

Circuit Court for St. Mary's County
Case No. 18-C-16-864

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2715

September Term, 2016

LS INVESTMENT CORPORATION, et al.

v.

MARYLAND DEPARTMENT OF
NATURAL RESOURCES

Nazarian,
Reed,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: April 26, 2018

*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.

In August 2013, Hollywood Oyster Company, LLC (“Hollywood”) applied for a water column lease for aquaculture in Sotterley Creek, off the Patuxent River in St. Mary’s County, Maryland. Hollywood, which sought to raise oysters in cages to be attached to the bottom of the creek, filed its application with appellee, the Maryland Department of Natural Resources (“DNR”). After DNR determined that Hollywood’s application was complete and met the applicable statutory requirements, it published notice of the proposed lease. In response, DNR received protests from Historic Sotterley, Inc. (“Historic Sotterley”),¹ as well as from appellants, Gita S. van Heerden (“van Heerden”) and LS Investment Corporation (“LS Investment”). Historic Sotterley and appellants own land along the shores of Sotterley Creek. We shall refer to Historic Sotterley and appellants collectively as “protestants.”

In light of the protests, the matter was referred to the Office of Administrative Hearings (“OAH”) for a contested case hearing before an administrative law judge (“ALJ”). DNR filed a Motion in Limine in which it asked the ALJ to prevent the protestants from presenting evidence at the merits hearing on eight topics.² The ALJ granted the motion as to all but one of the eight topics. The case proceeded to a three-day contested case hearing in April 2016, after which the ALJ denied the protests, and concluded that DNR could legally grant Hollywood’s proposed aquaculture lease.

¹ Historic Sotterley is not a party to the instant appeal.

² These topics will be fully identified in the Factual and Procedural Background section of this opinion.

The protestants sought judicial review of the ALJ's decision in the Circuit Court for St. Mary's County. Following a hearing in December 2016, the circuit court affirmed the ALJ's decision, concluding that: 1) the ALJ's decision was supported by substantial evidence; 2) the ALJ was not clearly erroneous in his fact-finding; and 3) the ALJ did not err in making evidentiary rulings, including the ruling on the Motion in Limine. Appellants noted a timely appeal, and present the following two related questions for our review:

1. By granting [DNR]'s Motion in Limine, did the ALJ improperly exclude relevant evidence pertaining to the determination of "public welfare" as it applies to the review of [Hollywood's] aquaculture leases?
2. Did the ALJ commit reversible error by not permitting [a]ppellants to obtain in discovery six other lease applications submitted by the applicant [Hollywood] so that [a]ppellant could develop an argument that DNR failed to apply its statutorily granted discretion uniformly?

We hold that the ALJ did not err, and affirm the circuit court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

As stated above, on August 15, 2013, Hollywood filed an application with DNR for an aquaculture water column lease in Sotterley Creek, off the Patuxent River in St. Mary's County, Maryland. Originally, Hollywood applied for a lease area of 4.55 acres, but later revised the application to 2.23 acres by a consent agreement with DNR. Under the proposed lease, Hollywood would raise oysters in cages which would be attached to the bottom of the creek. The cages would be made of coated mesh wire and stacked in threes, with each cage measuring about four inches high, and with each stack resting on the bottom of the creek on six-inch legs. Because the mean lower low water level at the shallowest point of the proposed lease area is about twenty inches, the water level would typically be

two inches above the tops of the cages during low tide. The lease area would be marked with a total of six buoys, each measuring sixty inches long with a nine inch diameter, and protruding thirty-six inches above the water.

After DNR determined that Hollywood's application was complete and met all applicable statutory requirements, it published notice of the proposed lease in February 2015. In response, DNR received protests from Historic Sotterley, van Heerden, and LS Investment.³ As stated above, the protestants, along with DNR, own properties that encompass the entire shoreline of Sotterley Creek.

Van Heerden owns a house situated on slightly less than nine acres of land on the southern shore of Sotterley Creek, and the proposed lease area is within view of her property; LS Investment owns 105 acres of land, which extends along the northern boundary of the creek and is mostly used for agricultural purposes; and Historic Sotterley owns approximately seventy-six acres of land, which includes the Sotterley Mansion, a Tidewater plantation house dating back to approximately 1717, and a number of related buildings. Finally, DNR owns a fourteen-acre parcel of land which includes a pier that extends into the creek.

Sotterley Plantation, which is designated as a national historic landmark, spans property owned by Historic Sotterley, LS Investment, and DNR. Sotterley Plantation was an active port in the slave trade during the eighteenth and early nineteenth centuries, and

³ DNR also received a protest from a waterman, but he withdrew his protest after the case was transmitted to OAH.

continued to operate as a port into the twentieth century. An important part of Historic Sotterley's mission is to educate the public about the history of slavery on the plantation.

On October 2, 2015, DNR transmitted the protests to OAH for a contested case hearing to be heard by an ALJ. Prior to the hearing, all of the parties filed motions for summary judgment or partial summary judgment. DNR also filed a Motion in Limine seeking to prevent the protestants from introducing evidence concerning:

- (1) Historical, cultural, educational and archaeological significance of Historic Sotterley Plantation;
- (2) Navigation concerns;
- (3) Adequacy of onshore infrastructure to support aquaculture related to land-based easements;
- (4) Locations of waterfowl blind licenses;
- (5) Bald eagle nests;
- (6) Land easements on adjacent properties;
- (7) Road right-of-way disputes between the parties; or
- (8) Other aquaculture leases held by, or applied for, by this lease applicant.

In an order dated February 4, 2016, the ALJ granted DNR's motion in limine except as to item number one. The ALJ's ruling provided in pertinent part:

I denied the Motion as to item number 1, above, and granted it as to the other items. As stated in the ruling on Historic Sotterley's Motion for Summary Judgment, Sotterley's historical and cultural significance is not in dispute, but is also generally not relevant. The Protestants will be permitted to present factual evidence concerning the impact of the proposed lease on Historic Sotterley and its mission, but such evidence may not be speculative. In other words, testimony about what might happen, or what could happen, or what archeological treasures might be found in Sotterley Creek will not be allowed. Expert testimony about Historic Sotterley and its mission is also excluded.

Finally, the ALJ denied all of the motions for summary judgment, and the case proceeded to a merits hearing.

The ALJ conducted a three-day contested case hearing in April 2016. Because the parties stipulated that the proposed lease met all statutory requirements for a water column lease, the sole issue before the ALJ was whether DNR abused its discretion in failing to deny the lease based on reasonable cause to protect the public welfare.⁴

During the hearing, Historic Sotterley presented a large volume of evidence regarding the “historical, cultural, educational and archeological significance of Historic Sotterley.” DNR objected to this evidence on relevance grounds, but the ALJ overruled the objections, believing it important to give the protestants an opportunity to present relevant evidence of any harm to the public welfare that might occur if the lease were granted. After considering the evidence presented by Historic Sotterley about its mission and the potential consequences of Hollywood’s requested lease, the ALJ determined that “the site has great historical, archeological, educational, and cultural significance that would *not* be greatly impacted by the proposed lease.” (Emphasis added).

In determining the effect on aquaculture that could potentially be caused by granting the proposed lease, the ALJ relied on testimony from DNR’s experts, John Turgeon of the Maryland Environmental Trust (“MET”) and Troy J. Nowak of the Maryland Historical Trust (“MHT”). Mr. Turgeon expressed no concerns about the lease. Mr. Nowak

⁴ Md. Code (2009, 2012 Repl. Vol.), § 4-11A-09(d)(4) of the Natural Resources Article provides that: “The [DNR], as it considers necessary to protect the public health, safety, and welfare, may: (i) Deny a lease application for reasonable cause; or (ii) Include any conditions in a lease.” It was pursuant to this section that the protestants argued that DNR should have denied Hollywood’s lease application.

characterized all aquaculture as “small-scale activity,” and testified that after considering possible visual and audible disturbance, as well as potential disruption to the creek bottom, the proposed lease would have a “small impact.” Mr. Nowak opined that, while the oyster cages might be visible from the cliffs or from other areas at extreme low tide, the lease would not impact the viewshed of the historic property. In Mr. Nowak’s view, granting the lease would not compromise MHT’s mission to preserve historic properties.

The ALJ also received testimony from the protestants’ experts. Dr. Julia A. King, a professor of anthropology, opined that an aquaculture lease would disturb the underwater archaeology, have a negative visual impact on the viewshed, and could potentially introduce unwanted sounds. Dr. King testified that although the underwater contents of the proposed lease area are unknown, any activity on the creek bed could affect potential archaeological sites. Dr. King, however, emphasized that because her expertise is in land archaeology, she would “defer to the underwater archeologist” concerning the importance of any sites in the creek. Donald Shomette, an expert in underwater archaeology, testified that artifacts had been found in Sotterley Creek, but acknowledged that no archaeological sites had been identified in the proposed lease area.

In his written opinion dated May 17, 2016, the ALJ noted the speculative nature of much of the protestants’ evidence regarding the potential impact of aquaculture in Sotterley Creek. Instead, the ALJ was persuaded by DNR’s experts that the “actual impact of granting the lease” would be “minimal.” The ALJ therefore determined that the protestants had failed to demonstrate that DNR abused its discretion in declining to reject Hollywood’s

lease application to protect the public health, safety, or welfare. The ALJ further concluded that DNR's decision to grant the Hollywood lease "was not arbitrary or capricious, but was based upon a comprehensive evaluation of relevant facts."

On June 15, 2016, the protestants filed a Petition for Judicial Review in the Circuit Court for St. Mary's County. In a written opinion dated March 2, 2017, the circuit court affirmed the ALJ's decision. Appellants noted this appeal.

DISCUSSION

I.

Appellants caption their first argument as follows: "By granting [DNR's] Motion in Limine, the ALJ improperly excluded relevant evidence pertaining to the determination of 'public welfare' as it applies to the review of [Hollywood's] aquaculture leases." Despite our careful review of the text of appellants' argument on this issue, we are unable to discern precisely what evidence appellants contend was improperly excluded. In fact, appellants fail to identify, in this section of their brief, even one instance where the ALJ improperly excluded evidence, expert or otherwise.

As best we can tell, appellants' core argument is reflected in the following statement contained in their brief: "Because the Administrative Law Judge had an opinion that severely restricted the scope of what would be 'relevant evidence' in his mind, the testimony provided by [appellants] of experts and a former member of the House of Delegates *did not carry the weight their testimony deserved.*" (Emphasis added). Appellants proceed to discuss expert testimony regarding the importance of the Historic

Sotterley viewshed and the impact that a commercial oyster operation would have on the area, as well as conservation easements which address the maintenance of the viewshed and adjacent waters. According to appellants' experts, a commercial oyster operation would substantially affect Historic Sotterley's viewshed. In contending that the ALJ failed to give appellants' experts' testimony the *weight* it deserved, appellants seem to be arguing that the ALJ's decision was unsupported by substantial evidence, not that the ALJ excluded relevant evidence.

Our review of an administrative decision is identical to that of the circuit court, which the circuit court in this case correctly articulated:

Our role "in reviewing [the final] administrative agency adjudicatory decision is narrow." *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67, 729 A.2d 376 (1999) (citing *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226 (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, 729 A.2d 376 (quoting *United Parcel*, 336 Md. at 577, 650 A.2d 226). "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, 9 A.3d 534 (2010) (quoting *People's Counsel v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007)).

Diffendal v. Dep't of Nat. Res., 222 Md. App. 387, 404 (2015). "We treat the ALJ's [factual conclusions] as prima facie correct and presumed valid, as 'it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.'" *Lawson v. Bowie State Univ.*, 421 Md. 245, 256 (2011) (quoting *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1999)).

Here, the ALJ considered expert testimony from both sides, and found the testimony of Mr. Turgeon from MET and Mr. Nowak from MHT more persuasive than the testimony of the protestants' experts. It was within the ALJ's province to resolve the conflicts in the expert testimony, and based on the record, we hold that a reasoning mind could have reasonably reached the same conclusion as the ALJ. *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 18 (2010).

II.

Appellants also argue that the ALJ erred by preventing pretrial discovery of Hollywood's other existing leases and pending lease applications. In their view, precluding appellants from obtaining copies of Hollywood's existing leases and lease applications improperly limited their ability to explore whether DNR acted arbitrarily and capriciously in granting the Sotterley Creek lease. Appellants further contend that they were prevented from exploring the cumulative effect of Hollywood's existing aquaculture leases. Both contentions lack merit.

A. Whether the ALJ Erred by Preventing Pretrial Discovery of Hollywood's Existing and Pending Leases

Appellants contend that the ALJ erred by preventing them from obtaining discovery of Hollywood's other existing and pending aquaculture leases, which the ALJ determined

were not relevant to his analysis of the Sotterley Creek lease.⁵ According to appellants, evidence of Hollywood's other leases would have been relevant to show "an inconsistency in the application of the DNR's discretion."

As a preliminary matter, we note that, in the administrative proceedings, appellants never specifically requested any documentation concerning Hollywood's other aquaculture leases. Historic Sotterley requested DNR's entire file on Hollywood's two existing oyster leases and subsequently filed a motion to compel when DNR refused to provide it. Appellants, however, did not similarly request discovery of documents related to Hollywood's other leases,⁶ nor have they directed us to that portion of the record where they adopted Historic Sotterley's argument that such evidence was relevant.⁷ We therefore

⁵ For the first time in their reply brief, appellants argue that they also should have been permitted to obtain discovery of Hollywood's unsuccessful attempt to place a lease in Hog Neck Creek next to Greenwell State Park. Not only did appellants fail to raise this in their opening brief, but we have found no indication in the record that this issue was ever raised before the ALJ or the circuit court. Even assuming *arguendo* that this issue had been raised before the ALJ, appellants have failed to provide reference to the record as Rule 8-504(a) requires. "[W]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 201 (2008) (quoting *von Lusch v. State*, 31 Md. App. 271, 282 (1976), *rev'd on other grounds*, 279 Md. 255 (1977)). Accordingly, we decline to address this issue. Md. Rule 8-131(a).

⁶ Our review of the record indicates that appellants requested "[a]ny and all documents in [DNR's] possession, custody, or control relating to [Hollywood] or application for the Proposed Lease," but did not specifically request documentation related to Hollywood's existing or pending leases.

⁷ We surmise that appellants' confusion on this issue may be due to the fact that Historic Sotterley's attorney in the administrative proceedings now represents appellants in this appeal.

conclude that appellants waived this argument. *See Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 444 (2015) (holding that physician waived argument that the ALJ should not have excluded evidence by failing to raise issue at the agency level).

Assuming *arguendo* that appellants' argument was not waived, the ALJ did not abuse his discretion in excluding documentation of Hollywood's other leases. Under Md. Code (1984, 2014 Repl. Vol.), § 10-213(d) of the State Government Article ("SG"), an ALJ may exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious. We note that "evidentiary rulings, particularly those hinging on relevance, are entrusted to the sound discretion of the ALJ." *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 386 n.17 (2013). Because these rulings are entrusted to the ALJ,

We do not disturb such rulings absent an abuse of the ALJ's discretion. *See Maryland State Police v. Zeigler*, 330 Md. 540, 557, 625 A.2d 914 (1993) (stating that "as long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts").

Solomon v. State Bd. of Physician Quality Assur., 155 Md. App. 687, 705-06 (2003).

In the instant case, the ALJ expressly followed our mandate in *Diffendal*: "If the statutory criteria [for an aquaculture lease] are met, the only basis on which a lease application may be denied is 'for reasonable cause' to protect 'the public health, safety, and welfare.'" 222 Md. App. at 409-10. Given the parties' stipulation that Hollywood's lease satisfied all statutory criteria, whether DNR was inconsistent in its consideration of the other leases has minimal significance, if any, in determining whether there was reasonable cause to deny the Sotterley Creek lease to protect the public health, safety, and

welfare. Accordingly, the ALJ's decision to exclude evidence of other leases fell squarely within the sound discretion entrusted to him as the gatekeeper of relevant evidence.

Our decision in *Neutron Prod., Inc. v. Dep't of the Env't*, 166 Md. App. 549 (2006) is also instructive. There, the Maryland Department of the Environment ("MDE") assessed penalties on Neutron, a nuclear facility. *Id.* at 561. In an effort to establish that the fines against it were unduly excessive, Neutron attempted to introduce evidence of MDE's enforcement actions against other licensees. *Id.* at 595-96. Similar to appellants in the instant case, Neutron sought to compare the agency's exercise of discretion in its case with the agency's exercise of discretion in other, potentially comparable cases. The ALJ rejected this evidence as irrelevant, stating that "[t]he fact[s] and circumstances of other cases could very well differ from [those] presented in this case." *Id.* at 596. On appeal, we held that it was not an abuse of discretion for the ALJ to exclude the evidence. *Id.* at 604. We reasoned that:

Because the ALJ was not persuaded as to the factual similarity of the cases offered for comparison, and given the wholly disparate procedural postures of the cases, the ALJ, in his discretion, appropriately rejected Neutron's request to present evidence of prior settlement agreements with radioactive licensees. . . . The flip side is also true. Had the [ALJ] been willing to consider such evidence, we are satisfied that MDE could not be heard to complain, because of the wide discretion afforded to the fact-finder in regard to relevancy determinations.

Id. at 604-05.

Here, we note that appellants were fully aware that Hollywood had two existing aquaculture leases in nearby Hog Neck Creek, yet they made no proffer that the Hog Neck Creek leases were factually similar or comparable to the Sotterley Creek lease. Given the

fact that appellants' principal argument before the ALJ was essentially that, based on historical concerns unique to Sotterley Creek, DNR should examine Hollywood's application *differently* from prior approvals, we are unpersuaded by appellants' implication that Sotterley Creek would be comparable to other lease sites. Accordingly, we hold that the ALJ was well within his broad discretion in excluding documents related to Hollywood's two existing leases as irrelevant.

Similarly, we hold that it was within the ALJ's discretion to exclude evidence of Hollywood's lease applications that were still pending at the time of the hearing.⁸ Appellants fail to articulate how an application for an aquaculture lease—which at the time of the hearing DNR had not even decided—would be relevant to the ALJ's consideration of the Sotterley Creek lease. We therefore conclude that the ALJ did not abuse his discretion in precluding evidence of Hollywood's pending lease applications.

B. Whether Appellants Should Have Been Able to Explore the “Cumulative Effect” of Hollywood’s Aquaculture Leases

Appellants argue that they were “not allowed to explore the cumulative effect” of Hollywood's existing operations. This contention is belied by the record, which reveals that appellants were permitted to introduce testimony regarding the impact of Hollywood's

⁸ To the extent that appellants ask us to substantively consider documents related to Hollywood's four pending lease applications, which were not in the record before the ALJ, we decline to do so. “It is the function of the reviewing court to review only the materials that were in the record before the agency at the time it made its final decision.” *Dep’t of Labor v. Boardley*, 164 Md. App. 404, 415 (2005). While there is a narrow exception to this rule, “it is limited to evidence of alleged procedural irregularities at the agency level[.]” *Erb v. Md. Dep’t of Env’t*, 110 Md. App. 246, 267 (1996).

existing aquaculture activities in Hog Neck Creek. For example, van Heerden testified extensively about the visual and audible impact of those operations, as well as their effect on boating, fishing, and road traffic. Appellants were also permitted to cross-examine Mr. Turgeon from MET, an expert witness for DNR, about whether he considered Hollywood's existing operations in Hog Neck Creek while evaluating the Sotterley Creek lease. We therefore agree with the circuit court that, even if the ALJ's pretrial ruling did purport to exclude testimony regarding Hollywood's existing aquaculture operations, any error in that regard was harmless because the ALJ actually admitted testimony concerning the effect of Hollywood's other leases.

CONCLUSION

For the foregoing reasons, we hold that the ALJ did not err and, accordingly, affirm the circuit court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.