UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2079

SEPTEMBER TERM, 2014

WASHINGTON SUBURBAN SANITARY COMMISSION ET AL.

v.

MARYLAND UNDERGROUND FACILITIES DAMAGE PREVENTION AUTHORITY

Eyler, Deborah, S.,
Nazarian,
Sharer, Frederick J.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: October 22, 2015

In this administrative appeal, the Washington Suburban Sanitary Commission ("WSSC") and its contractor, Pinpoint Underground, LLC ("Pinpoint"), the appellants, challenge the final decision of the Maryland Underground Facilities Damage Prevention Authority ("the Authority"), the appellee, to fine them and to impose other conditions arising from violations of Md. Code (2010, 2010 Repl. Vol., 2013 Supp.), Title 12, Section 1 of the Public Utilities Article ("PU") ("the Miss Utility Statute"). On judicial review, the Circuit Court for Anne Arundel County affirmed the decision of the Authority. WSSC and Pinpoint present three questions for review, which we have condensed and rephrased as one:

> Should the decision of the Authority be reversed because it resulted from unlawful procedures, was arbitrary and capricious, and/or was not supported by substantial evidence in the record?

We answer this question in the affirmative and shall reverse.

The Miss Utility Statute

In 1990, the General Assembly enacted the Miss Utility Statute, Md. Code (1957, 1991 Repl. Vol.), Section 28A(a) of Article 78. Its aim was to protect the public from death or injury caused by damage to underground public utility structures, including sewer, gas, oil, and water lines, and to prevent damage to those underground facilities during construction projects. It "required that all owners of underground facilities in the state—*i.e.*, public utilities, telecommunications corporations, cable television corporations, political subdivisions, municipal corporations, steam heating companies, and authorities—become 'owner-members' of a 'one-call' system." *Reliable Contracting Co., Inc. v. Md. Underground Facilities Damage Prevention Auth.*, 222 Md. App. 683,

686, *cert. granted*, 444 Md. 638 (2015).[1] If a contractor planned to perform any excavation or demolition work in the State, the contractor was required to notify the one-call system and could not begin excavation or demolition until it received notification that all underground facilities in the vicinity had been marked or that no underground facilities were in the vicinity of the site. *Id.*

In 2006, Congress enacted the Pipeline Inspection, Protection, Enforcement, and Safety Act, 49 U.S.C. § 60134 ("the PIPES Act"). That act authorized the federal Department of Transportation to allocate grants to a "State authority" to improve underground facilities damage prevention programs. 49 U.S.C. § 60134(a). Only State authorities having the power to assess civil penalties for violations of State law governing underground facilities were qualified for federal grants. *See* 49 U.S.C. § 60134(b)(6), (7).

In 2010, the General Assembly revised the Miss Utility Statute, consistent with the PIPES Act, to create the Authority. As relevant here, the Authority is empowered to adopt bylaws; maintain facilities for the purposes of holding hearings; employ a staff; and "do all things necessary or convenient to carry out the powers expressly granted by this subtitle." PU § 12-110(a). It is comprised of nine members, all of whom are appointed by the Governor to staggered two-year terms. PU § 12-107. With the exception of one

[1] In *Reliable Contracting*, this Court rejected a challenge to the constitutionality of the provisions of the Miss Utility Statute empowering the Authority to adjudicate complaints and assess civil penalties.

member selected from the general public, its members all represent industry stakeholders.[2] PU § 12-107(b). Authority members are not compensated and must meet at least once every three months. PU § 12-109(a) & (c). The Authority receives no State funding, but may apply for State and federal grants and fund itself through filing fees and administrative fees. PU § 12-111.

The Miss Utility Statute imposes duties upon "Owners" of underground facilities and any "person that intends to perform an excavation or demolition in the State." PU § 12-124(a). Prior to beginning excavation or demolition, a person must "initiate a ticket

[2] Pursuant to PU section 12-107(b), the Authority consists of:

> (1) one member from a list submitted to the Governor by the Associated Utility Contractors of Maryland;
> (2) one member from a list submitted to the Governor by the Public Works Contractors Association of Maryland;
> (3) two underground facility owners that are members of a one-call system from a list submitted to the Governor by the Maryland members of the Maryland/DC Subscribers Committee;
> (4) one member from a list submitted to the Governor by the one-call centers operating in the State;
> (5) one member who represents the State's underground utility locator community from a list submitted to the Governor by the Maryland members of the Maryland/DC Damage Prevention Committee;
> (6) one member who has experience in the field of underground utilities from a list submitted to the Governor by the Maryland Association of Counties;
> (7) one member who has experience in the field of underground utilities from a list submitted to the Governor by the Maryland Municipal League; and
> (8) one member of the general public from a list submitted to the Governor by the other appointed and qualified members of the Authority.

request" through the "one-call system." *Id*. The "one-call system" is a "communications system" that allows persons planning to excavate or demolish to notify Owners by calling a toll-free number or using an online request form. PU § 12-101(i). The person initiating a ticket inputs information that includes "the location of the proposed excavation or demolition" and the "type of work to be performed in connection with the proposed excavation or demolition." PU § 12-124 (b)(1) & (3). After a ticket has been initiated in the one-call system, the system "transmit[s] a copy of the ticket to all owner-members in the geographic area indicated for that ticket." PU § 12-124(c).

PU section 12-126 governs the marking of underground facilities in response to a ticket. An Owner "shall mark its underground facility" if the proposed excavation or demolition is "within 5 feet of the horizontal plane of the underground facility" or, in the case of blasting, is close enough to be damaged or disturbed. PU § 12-126(a). Ordinarily, within two business days of being notified of a ticket, an Owner must complete marking its underground facilities or notify the one-call system that it has no underground facilities in the vicinity. PU § 12-126(c). Subsection (d) sets forth four exceptions to the 2-day timeline.

First, if, "because of the scope of the proposed excavation or demolition," the Owner is unable to mark its underground facilities within two days, it must "promptly notify" the one-call system and the person performing the excavation or demolition and work with that person to "develop a mutually agreeable schedule for marking the underground facility." PU § 12-126(d)(1). Second, if the Owner and the person

performing the excavation or demolition cannot reach a mutually agreeable schedule under (d)(1), the Owner must "mark the portion of the site where excavation or demolition will first occur" and "mark the remainder of the site within a reasonable time." PU § 12-126(d)(2). Third, if "due to circumstances beyond an [Owner]'s control and for reasons other than [the scope of the proposed excavation or demolition], an [Owner] is unable to mark the location of the [Owner]'s underground facility within [2 business days]," the Owner shall request an extension from the one-call system. PU § 12-126(d)(3). Finally, "in connection with extensive or contiguous excavation or demolition projects, the person performing the excavation or demolition and the [Owner] may establish a working agreement regarding the time periods for marking the underground facility." PU § 12-126(d)(4).

The Authority is charged with enforcing violations of the Miss Utility Statute. It is empowered to hear complaints and, "after a hearing, assess a civil penalty." PU § 12-112(a). If an Owner fails to comply with PU section 12-126 by marking its underground facilities or notifying the one-call system that it has no underground facilities in the vicinity of the proposed excavation or demolition within 2-business days, or by a later time under one of the statutory exceptions, the Authority may assess a civil penalty not exceeding $2,000. PU § 12-135(a)(3).

Before assessing any civil penalty, the Authority must give the party charged with a violation of the Miss Utility Statute "reasonable prior notice of the complaint" and an "opportunity to be heard." PU § 12-112(c). At a hearing before the Authority, the

testimony must be taken under oath. PU § 12-113(a)(1). The Authority may subpoena witnesses to attend a hearing. PU § 12-113(c). Following a hearing on an alleged violation of the statute, the Authority shall issue a decision "in writing, stating the reason for its decision." PU § 12-113(d)(1). Any person aggrieved by the decision of the Authority may petition for judicial review in the circuit court. PU § 12-113(e).

FACTS AND PROCEEDINGS

A. The NPVs

The instant appeal stems from three tickets initiated with the one-call system in 2013 and subsequent complaints, known as Notices of Probable Violations ("NPVs"), filed with the Authority. The NPVs all alleged that WSSC's contractor, Pinpoint, failed to timely mark WSSC's underground facilities in response to those tickets. We shall discuss each ticket in turn.

1. NPV 316a (Ticket No. 13067338)

On February 7, 2013, a Thursday, the Davis H. Elliot Company ("Elliot") initiated Ticket No. 13067338 with the one-call system. This ticket was for the "RENEW[AL]" of streetlight pole #6101 for Baltimore Gas & Electric ("BGE") at 9201 Filly Court in Bowie. Elliot requested the marking of a "10FT RADIAS [sic] AROUND BROKEN POLE OR ORANGE CONE AT OR NEAR ABOVE ADDRESS." Elliot provided contact information for two employees, Diane Colling and Pat Caralle.

WSSC was notified of the ticket. It was required to respond by Monday, February 11, 2013. On that day, WSSC input a "Code 4" in the one-call system, which is a request

for a 48-hour "locate extension." The 48-hour extension expired on Wednesday, February 13, 2013. On that date, WSSC entered a "Code 5" in the system, which corresponds to "Not Complete/In Progress." The instructions on the one-call system website state that that code may be entered after an Owner has "spoken to excavator and they have agreed to this message."[3]

On February 19, 2013, Elliot entered a "Code 7," which indicates a "Dispute" between the excavator and the Owner.

On February 20, 2013, thirteen days after the ticket was initiated, WSSC entered a "Code 1" indicating that the site was "Clear/No Conflict," *i.e.*, that WSSC had no underground facilities within the vicinity of the streetlight pole repair project.

Five days later, on February 25, 2013, Elliot filled out an online NPV form, which was submitted to the Authority. Elliot alleged that it was a contractor working for BGE to replace a broken streetlight pole and that it had initiated Ticket # 13057338. As relevant here, in the "Additional Comments" field of the online form, Elliot asserted:

> On the above ticket # WSSC did not respond by the required date which was 2/11/2013. They are required to respond within 48 hours of calling the ticket in. Due date of the ticket was 2/11 and the locator responded on 2/13/2013 with a status of not complete/in progress. With that status the locator is required to notify the excavator, no notification made to Elliot. I

[3]We note that the Miss Utility Statute and the codes available under the one-call system are not well-matched. It is the language of the statute, not the online system for initiating and resolving tickets, that controls whether an Owner or an excavator may be found in violation of the law.

> have never received any notification from WSSC and this is not the first time this issue has occurred.

2. NPV 316b (Ticket No. 13067349)

Also, on February 7, 2013, Elliot initiated a second ticket, Ticket No. 13067349, to replace another streetlight pole for BGE. This streetlight pole was located at 15662 Dorset Road in Laurel, pole # 7028. Elliot again requested a "10FT RADIAS [sic] AROUND BROKEN POLE OR ORANGE CONE AT OR NEAR ABOVE ADDRESS." Colling and Caralle were listed as contacts on the job.

On February 11, 2013, WSSC entered a Code 4, requesting a 48-hour extension. On February 13, 2013, WSSC entered a Code 5, indicating "Not Complete/In Progress." On February 18, 2013, WSSC entered a Code 1, meaning that the site was "Clear/No conflict."

Within the "Additional Comments" field of its NPV complaint form filed for Ticket No. 13067338, Elliot also alleged a violation with respect to Ticket No. 13067349:

> The same exact thing happened when I checked ticket # 13067349 which had the same due date again they responded after the required time and with a status of not complete/in progress and without any notification [t]o Elliot. Please address this issue. Thanks for your cooperation.

The Authority treated this as a separate NPV complaint arising from that ticket.

3. NPV 408 (Ticket No. 13149922)

On Monday, March 25, 2013, which was a holiday,[4] Atlantic Construction Company ("Atlantic") initiated Ticket No. 13149922 in the one-call system for a directional boring project beginning at "the intersection of Contee Rd and Rt. 1" in Muirkirk and continuing "south along Rt. 1" until the "entrance to Maryland National Cemetery." Atlantic requested marking from the centerline of Rt. 1 "to 20 feet back from edge of pavement on both sides." It listed two contacts: Jason Allder and Jeremy Lahman. The ticket response date was March 28, 2013.

On March 28, 2013, WSSC entered a Code 4, requesting a 48-hour delay.

On April 2, 2013, Atlantic requested a "Re-Mark" by WSSC in the one-call system. Also on that date, Atlantic filed an online NPV complaint form with the Authority referencing the above ticket number. In the "Additional Comments" field, it stated:

> Pinpoint Underground is an irresponsible locating company. In an effort to receive cooperation, I\'ve [sic] contacted them numerous times and also asked for remarks on all tickets. They continue to pose scheduling issues with work and are standing in the way of progress. In an effort to reduce damages, the law requires us as contractor\'s [sic] to not dig without locate marks. However, when the locator\'s [sic] cause delays it costs us money and time.

On April 8, 2013, WSSC entered a Code 2, indicating that it had marked its underground facilities at the Route 1 site.

B. <u>The Authority's Investigation</u>

[4] It was Passover.

The Authority conducted an investigation into the alleged violations by WSSC and its contractor, Pinpoint, with respect to the three tickets, as well as three others not being challenged in the instant appeal. On May 2, 2013, the Authority gave WSSC written notice of probable violations of PU section 12-126(c) & (d). It set forth the dates that each NPV complaint had been filed and stated that it had "thoroughly researched the data submitted on the NPV's" and had come to certain conclusions.

With respect to NPV 316a for Ticket No. 13067338, the Authority concluded that when Pinpoint, on behalf of WSSC, statused the ticket as "'Not complete/In progress' (Code 5)" it had not "met the scope requirements as noted in subtitle §12-126(d)(1) and never made contact with the excavator as required in subtitle §12-126(d)(1)(i)(ii)." The Authority found that the "Response Due Date" on the ticket was February 11, 2013, and that it was permissibly extended to February 13, 2013, but that the ticket was not cleared until "five days after [that] ticket should have been statused 'Clear/No Conflict' or 'Marked.'"

With respect to NPV 316b for Ticket No. 13067349, the Authority concluded that when Pinpoint, on behalf of WSSC, statused the ticket as "Not complete/In progress" it had not "met the scope requirements as noted in subtitle §12-126(d)(1)." It found that the "Response Due Date" on the ticket had been February 11, 2013, and that it was permissibly extended to February 13, 2013, but that it had not been statused as "Clear/No Conflict" until three days after it should have been statused as either clear or marked.

Finally, with respect to NPV 408 for Ticket No. 13149922, the Authority found that the "Response Due Date" was March 28, 2013, and that it was extended to April 4, 2013, due to the holiday and a 48-hour delay, but that Pinpoint, for WSSC, had not marked the site until April 8, 2013, two days late.

The Authority recommended imposing civil penalties against WSSC of $2,000 for each of the three violations.[5] It advised WSSC that it could request a "formal hearing in front of The Authority," at which time "all facts of the Notice of Probable Violation(s) are reviewed before any final action (fines and/or damage prevention training) can be taken by The Authority." Alternatively, WSSC could waive its right to a hearing and accept the proposed fines. The Authority noted that if WSSC elected a hearing, the Authority had "subpoena powers to compel attendance of any witness or witnesses that [might] have information pertinent to the NPV in question." At any hearing, "[a]ll persons appearing before The Authority w[ould] provide information under oath and the proceedings w[ould] be recorded."

By letter dated May 22, 2013, Pinpoint advised the Authority that it was requesting a formal hearing on behalf of itself and WSSC. A hearing was scheduled for July 10, 2013.

On June 27, 2013, counsel for Pinpoint wrote to the Authority to advise that he would be representing Pinpoint and WSSC at the July 10, 2013 hearing; that his clients

[5] The Authority also found that the WSSC had violated the Miss Utility Statute in two of the other three NPVs and recommended $2,000 fines for the two violations.

"den[ied] any wrong doing"; and that they "demand[ed] strict proof of any violation." Counsel further advised that he had learned that certain members of the Authority might have a "conflict" and asked that any member who was "affiliated with WSSC," had "investigated or participated in the investigation of the alleged violations," had an "ownership interest in the call center," or was "affiliated with other underground location companies who compete against Pinpoint" recuse him or herself.

C. The Hearings

On July 10, 2013, counsel for Pinpoint and WSSC appeared for the hearings on NPVs 316a, 316b, and 408, along with Lawrence Johnson, the president and owner of Pinpoint. No representatives from Elliot or Atlantic were present.

Seven of the nine members of the Authority were present: Chairman Thomas Hoff, Thomas Baldwin, Arthur Bell, Marcia Collins, Walter Gainer, Wayne Gilmer, and Kevin Woolbright. At the outset of the proceedings, Woolbright recused himself because he worked for WSSC. Baldwin also recused himself in NPVs 316a and 316b because he was employed by BGE and had overseen the unit for which Elliot had been a contractor on both of its contested tickets. Gilmer indicated that he also might need to recuse himself because he was "representing the [underground locator] industry and Pinpoint [was] part of that." Chairman Hoff disagreed, stating that he did not think "that [it was] necessary" for Gilmer to be recused. After some further discussion among the members, it was determined that Gilmer would not recuse himself. Counsel for Pinpoint and WSSC asked Chairman Hoff to recuse himself as well, explaining that an issue might

arise during the hearings about whether the one-call system was "receiving certain messages properly," and because Chairman Hoff was the owner of the call center, he should not preside. Chairman Hoff reserved ruling on the request, but never did so. He noted that there was a "quorum," as five un-recused Authority members were present. *See* PU § 12-109(a).

1. NPV 316a.

At the outset of the hearing, Chairman Hoff informed counsel for Pinpoint and WSSC that "the only reason you're here is to tell us things that make us think things differently than we've already written down," *i.e.*, on the NPV.

Jim Barron, the executive director of the Authority, then summarized the Authority's investigation on NPV 316a. He was not sworn. He used a "summary sheet" he had prepared, titled "Notice of Probably [sic] Violation (NPV)," which included the name of the complaining party; the date of the "NPV Incident"; the "NPV Location"; the alleged violator; and the "Basis of NPV." On the summary sheet, the basis stated was "§12-126(c)(1)(2) The facility Owner did not mark their facility and/or respond the underground facilities information exchange system '. . . within 2 business days after the date on which a ticket is transferred to an owner-member . . . .'" The summary sheet then listed the steps Barron took in the "Probably [sic] Violation Investigation Process." He first reviewed the online complaint filed by Elliot. Then, "[u]sing ITIC and Search & Status" he looked up Ticket No. 13067338. He summarized the history of the ticket as discussed, *supra*. Attached to the summary sheet were printouts of the original ticket; the

Search & Status for the ticket showing all of the responses by all of the facility owners notified; and a printout of the online NPV complaint form filled out by Elliot.[6]

Counsel for Pinpoint and WSSC objected, arguing that Barron was summarizing the online complaint made by Elliot, but Elliot was not present at the hearing. He said he had expected that "witnesses would be present to testify about complaints that were made or – or at least a sworn statement from the witnesses indicating what – specifically what was said and especially what was said by Pinpoint to them about this job."

Chairman Hoff offered to "clear that up for [him]." He explained that Elliott had used the web portal to initiate its ticket, so no one from the call center had "actually listened to a call." Barron had used Search & Status, a "public database," to research the ticket history. According to Chairman Hoff, the information from Search & Status was no different from an "affidavit."

Counsel for Pinpoint and WSSC clarified that he was less concerned with the ticket history and more concerned with the lack of testimony from any representative from Elliot. He characterized Elliot's online complaint to the Authority as "un-substantiated hearsay."

At that point, Gainer interjected and spoke at length about his personal experiences with Pinpoint. He opined that Pinpoint just did not "know the law" and that

[6] The ticket and Search & Status attached to the summary sheet actually were for Ticket No. 13067349, which as mentioned, was NPV 316b. The correct ticket and Search & Status for Ticket No. 13067338 were attached to the summary sheet for NPV 316b.

"100 percent of the time they hit 48 hour notice." He complained that when he calls Pinpoint to find out what is going on,

> you can't get through to them 'cuz their – their mail is completely 100 percent full. I checked it this morning. I'm just telling you, I use this every day. I work over at the government of Prince George's County and I use it every day and I – so I'm just being honest and telling you, I think they need to get educated on what the law is and how to work this system.

At the conclusion of the proceedings, counsel for Pinpoint and WSSC moved for Gainer to recuse himself. The request was denied.[7]

After further discussion among counsel and the Authority members, counsel for Pinpoint and WSSC reiterated that he had expected that "there would be a live witness [from Elliot] with some . . . testimony under oath from this complaint" concerning, at the very least, "what the interaction with . . . the [Pinpoint] locator was rather than just a print out from a computer."

Authority member Art Bell interjected, stating that the purpose of the hearing was to allow WSSC and Pinpoint to put on their side of the case, rather than a "trial between you and the other person." Counsel responded that that was not "correct" because the Authority had "the burden of proof to prove that . . . WSSC and Pinpoint . . . did anything wrong" and had to "put on some sort of a case to prove that." Barron replied that he had researched the ticket to see how Pinpoint had responded and, in his view, those responses "show[ed] a violation of the law."

[7] Had any additional Authority member been recused, there would not have been a quorum.

Barron then continued his "presentation." He explained that the response date on the ticket was February 11, 2013; it was extended to February 13, 2013; and, on that date, Pinpoint entered a Code 5. A Code 5 only is appropriate when the "locating company and the contractor have met and agreed" and when the "the request is so large that they can't get to it in one location." Barron explained that he had an email from Pat Caralle (of Elliot) explaining that he left a voicemail for Pinpoint on February 19, 2013, at 6:45 a.m., and did not receive a return call that day. He "finally talked to WSSC on 2/20 at 1:32 p.m. and was told the tickets were marked by the end of that day on 2/20." Counsel for Pinpoint and WSSC objected to the e-mail from Caralle being admitted in evidence. There was no ruling on his objection, but the email does not appear in the record.

Johnson was sworn in as a witness for Pinpoint and WSSC. He testified that Pinpoint had responded to the ticket in a timely manner. He explained that Pinpoint requested a 48-hour delay because:

> The information on the ticket was not – was not the correct location. The correct – the information on the ticket was flawed. Actually, . . . the address location was correct but the information that's further in the ticket, where it states that the – the pole or orange cone is . . . supposed to exist at that address location with that pole number did not existed [sic]. And that's why we delayed it. And made call to Davis H. Elliot.

He maintained that Pinpoint also was "in compliance" after the 48-hour delay, when it entered the Code 5. This was so because Pinpoint called Elliot a second time, stating that it needed "clarification [as to] . . . where this pole's supposed to exist." At that point, Pinpoint entered a Code 5 because there were "no other sub codes that we have in the system to use." Johnson testified that, although there was a code for

"Incorrect address information" (Code 10A), the "system" did not allow one to input that Code if a 48-hour delay already had been requested. Given that Johnson's utility locator had made two calls to Elliot and had spoken to one Dana Collins at Elliot's office, Pinpoint "awaited a response."

Pinpoint then introduced into evidence a copy of its handwritten incoming call log. For every call that came into Pinpoint's office, the log reflected the date, the time, the company that called, the contact person, the ticket number, the locator for Pinpoint assigned to that ticket, and the time when the message was "sent out to [Pinpoint's] locator [in the field.]" These records reflected that, on February 20, 2013, "Pat" from Elliot called Pinpoint at 1:30 p.m. with regard to Ticket No. 13067388 and a message was sent to Pinpoint's locator in the field, "Chris," at 1:45 p.m.[8] As mentioned, February 20, 2013, was the date that Pinpoint entered a Code 1 into the one-call system indicating that there were no WSSC underground facilities in the vicinity of the broken streetlight pole.

Johnson testified that Pinpoint does not maintain records of outgoing calls to contractors because those calls are made by locators in the field using their company-issued cell phones. He explained that Pinpoint handles "a thousand tickets a day" and that calls are made between locators and excavators on a "continuous basis." According

[8] The call log also reflected a voicemail from Pat at Elliot on February 19, 2013, at 6:53, but with regard to Ticket No. 13067349. This would be consistent with Caralle's email to Barron saying that he left a voicemail at 6:45 a.m. on February 19, 2013.

to Johnson, Pinpoint did not have any "call detail" records of cell phone calls made by locators in the field.

Johnson said it simply was his "word against [Elliot's word] as far as that's concerned[, *i.e.*, whether Pinpoint contacted Elliot]." He elaborated:

> Because if they say that we didn't contact them and we're saying we did, you know, I don't know whether the burden of proof would be on them or us to – to prove that we called them or what have you. We have documentation of our records – I mean, it's handwritten – I don't know if it's admissible or not – that when the call came into us, you know, when they finally called our office in reference to this and the second ticket [*i.e.*, Ticket No. 13067349] information, what have you, what time it came in . . . .

At that point, Authority member Baldwin interjected. As mentioned, Baldwin had recused himself because he supervised the unit at BGE that had contracted with Elliot for the repair of the streetlight pole. Nevertheless, he spoke at length about his "interpretation of the law." He took the position that when "things go to a [C]ode [5], it's the responsibility of the facility owner or their agent to make the contact" and, as such, "the crux" of the case was "did that call [from Pinpoint to Elliot] take place and is there any proof that that call took place." Baldwin stated that whether the location was specified clearly on the ticket was irrelevant because it all came down to "whether or not the contact was made on the [C]ode [5]."

Later during the hearing, when Johnson was fielding questions from Gainer and Chairman Hoff about why Pinpoint couldn't find the broken streetlight pole, Baldwin again interjected, stating "everybody else found it." (Baldwin was not sworn in.) Johnson disputed that this was so. Baldwin questioned Johnson at length on this issue.

Johnson maintained that his locator went to the 9201 Filly Court address and found neither a broken pole nor an orange cone at that address. Baldwin countered that the ticket said "at or near" that address. Johnson agreed, but said it "was not there."

At that point, another Authority member, Wayne Gilmer, announced that he worked for the locating company that had contracted with BGE on the same job, and his company had marked BGE's underground electric lines on Ticket No. 13067338. His locator had responded on February 11, 2013, at 1:17 p.m., which, as mentioned, was the original response date. Gilmer had photographs showing an orange cone in a hole where a streetlight pole had been. Gilmer offered the photographs into evidence at the hearing without objection. Gilmer was not sworn in.

Johnson disputed that the photographs accurately depicted the site as it appeared on the day that his locator in the field went to the address.

2. NPV 316b

As in the first hearing, Barron (still unsworn) presented the Authority's "evidence" based on his summary sheet.[9] He stated as follows:

> [T]his is almost identical to the previous one, only a different ticket number, different address and different phone number. Called in again on the 7th. Response was required by the 11th. Davis Elliot and – like I said, almost identical. The search and status shows exactly what happened. Again, is almost identical. The – at the end of the second day where the

[9] The summary sheet for 316b erroneously listed the NPV Location as "9201 Filly Court" and, in the section entitled "Probably [sic] Violation Investigation Process," listed the ticket number for NPV 316a. The dates that were stated, based upon the Search & Status report, were for the correct ticket.

> response was required, a 48 hour delay was requested. Then at the end of the 48 hour delay, a code five was entered in, and then finally five days later a cleared no conflict was entered into the system. So we're talking about the exact same set of circumstances we did in the previous – in the previous NPV 316-A, just a different location.

At the conclusion of Barron's summary, counsel for Pinpoint and WSSC asked if that was "the [A]uthority's evidence?" Barron replied, "Yes, sir."

Johnson was recalled to testify. He stated that it was "basically the same explanation as . . . the other one. . . . . [T]he location – . . . . There's no broken pole, there was no cone, there was no pole number." He noted that Pinpoint's call logs showed that it had received a voicemail message from Elliot regarding Ticket No. 13067349, on February 18, 2013, at 8:27.[10] According to Johnson, as a result of that call, Pinpoint's locator met with someone from Elliot and was shown "where they were gonna be digging."[11] That same day, Pinpoint statused the ticket as "Clear/No conflict."

Johnson explained that these types of contacts "happen[] between locators and excavators . . . on a daily basis." Rather than Pinpoint statusing a ticket as an incorrect address, it would call the excavator for a "little clarification." He said that Pinpoint has

[10] The call log does not reflect whether the call was at 8:27 a.m. or p.m.

[11] A second voicemail purportedly pertaining to Ticket No. 13067349 was left on February 19, 2013, at 6:53. The log reflects that after that call, a message was sent to Pinpoint's locator in the field, Chris, at 7:50. This call was received the day after Pinpoint entered a Code 1 (Clear/No conflict) in the system with respect to Ticket No. 13067349, however. As noted, *supra*, it seems likely that this call actually pertained to Ticket No. 13067338.

no choice but to enter a Code 5 if it does not hear back from the excavator and the 48-hour extension is expiring.

Baldwin, who, as mentioned, had recused himself, and Chairman Hoff and Bell then began questioning Johnson about his proof that contact was made with Elliot before the Code 5 was entered. Counsel for Pinpoint and WSSC interjected,

> You have the burden of – he doesn't have the burden of proving this. There's an absence of records on both sides and he shouldn't have the burden of proving that he did. He's testified that he contacted them and that's the only evidence before you to consider. There's no evidence on the other side. That is evidence. Them saying he did it.

The Authority members advised Johnson that, in the future, he should direct his locators to keep a record of phone calls made from the field to excavators or to send a follow-up e-mail summarizing contacts. The hearing on NPV 316b then concluded.

3. NPV 408

In NPV 408, Barron (still unsworn) presented the Authority's evidence:

> Atlantic . . . established a ticket on 3/25/2[0]13, ticket 13149922. By law, the response date was be marked or clear no conflict by 3/28/2[0]13. Details of the marking and the (inaudible) on Route 1, Baltimore Avenue. This is down near the Laurel area near the national cemetery. If we get to the search and status, we can see that near the end of the three – the – the required marking period, Pinpoint filed a 48 hour delay on the 28th. The 29th happened to be a holiday. So they . . . eventually marked the facility on 4/8, which including a holiday (inaudible) – that's the wrong one. The marking actually occurred four business days after the ticket should have been active, including the 48 hour delay. So, if you take the time from the ticket required by law, add the 48 hour delay, they were still four days late in actually marking the ticket, marking the location.

Johnson was recalled as a witness for Pinpoint and WSSC. Counsel asked about the significance of the word "remark" at the top right corner of the ticket. Johnson

replied that the ticket had been "marked previously and then was asked to be re-marked." The ticket was "retransmitted to be re-mark[ed]" on April 2, 2013. Johnson explained that Pinpoint had "on site meetings with [Atlantic] in reference to the scope and the -- and other variables that had to do with his – this particular ticket and others that we had following behind that." The meetings were attended by Johnson, representatives from Atlantic, and representatives from WSSC. At those meetings, Atlantic refused to agree to a Code 5 being entered and insisted that the entire project be marked immediately. Pinpoint marked some of the site, but not the entire site because it was more than "a thousand feet" and would have required "traffic control" and because WSSC had to pull additional records to locate some of the underground facilities. Thereafter, on April 2, 2013, Atlantic called it in as a "re-mark" and, in the comments on the ticket, asked WSSC to "relocate" the "water utilities." Pinpoint finished marking the entire site on April 8, 2013, and entered a Code 2 in the one-call system.

Johnson was asked by Authority members whether he required his locators to take photographs or otherwise document their markings at a site. He replied that he did in "most cases" but he did not know if any photographs existed documenting the marking at Atlantic's site.

D. The Authority's Final Decision

On July 12, 2013, the Authority issued its final decision. With respect to NPVs 316a and 316b, the Authority decided, "[a]fter review of the facts and testimony from the hearing[s]," to reduce each recommended $2,000 fine to a $1,000 fine. It stated that,

although it found that a "violation of the law did occur[,] . . . *neither party (complainant or probable violator) provided evidence that could establish if contact actually occurred by and between Pinpoint . . . and . . . Elliot . . . when a Code 5 – Not Complete/In Progress was entered into the 'underground facilities information exchange system*.'" (Emphasis added.) It did not make any factual findings.

With respect to NPV 408, the Authority decided to "dismiss[] the $2000.00 fine" because, although a "violation of the law did occur, . . . since Pinpoint . . . was experiencing great difficulty in securing sewer line records from WSSC their only option after requesting a 48 hour delay was to status a Code 5 – Not Complete/In Progress." The Authority found that the excavator "would not agree to a Code 5 forcing (1) Pinpoint . . . to mark the facilities after the required date and (2) forcing the Contractor to suspend his excavation activity until the entire site was marked."

The Authority also decided to impose five "requirements" on WSSC and Pinpoint for the violations of the law with respect to NPVs 316a, 316b, 408, and two other NPVs not challenged in the instant appeal. Requirements one and two were that WSSC "make every effort to avoid overuse" of Code 4 (48-hour delay) and Code 5 (Not complete/In progress). At the end of a 90-day period, WSSC was to provide the Authority a tally of the total tickets it received in that time, the total number of tickets statused as a Code 4 and/or a Code 5, and the percentage of tickets involving a Code 4 and/or a Code 5 status. With respect to tickets statused as a Code 5, WSSC also was required to provide "[d]ocumentation . . . showing if and when the excavator was contacted and the details of

their agreement to proceed under a Code 5." Third, Pinpoint was required to modify its internal computer software systems to allow it to access the "Comments" field in the one-call system web-interface and to provide documentation to the Authority that it had remedied this situation within 90 days. Fourth, Pinpoint was required, also within 90 days, to provide documentation to the Authority rebutting the allegation made at the hearing that it was "extremely difficult to reach by phone" or showing that it had remedied the situation. Also during that 90-day period, the Authority would direct two contractor organizations to ask their members to "monitor the Pinpoint . . . phone systems and report back to The Authority of any problems their members may be having in making contact." Finally, Pinpoint was directed to attend the next regularly scheduled "Damage Prevention Committee" meeting and to arrange for damage prevention training. It was obligated to complete that training within 90 days.

The Authority's decision did not give the names of the members who deliberated and voted on the decision, did not give a roll call, and did not state that certain members had recused themselves.

Within thirty days of receipt of the Authority's decision, WSSC and Pinpoint filed a petition for judicial review in the Circuit Court for Anne Arundel County.[12] On

[12] In late August 2013, while the petition for judicial review was pending, WSSC and Pinpoint e-mailed Barron and asked for the "names of all members who deliberated and voted on the decision of July 12, 2013." Barron responded by e-mail listing the seven Authority members who had been present at the hearing on July 10, 2013, noting that Baldwin had recused himself from NPV 316a and NPV 316b, and stating that there had

(Continued…)

November 7, 2014, after hearing argument, the circuit court issued an order affirming the decisions of the Authority. This timely appeal followed.

STANDARD OF REVIEW

In an appeal from a judgment entered on judicial review of a final agency decision, we look "through" the decision of the circuit court to review the agency decision itself. *People's Counsel v. Country Ridge Shopping Center, Inc.*, 144 Md. App. 580, 591 (2002). Our role "in reviewing [the final] administrative agency adjudicatory decision is narrow.'" *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67 (1999) (citing *United Parcel v. People's Counsel*, 336 Md. 569, 576 (1994)). It "is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Id*. at 67-68 (quoting *United Parcel*, 336 Md. at 577). "An agency's fact-finding is based on substantial evidence if 'supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Kim v. Md. State Bd. of Physicians*, 196 Md. App. 362, 370 (2010), *aff'd* 423 Md. 523 (2011) (quoting *People's Counsel v. Surina*, 400 Md. 662, 681 (2007)). "The agency's decision must be reviewed in the light most favorable to it; because it is the agency's province to resolve conflicting evidence and draw inferences from that

(…continued)
been "[n]o roll call vote . . . just a yea nay vote." Barron's e-mail did not state that Woolbright also had recused himself.

evidence, its decision carries a presumption of correctness and validity." *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 751 (2006). With respect to legal conclusions, although we may "give weight to an agency's experience in interpretation of a statute that it administers, . . . it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Schwartz v. Md. Dep't of Natural Res.*, 385 Md. 534, 554 (2005).

DISCUSSION

WSSC and Pinpoint contend the Authority's decision finding them in violation of the marking requirements in PU section 12-126 must be reversed for four reasons. First, the decision was unlawful because the Authority imposed the burden of proof on WSSC and Pinpoint at the July 10, 2013 hearing and "failed to dismiss the complaints . . . when the complaining parties failed to appear at the hearing." Second, the Authority improperly permitted Barron to offer unsworn testimony as the "*de facto* complaining party at the hearing" and to submit hearsay statements made by the absent complaining parties into evidence, depriving WSSC and Pinpoint of the right to cross-examine them. Third, Authority members with "demonstrated pre-judgment, personal, and/or financial bias" failed to recuse themselves and other Authority members who had recused themselves nevertheless actively participated in the hearing. Finally, the "uncontroverted sworn evidence in the record establishe[d] that [WSSC and Pinpoint] complied with the [PU section 12-126(d)(3)] notice provisions."

The Authority responds that "the record is clear that [its] decision with regard to each NPV was based on substantial evidence" because WSSC and Pinpoint "admitted to the violations alleged in NPVs 316a, 316b, and 408." It argues, moreover, that WSSC and Pinpoint have waived any argument that the July 10, 2013 hearings were "unlawful, unconstitutional, and in violation of [their] state and federal Due Process rights" because they did not challenge the resolution of two other NPVs heard that same day "subject to identical procedural rules." Alternatively, the Authority maintains that its procedures were lawful and that most of the arguments raised by WSSC and Pinpoint are not preserved.

Hearings before the Authority are governed by the contested case provisions of the Administrative Procedure Act ("APA"), SG section 10-201 *et seq*. *See* PU § 12-112(c) (granting right to a hearing before Authority); PU § 12-113(e)(1) (granting right to judicial review pursuant to the APA); *Reliable Contracting*, 222 Md. App. at 691. Our review of the Authority's final decision is thus governed by SG section 10-222(h), which provides that a final agency decision may be reversed if it:

> (i) is unconstitutional;
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
> (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). For the following reasons, we conclude that the Authority's final decision resulted from an unlawful procedure and was "unsupported by competent, material, and substantial evidence in light of the entire record."

"[T]he requirements of procedural due process as guaranteed by the Fourteenth Amendment to the Constitution and Article 24 of the Maryland Declaration of Rights apply to an administrative agency exercising judicial or quasi-judicial functions." *Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 407 (1997). Although the procedures for an administrative hearing need not be "as formal and strict" as in a judicial hearing, *Prince George's Cty. v. Harley*, 150 Md. App. 581, 595 (2003), an administrative agency must "'observe the basic rules of fairness as to parties appearing before them.'" *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 726 (1989) (quoting *Dal Maso v. Bd. of Co. Comm'rs*, 238 Md. 333, 337 (1965)). This includes affording a "reasonable right of cross-examination" to the parties when the agency is called upon to "decide disputed adjudicative facts based upon evidence produced and a record made." *Hyson v. Montgomery Cty.*, 242 Md. 55, 67 (1966). In the instant case, the Authority's procedures failed to meet this bar and deprived WSSC and Pinpoint of due process of law.

First, the Authority improperly placed the burden on WSSC and Pinpoint to prove that they had *not* violated the Miss Utility Statute. It is beyond cavil that "the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body." *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959);

accord Comm'r of Labor & Industry v. Bethlehem Steel Corp. 344 Md. 17, 34 (1995); *Edmond v. Ten Trex Enters., Inc*., 83 Md. App. 573, 583 (1990). In the instant case, Elliot and Atlantic made online complaints and were the parties asserting affirmatively that WSSC and/or Pinpoint had violated the marking provisions of the Miss Utility Statute. Neither complainant appeared at the July 10, 2013 hearings, however.

In the absence of these complaining parties, the Authority, through Jim Barron, put on its own evidence compiled during its investigation of the complaints. As discussed, that evidence was merely a printout of the online complaints and a ticket "Search & Status" history. Unlike some administrative agencies, the Authority is not expressly vested with investigatory powers under the Miss Utility Statute. *Compare, e.g.*, Md. Code (1981, 2014 Repl. Vol.), § 14-401.1 of the Health Occupations Article (vesting investigatory powers in the Board of Physician Quality Assurance); Md. Code (1989, 2010 Repl. Vol., 2014 Supp.), § 17-323 of the Business Occupations and Professions Article (empowering the State Real Estate Commission to investigate complains against real estate brokers).

Even assuming that the Authority has implicit power to investigate complaints, however, it violated its own statute by permitting Barron to present the Authority's evidence without being sworn in as a witness. *See* PU § 12-113(a)(1) ("all testimony shall be given under oath"). Barron did not testify under oath about his investigation and could not effectively be cross-examined. Taken together, the Authority's procedures improperly shifted the burden of proof to WSSC and Pinpoint, requiring them to

introduce evidence to rebut charges that were not substantiated by any admissible evidence in the record.

Furthermore, in the hearings on 316a and 316b, Baldwin, who had recused himself from the proceedings arising from Elliot's complaints because he worked for the division of BGE that had contracted for the repair of the two streetlight poles, nevertheless participated in questioning Johnson at length and, also without being sworn, stated his view of the factual issues in the cases. Gainer, who was not sworn in as a witness, spoke at length about his personal experiences dealing with Pinpoint and expressed the opinion that Pinpoint did not "understand the law" and that its voicemail box always is full. Gainer's unsworn testimony concerning Pinpoint's voicemail formed the sole basis for one of the conditions imposed by the Authority in its final decision.

Moreover, in the middle of the hearing on 316a, Gilmer divulged, for the first time, that he had personal knowledge of events surrounding the ticket at issue because his own locator company had responded to that ticket (and the ticket in 361b) for BGE; and he proceeded to testify—unsworn—that his company had found the location referenced in the ticket and there was no reason that Pinpoint could not have found it as well. He handed out photographs his company had taken about 10 hours before Pinpoint requested the 48-hour delay, one of which depicted an orange cone. (The photographs did not give the address at which they were taken.) Thus, Gilmer metamorphosized into a fact witness but nevertheless kept his inherently inconsistent role as decision-maker (despite the request that he recuse himself). Because no roll call was taken and the final decision said

nothing about recusals, it appears that Gilmer participated in the decision even though he was a fact witness. (It also is unclear whether Woolbright, who recused himself, nevertheless deliberated and voted on the three NPVs.)

Finally, we note that Chairman Hoff, who Pinpoint and WSSC asked to recuse himself because he owns the one-call system involved in the case, called as a witness his own employee to testify about the system. That employee criticized Pinpoint for not using software that allows for the entry of comments. Chairman Hoff did not rule on the recusal motion and participated in reaching the final decision, as it is under his signature.

For all of these reasons, the July 10, 2013 hearings did not comport with minimum standards of due process and the decision of the Authority arising from those hearings must be reversed.[13]

Even if the due process deficiencies did not warrant reversal, we nevertheless would reverse on the alternative basis that the decisions were not supported by substantial evidence in the record.

As explained, PU section 12-126(d) creates exceptions to the 2-business-day marking deadline when an Owner cannot mark a location due to the scope of the project (PU sections 12-126(d)(1) & (2)) and when an Owner is unable to mark a location due to

[13] We reject the Authority's contention that WSSC and Pinpoint waived their procedural arguments by not appealing the final decisions in two other NPVs. This argument, which is made without any supporting legal authority, lacks merit. The events underlying the two other NPVs were separate from the events underlying NPVs 316a, 316b, and 408; and WSSC and Pinpoint conceded in those two cases that they had committed statutory violations.

"circumstances beyond [its] control," other than the scope of the project (PU section 12-126(d)(3)). Under the former exceptions, an Owner must notify the one-call system and contact the excavator to "develop a mutually agreeable schedule." PU § 12-126(d)(1). If an agreement is reached, the Owner marks according to that schedule, pursuant to (d)(1). If an agreement cannot be reached, the Owner must mark the "portion of the site where excavation and demolition will first occur" and mark the remainder of the site "within a reasonable time." PU § 12-126(d)(2). Under the latter exception, the Owner must "report to the [one-call system] that an extension is required." PU § 12-126(d)(3).

In NPVs 316a and 316b, Pinpoint argued that a hybrid of the (d)(1) and (d)(3) exceptions applied and made its actions lawful.[14] It asserted that, within two business days of receiving the tickets, its locator in the field went to the sites and could not find an orange cone or a broken streetlight pole. Unable to mark or clear the locations "due to circumstances beyond [its] control," Pinpoint's locator called Elliot for clarification and requested a 48-hour extension from the one-call system. According to Pinpoint, Elliot did not return its call within that 48-hour period. Because the one-call system only permits one extension and because Pinpoint could not mark the sites until it heard back from Elliot, it entered a Code 5 in the one-call system to indicate that the tickets had not been completed. Thereafter, Elliot returned Pinpoint's call, clarified the locations at issue, and Pinpoint cleared the tickets. It was plain from the Authority members'

[14] Contrary to the Authority's assertion, Pinpoint and WSSC did not admit to the violations alleged in NPVs 316a, 316b, or 408.

questions during the hearings that the Authority viewed the crucial issue to be whether Pinpoint attempted to make contact with Elliot. The Authority questioned the lack of call detail records showing that such contact had been made and criticized the hand-written call logs introduced into evidence by Pinpoint.

In its final decision with respect to NPVs 316a and 316b, however, the Authority found that a "violation of the law did occur" but "neither party (complainant or probable violator) provided evidence that could establish if contact actually occurred by and between Pinpoint . . . and . . . Elliot . . . when a Code 5 . . . was entered into the [one-call system]."[15] Thus, notwithstanding the Authority's determination that the evidence was in equipoise on the crucial issue whether Pinpoint had contacted Elliot before entering the Code 5, the Authority nevertheless found that WSSC and Pinpoint had violated the law. This was error. *See Collins/Snoops Assocs., Inc. v. CJF, LLC*, 190 Md. App. 146, 161 (2010) (when trial court found evidence to be in equipoise following a bench trial on a breach of contract claim, court properly entered judgment in favor of the defendants as the plaintiffs had not met their burden).

The only "evidence" before the Authority from Elliot in NPV 316a and 316b with respect to whether Pinpoint called Elliot to obtain information about the locations to be marked (or cleared) was the unsworn testimony of Barron recapitulating the unsworn and

[15] It is questionable whether the Authority's final decision even satisfies the requirement that it render a decision "in writing, stating the reason for its decision." PU § 12-113(d)(1).

unverified NPV complaint, in which Elliot represented that WSSC/Pinpoint had not notified it. The evidence before the Authority from WSSC/Pinpoint was Johnson's sworn testimony that Pinpoint's locators in the field called Elliot and reported that the locations could not be determined and Pinpoint needed clarification to enable it to mark or clear, and that Elliot did not respond until after the deadline.

Because the Authority, through the complainants, bore the burden to prove a violation, including, in NPVs 316a and 316b, that Pinpoint did not call Elliot to obtain information necessary to mark or clear the locations, the Authority's conclusion that the evidence was in equipoise on that issue mandated rulings in favor of WSSC/Pinpoint and foreclosed findings of violations in those NPVs.

We now turn to NPV 408. As mentioned, the Authority found that there had been "a violation of the law" with respect to that ticket, but decided that a fine was not warranted. It credited Johnson's testimony that he met with the excavator in person to discuss the scope of the markings, but that the excavator would not agree to a Code 5 being entered. It also credited Johnson's testimony that it took additional time for Pinpoint and WSSC to locate the pertinent sewer line records. Johnson's testimony that Pinpoint partially marked the site before 2 business days expired was unrebutted. Thus, the only sworn testimony before the Authority, and indeed the only evidence at all, showed that WSSC and Pinpoint met with the excavator, were unable to reach a mutually agreeable schedule, partially marked the site, and marked the remainder of the site within a week. Under PU section 12-126(d)(2), this was lawful. There being no other evidence

before the Authority contradicting Johnson's account, the Authority's finding that WSSC and Pinpoint violated the law on this ticket was not supported by substantial evidence in the record.

Finally, WSSC and Pinpoint argue that the "non-monetary sanctions imposed in the Authority's decision were arbitrary, capricious, *ultra vires* and illegal." Having reversed the Authority's decisions in NPVs 316a, 316b, and 408 ruling that WSSC and Pinpoint violated the marking requirements of the Miss Utility Statute, it necessarily follows that the Authority could not impose additional conditions on WSSC and Pinpoint for those violations. Thus, we also reverse that aspect of the Authority's decision as it pertains to those NPVs. The propriety of the imposition of those conditions with respect to the two NPVs not challenged on appeal is not properly before us.[16]

[16] There does appear to be merit in the argument that the Authority cannot impose conditions of this sort for a marking violation. PU section 12-135, which governs civil penalties assessed by the Authority, states:

> (a)(1) A person *that performs an excavation or demolition without first providing the notice required under § 12-124(a) of this subtitle and damages, dislocates, or disturbs an underground facility* is deemed negligent and is subject to a civil penalty assessed by the Authority not exceeding:
>
> (i) $2,000 for the first offense; and
>
> (ii) subject to subsection (c) of this section, $4,000 for each subsequent offense.
>
> (2) *Instead of or in addition to a civil penalty* ***assessed under this subsection****, the Authority may:*
>
> (i) require that a person:
>
> 1. participate in damage prevention training; or

(Continued…)

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO ENTER AN ORDER REVERSING THE FINAL DECISION OF THE MARYLAND UNDERGROUND FACILITIES DAMAGE PREVENTION AUTHORITY IN NPV Nos. 316a, 316b, AND 408. COSTS TO BE PAID BY THE APPELLEE.

(…continued)

2. implement procedures to mitigate the likelihood of damage to underground facilities; or

(ii) impose other similar measures.

(3) ***A person that violates any provision of Part IV of this subtitle is subject to a civil penalty assessed by the Authority not exceeding $2,000.***

(Emphasis added.) Thus, the Authority only is empowered to impose requirements in "addition to a civil penalty" against a person who performed excavation or demolition without giving the one-call system the notice mandated by PU section 12-124(a), and the excavation or demolition resulted in damage to an underground facility. In contrast, for other violations of Part IV of subtitle 1 of the Miss Utility Statute, such as violations of the marking requirements of PU section 12-126, the Authority only is empowered to impose a civil penalty not exceeding $2,000, under PU section 12-135(a)(3).