Circuit Court for Baltimore County
Case No.: 03-C-17-012549

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2392

September Term, 2018

REGINA GEORGE

v.

DIVISION OF PAROLE AND PROBATION, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

Beachley,
Gould,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: February 19, 2020

Regina George suffered a workplace injury that according to her employer, the Division of Parole and Probation, Department of Public Safety and Correctional Services ("Department"), prevented her from performing the essential tasks of her position. As a result, Ms. George entered into an agreement in which she agreed to submit a conditional resignation, in return for the Department's agreement to look for another suitable position in light of her limitations. The Department agreed that it would only accept her resignation should its search prove fruitless. Ultimately, the Department concluded that Ms. George's injuries prevented her from working in any other position and accepted her conditional resignation. Ms. George challenged this determination (and the process that led thereto) through a grievance process that ultimately reached the Office of Administrative Hearings ("OAH"), where her grievance was denied.

Subsequently, Ms. George filed a petition for judicial review in the Circuit Court for Baltimore County. The circuit court dismissed her petition as untimely, prompting this timely appeal. For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND FACTS AND PROCEEDINGS

Ms. George was a Pre-Trial Release Investigator II with the Department. In 1999, she injured her left foot and ankle in an elevator accident at work. Until 2013, the Department accommodated her injury by allowing her to enter her workplace (the Department's "Central Booking" facility) through an entrance that was more easily accessed than the one used by other employees. However, in 2013, Ms. George was caught bringing prohibited items into Central Booking, and the accommodation was revoked. Ms. George pursued a grievance alleging that the revocation of the accommodation violated

her rights under the Americans with Disabilities Act, the denial of which was affirmed by an administrative law judge. Ms. George also filed a lawsuit in the United States District Court of Maryland alleging similar claims, which was dismissed on summary judgment.

In 2015, Ms. George suffered another workplace accident, this time falling and hitting her head on the concrete floor and suffering a concussion. As a result, she was unable to return to work. Over the ensuing 11 months, Ms. George was evaluated and treated for the injuries arising out of the accident. In August 2016, the State Medical Director (the "Medical Director") concluded that Ms. George was unable to perform the essential duties of her position, with or without accommodation. As a result, the Department initiated the process for terminating Ms. George.

The termination process included a mitigation conference at which representatives of the Department met with Ms. George and negotiated a resolution in which the Department would look for a position that Ms. George was both qualified for and able to perform notwithstanding her limitations. In return, Ms. George agreed to execute a conditional resignation, to be effective in the event no such position could be found.[1]

Subsequently, a psychologist tested Ms. George and found that she was experiencing difficulties with her memory and concentration, including severe lapses in recall. Based on this report, the Medical Director determined that there were no suitable

[1] Ms. George was accompanied to the mitigation conference by her union representative.

positions for Ms. George, and the Department accepted her previously-submitted resignation.

Ms. George filed a grievance alleging that the Department had failed to conduct a good faith search for other suitable positions and not offered her the services of its Interactive Americans with Disabilities Act Process. A hearing on her grievance was held before OAH on July 27, 2017. Ms. George was represented by her union representative, as is permitted under Md. Code Ann., State Personnel and Pensions Article ("SPP") § 12-105 (1993, 2015 Repl. Vol.). Ms. George contends that when asked for her address at the beginning of her testimony, she gave both her physical address and her post office box.[2]

Pursuant to SPP § 12-205(c)(2)(i), OAH was required to issue a decision within 45 days of the close of the hearing, which meant that the deadline for the decision was September 11, 2017. On that date, OAH issued its written decision to uphold her termination. OAH mailed the decision to Ms. George's address of record—her physical street address—as well as to her union representative. The mail addressed to Ms. George was returned to OAH on September 21, 2017, marked as "not deliverable as addressed."

[2] Although OAH hearings are recorded and are transcribed at the request of the parties, the transcript from the hearing is not part of the record. Ms. George submitted an affidavit in opposition to the Department's motion to dismiss in the circuit court stating that she had provided her post office box in addition to her physical address when asked at the hearing for her address. Ms. George's affidavit explained that she had a post office box for the prior two years because her community "was plagued by vandalism which included mailboxes being damaged or destroyed." She further stated in her affidavit that she had been advised by the postmaster that mail could not be delivered to vandalized mailboxes, and therefore she rented a post office box so that she could receive mail. Ms. George's affidavit did not, however, state that she had explained the reason for her use of a post office box when she had testified at the hearing.

On December 12, 2017, three months after the decision was due, after having received nothing from OAH, Ms. George contacted OAH. OAH informed her that a copy of the decision had been mailed to her home address and had been returned to OAH as undeliverable. At Ms. George's request, OAH mailed a copy of the decision to her post office box address.

On December 26, 2017, Ms. George filed a petition for a judicial review of OAH's decision. The Department filed a motion to dismiss the petition as untimely, arguing that under Maryland Rule 7-203, the deadline for Ms. George's petition was October 13, 2017—30 days after the decision had been first mailed to her street address of record. The circuit court granted the Department's motion and dismissed the petition as untimely. This appeal followed.

DISCUSSION

Ms. George presents one question for review which we have rephrased as follows: did the circuit court properly dismiss Ms. George's petition for judicial review as untimely?

The Parties' Contentions

Ms. George argues that the "circuit court should have considered December 12, 2017 as the date that OAH sent notice to her, since that is the date the notice was sent to her mailing address. According to Ms. George, the September 11 mailing of the decision was insufficient because OAH was aware from her testimony that she had been using a post office box address, and OAH knew that she had not received the decision because it had been returned as undeliverable. Thus, Ms. George argues, the 30-day time period

under Md. Rule 7-203 did not begin until December 12, 2017, when OAH mailed a copy of the decision to her post office box address.

Claiming that she had a "property interest in her continued employment," Ms. George relies on cases that address the procedural due process implications when notices of various kinds are not actually received. See Jones v. Flowers, 547 U.S. 220 (2006) (notice of property tax delinquencies); Griffin v. Bierman, 403 Md. 186 (2008) (notice of a foreclosure sale); Maryland State Bd. of Nursing v. Sesay, 224 Md. App. 432 (2015) (notice of the date and time for an administrative hearing). Relying on these cases, Ms. George contends that the notice by regular mail "was insufficient to protect her due process rights."

The Department counters that the petition was untimely. The Department argues that the requirement for OAH to "issue a written decision" within 45 days "after the close of the hearing record," as provided under SPP § 12-205(c)(2)(i), means that "the statute requires notice to be sent to the petitioner," which the ALJ did by mailing it to Ms. George's address of record. The Department relies on S.B. v. Anne Arundel County Dep't of Soc. Servs., 195 Md. App. 287 (2010), for the proposition that when a statute requires a final decision to be mailed or delivered, notice is complete upon mailing.

As for Ms. George's due process argument, the Department argues that: (1) Ms. George waived this argument because she did not raise it in the circuit court; (2) there was no due process violation because the Department did, in fact, mail the decision to the home address on record; (3) Ms. George was on constructive notice that the case had been decided because the statute required a decision within 45 days of the close of the hearing;

and (4) the due process cases cited by Ms. George did not apply because they involved the failure to provide notice of potential loss of property or other rights, whereas Ms. George received all of the notice and opportunity to be heard to which she was entitled. As the Department puts it: "Moving forward with the deprivation of rights where it is unclear whether the affected parties received notice is fundamentally different from this case, where Ms. George had actual notice of the operative proceedings, participated fully in them, and then, by virtue of her failure to update her address of record with OAH, did not receive timely notice of the ALJ's decision."

Analysis

We agree with the Department and the circuit court that Ms. George filed her petition for review too late. As we explain below, Ms. George was charged with actual knowledge that, as of September 11, 2017, OAH had issued a decision denying her claim, and this legal conclusion is compelled by statute, even if OAH had mailed the decision to the wrong address on September 11, 2017. Our analysis begins with a brief review of the statutory framework within which Ms. George's grievance was adjudicated.

The grievance proceeding begins with the three-step process set forth in SPP §§ 12-201, 12-203, 12-204, and 12-205. In the first step, the grievant files her written complaint, which is reviewed and decided by the "appointing authority."[3] SPP § 12-203. The

[3] The "appointing authority" is defined under SPP § 1-101(b) as an individual or a unit of government that has the power to make appointments and terminate employment.

appointing authority must issue its written decision within ten days from its meeting with the grievant. SPP §§ 12-201, 12-203.

In the second step, the grievant may appeal up the chain of command to the "head of the principal unit," who, in turn, must meet with the grievant and issue its written decision within ten days. SPP §§ 12-201, 12-204.[4]

The third step is an appeal to the Secretary of the Department of Budget and Management ("DBM"), who has 30 days to review the matter and attempt to resolve it with the grievant. SPP §§ 12-201, 12-205. If the Secretary of DBM is unable to resolve it within that timeframe, the matter is referred to OAH.

OAH conducts a hearing and must issue its decision "[w]ithin 45 days after the close of the hearing record . . ." SPP §§ 12-201, 12-205(b)(2) and 12-205(c)(2)(i). The grievant may be assisted or represented by any person at any time during the grievance process, including at OAH hearing. SPP §§ 12-105(a); COMAR 28.02.01.08. Under Md. Code Ann., State Government Article ("SG") § 10-221(c) (2014), OAH is required to "promptly [] deliver or mail a copy of the final decision" to the parties. Service is deemed complete upon mailing, and receipt of the decision is not required. See SG § 10-221; S.B., 195 Md. App. at 307.[5]

[4] A "principal unit" is defined under SPP § 1-101(k)(1) in relevant part as "a principal department or other principal independent unit of State government."

[5] Under certain circumstances not relevant here, the first or second step (but not both) may be skipped. SPP § 12-201(b). It appears from the record that as to Ms. George's appeal, the first step was skipped.

Even though each step of the grievance process has defined time limits for issuing a decision, the statute contemplates the possibility that a deadline could be missed. In that regard, SPP § 12-106(b) provides:

> Except as otherwise provided in this title, a failure to decide a grievance at any step in the grievance procedure in accordance with this title is considered a denial from which an appeal may be made.

Because the referral of the matter to OAH under SPP § 12-205 is within "this title," SPP § 12-106(b) applies to the 45-day deadline for OAH to issue its decision as required by SPP § 12-205(c)(2)(i). Thus, if OAH does not issue its decision within 45 days, the grievance is "deemed denied" by operation of law. See SPP § 12-106(b); SPP § 12-205(c)(2)(i).

Once OAH issues its decision, or fails to issue its decision within 45 days, Maryland Rule 7-203 enters the picture, and the 30-day countdown begins to run. Rule 7-203(a) provides:

> (a) Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:
>
> (1) the date of the order or action of which review is sought;
>
> (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
>
> (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

The application of the foregoing process to Ms. George's grievance is straightforward. Ms. George's hearing at the OAH started and ended on July 27, 2017. The last possible date for OAH to issue its decision was 45 days later, on Monday,

September 11, 2017.[6] As it happens, that's the day that OAH in fact mailed its decision. But even if it had not mailed its decision by then, Ms. George's appeal would have been "deemed denied" on that date under SPP § 12-106(b) as a matter of law.

In reaching this conclusion, we are guided by two decisions from the Court of Appeals that addressed a virtually identical "deemed denial" provision in Title 11 of the State Personnel and Pensions Article, which sets forth the process for disciplinary actions for executive branch employees in the State Personnel Management System. SPP § 11-102. Title 11 has a multi-step internal appeal process under which the head of a state unit must issue a written decision to an employee grievance within 15 days after receiving the grievance appeal. Fisher v. Eastern Correctional Inst., 425 Md. 699, 702 (2012) (citing SPP § 11-109(e)(2)). The employee can then appeal to the Secretary of DBM "[w]ithin 10 days after receiving the decision under § 11–109 of this subtitle." Id. at 703 (quoting SPP § 11-110(a)(1)). And, "[a] failure to decide an appeal in accordance with [Title 11] is considered a denial from which an appeal may be made." Id. (quoting SPP § 11-108(b)(2)). Thus, in key respects, the Title 12 grievance process that governed Ms. George's appeal tracks the Title 11 appeal process at issue in Fisher.

In Fisher, an employee of the Eastern Correctional Institution contested the termination of her employment pursuant to the Title 11 appeal process. 425 Md. 699. After being terminated, the employee sent a timely written appeal to the Secretary of the Department. Id. at 703. After receiving no response for several months (despite numerous

[6] The 45th day after the hearing fell on Sunday, September 10, 2017. Pursuant to Md. Rule 1-203, the deadline therefore was September 11, 2017.

letters sent from her attorney), the employee filed her second level appeal with the Secretary of DBM. Id. at 704. The appeal was dismissed as untimely, and the Court of Appeals affirmed. Id. at 705.

According to the Court, in order to effectuate the "deemed denial" provision of SPP § 11-108(b)(2), the statutory scheme must be read "to mean that, regardless of the reason for a failure of decision within the allotted period of fifteen days—be it error, negligence, or, more likely, a determination by the head of the principal unit not to issue a written decision—the failure of decision is, by operation of § 11–108(b)(2), a denial of the appeal." Id. at 710. Thus, "[r]egardless of whether the head of the principal unit issues a written decision within fifteen days after receipt of the employee's appeal in accordance with § 11-109(e)(2), or the appeal is denied by operation of § 11–108(b)(2), the employee who desires to take a further appeal must do so within ten days after the earlier of these occurrences, pursuant to § 11-110(a)(1)." Id. at 713.

The Court of Appeals was asked to revisit its decision in Fisher five years later in Hughes v. Moyer, 452 Md. 77 (2017). There, the terminated employee appealed to the Secretary of the Department, who had failed to respond within the time provided by SPP § 11-109. 452 Md. at 80, 82. The employee, however, had been unaware that the Secretary of the Department's silence triggered the "deemed denial" provision in SPP § 11-108(b)(2) and therefore missed the deadline to appeal to the next level. Id. She petitioned the circuit court for a writ of mandamus to compel the Secretary of the Department to issue a decision, but the court dismissed the action based on Fisher. Id. at 88. On appeal, she argued that the Court should revisit its decision in Fisher by addressing an issue it had neglected: the

due process implications of the "deemed denial" provision in SPP § 11-108(b)(2). Id. at 92. The Court "decline[d] to reconsider [its] construction of the "deemed denial" provision in Fisher," noting that a contrary interpretation would render the provision meaningless. Id. But that did not end the Court's analysis.

The Court in Hughes went on to address an issue that had not been raised in Fisher, namely, the adequacy of the notice to Ms. Hughes of her appeal rights. Hughes, 452 Md. at 93. Under § 11-106(a)(5), "[b]efore taking any disciplinary action related to employee misconduct, an appointing authority shall . . . give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights." Hughes, 452 Md. at 94 (quoting § 11-106(a)(5)). Ms. Hughes argued that the notice given to her had omitted her appeal rights beyond the first-tier review, and therefore she had not been advised of the consequences of the Department's failure to timely issue a decision. Id. at 93.

The Court sided with Ms. Hughes and held that, as a matter of statutory construction, the use of the plural "appeal rights" in §11-106(a)(5) included all appeal rights through the entire disciplinary process. Id. at 94-95. Noting that the statute was "ambiguous as to the extent of the detail required" in the notice, the Court examined the legislative history of the statute as well as the due process implications of such notice. Id. at 95. As to due process, the Court acknowledged that Ms. Hughes, as a tenured employee who could only be dismissed for cause, had "a property interest in [her] public employment" that necessitated the opportunity for a hearing. Id. at 95. Also, the legislative history indicated that the General Assembly had intended to provide due process by affording a hearing at the second tier of the process before OAH. Id. at 96. Thus, the Court concluded, the notice of appeal

rights required under § 11-106(a)(5) would have to include the appellate rights at each level of review. Id. at 99.

The decisions of the Court of Appeals in Fisher and Hughes are applicable here for, at least, three reasons. First, the "deemed denial" provisions in § 11-109(e)(2) and § 12-106(b)(2) are virtually identical, and therefore, we presume an intention by the General Assembly for these statutes to carry the same meaning and import. See Lockett v. Blue Ocean Bristol, LLC, 446 Md. 397, 422 (2016) (noting that "[w]hen a word susceptible of more than one meaning is repeated in the same statute or sections of a statute, it is presumed that it is used in the same sense"). Thus, under § 12-106(b)(2), Ms. George's petition for review was untimely, just as under § 11-109(e)(2), the appeals in Fisher and Hughes were untimely.

Second, from a due process standpoint, Ms. George's interest in her employment is, at best, no greater than the property interests at issue in Fisher and Hughes, and are thus worthy of no greater protection. The property interest in public employment attaches when the employee has a "'legitimate claim of entitlement' to the position, as under a tenure plan or where dismissal may only be for cause . . ." Maryland Classified Employees Ass'n, Inc. v. State, 346 Md. 1, 22 (1997).[7] Ms. George waived this claim of entitlement, as the ALJ explained:

[7] As we have previously stated, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Elliott v. Kupferman, 58 Md. App. 510, 520 (1984) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

> As of August 11, 2016, the Grievant was no longer attempting to remain in her previous position; instead, to avoid being terminated from State service she sought another position within the Department. Subject to the terms of the waiver agreement, the Grievant waived her right to be returned to her previous position, or even to argue in this grievance that she can perform the essential duties of her former position.

Thus, unlike the employees in Hughes and Fisher, Ms. George cannot claim a property interest in her prior position, as "[a]n employee has no vested property interest in keeping a job that the employee admits he or she cannot perform." Murphy v. Baltimore Cty., 118 Md. App. 114, 124 (1997). Accordingly, although Ms. George was entitled to expect the Department to make a good faith effort to look for another suitable position, her due process rights cannot be violated if the "deemed denial" clause is enforced and applied to the same extent it had been applied in Fisher and Hughes.

Third, Ms. George is presumed to know the law, which would include the "deemed denial" provision in § 12-106(b).[8] See Hughes, 452 Md. at 98. Accordingly, from Ms. George's perspective at the time, receiving *no* decision within a few days of September 11

[8] That presumption did not apply in Hughes because in the case of SPP § 11-106(a)(5), the legislature "superseded this common law principle by requiring specific notice to . . . specific parties of specific legal rights"—in that case, by giving explicit notice of the parties' appeal rights. Hughes, 452 Md. at 98. The grievance procedures in Title 12, unlike the appeals process applicable in Fisher and Hughes, do not require the Department to give the grievant notice of her appeal rights. Thus, the exception to the presumption that a person knows the law that was applied in Hughes is not applicable here. In any event, Ms. George has not argued that she was not properly advised of her rights, thus we need not address this issue here.

was legally equivalent to receiving an adverse decision.[9] As such, she was on notice that a petition for review had to be filed within 30 days of September 11.

We emphasize that the applicability of this analysis depends on the specific facts of the case. If the decision had been issued before the 45th day after the hearing had closed, then the "deemed denial" provision would not have started the 30-day time period under Rule 7-203. For example, if the adverse decision had been issued and mailed on the third day after the hearing had closed, the petition for judicial review would have been due 33 days after the hearing closed, that is, well before the "deemed denial" date. If that had happened here, we would have been compelled to address the adequacy of notice to Ms. George head-on.[10] Doing so here would be a pointless undertaking because even if we were to conclude that, as Ms. George contends, the circuit court should have considered December 12 as the date Ms. George had been served the decision, for the reasons stated above, the "deemed denial" provision of § 12-106(b) would have nonetheless rendered her petition for review untimely.

[9] We also note that "[a]ctual notice has been held to negate a due process violation." Bush v. Pub. Serv. Comm'n of Maryland, 212 Md. App. 127, 140 (2013). In this case, Ms. George was represented by a union representative from the Maryland Association of Correctional and Security Employees, to whom the decision was mailed on September 11, 2017.

[10] We also would have had to address the Department's contention that Ms. George failed to preserve her due process argument.

CONCLUSION

Ms. George's petition for judicial review was filed over two months late. As we stated in Colao v. Cty. Council of Prince George's Cty., 109 Md. App. 431, 444 (1996), aff'd, 346 Md. 342 (1997), "discretion has been removed from the circuit court with respect to untimely filed petitions for judicial review of agency decisions." The circuit court correctly concluded that Ms. George's petition was not timely filed. We therefore affirm.

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