority only an unreported opinion by the United States District Court for the Northern District of Illinois, *Fleming v. U.S. Postal Serv. AMF O'Hare*, 1992 WL 22207 at *2-3 (1992), that has no factual application here in any event).

Even assuming that Mr. Lewis is correct that one of his suspensions was overturned on appeal, and even discounting the counseling letters whose admission he complains about here, the ALJ's decision to admit evidence is discretionary, and we see nothing to indicate that his decision was arbitrary or capricious. Nothing in the ALJ's decision even hints that

he relied in any way on the documents; it was purely Mr. Lewis's failings with respect to E.H.'s care that formed the basis of the affirmance—the "reality" that for eight days, due to Mr. Lewis's failings, no one had any information as to the whereabouts of E.H.—and that justified the ALJ's decision.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.