Circuit Court for Baltimore City
Case No. 24-C-17-006081

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2785

September Term, 2018

GREGORY MOBLEY

v.

MARYLAND DEPARTMENT OF HEALTH

Fader, C.J.,
Graeff,
Nazarian,

JJ.

Opinion by Fader, C.J.

Filed: February 21, 2020

Gregory Mobley, the appellant, was terminated with prejudice from two part-time skilled services positions at two institutions operated by the Maryland Department of Health (the "Department") due to alleged misconduct. He appealed to an administrative law judge ("ALJ"), who upheld the terminations, and then petitioned for judicial review by the Circuit Court for Baltimore City. The circuit court denied Mr. Mobley's petition, and Mr. Mobley appealed. We conclude that Mr. Mobley waived three of the four claims he currently raises on appeal by failing to present them to the administrative agency and that his remaining claim is without merit. We also conclude that substantial evidence supported the ALJ's decision to uphold the terminations and, therefore, will affirm.

BACKGROUND

We begin by outlining the statutory scheme governing administrative appeals of state personnel actions, and then discuss the facts of Mr. Mobley's case.

Statutory Background

As a skilled services employee, Mr. Mobley was covered by Title 11, Subtitle 1 of the State Personnel and Pensions Article,[1] which both "contains a comprehensive administrative appeal process for disciplinary actions" and also "provides for . . . processes that must occur *before* certain disciplinary actions are taken." *Pub. Serv. Comm'n v. Wilson*, 389 Md. 27, 68-69 (2005). Most relevant here, § 11-106 provides that the "appointing authority"—which is the "individual or a unit of government that has the power to make appointments and terminate employment," § 1-101(b)—"is restricted in its

[1] Unless otherwise indicated, all citations to the Annotated Code of Maryland in this opinion are to the State Personnel and Pensions Article (Repl. 2015; Supp. 2019).

ability to take any disciplinary action, including termination, when that action is based on 'employee misconduct.'" *Wilson*, 389 Md. at 69. Section 11-106 reads in pertinent part:

> (a) *Procedure*. — Before taking any disciplinary action related to employee misconduct, an appointing authority shall:
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> (1) investigate the alleged misconduct;
>
> (2) meet with the employee;
>
> (3) consider any mitigating circumstances;
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> (4) determine the appropriate disciplinary action, if any, to be imposed; and
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> (5) give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.
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> (b) *Time limit*. — . . . [A]n appointing authority may impose any disciplinary action no later than 30 days after the appointing authority acquires knowledge of the misconduct for which the disciplinary action is imposed.

By regulation, the appointing authority may "[d]elegate in writing the authority to act on the appointing authority's behalf to any other employee or officer under the appointing authority's jurisdiction." COMAR 17.04.01.04(A). The singular exception identified in the regulation is that the appointing authority "may not delegate the authority to make the final decision regarding disciplinary termination of a nontemporary employee." *Id.* 17.04.01.04(B).

When an employee is disciplined or terminated pursuant to § 11-106, that employee has a right of appeal to the Secretary of Budget and Management, who may "refer the appeal to the Maryland Office of Administrative Hearings ('OAH'), the State's centralized panel of neutral administrative law judges." *Wilson*, 389 Md. at 69 (citing State Pers. & Pens. § 11-110(b)). "If the matter is referred to the OAH," then "the OAH must hold a

hearing on the matter." *Wilson*, 389 Md. at 69. "The hearing is governed by the procedures in the State Administrative Procedure Act ('APA')," §§ 10-201–10-226 of the State Government Article (Repl. 2014; Supp. 2019). *Wilson*, 389 Md. at 69 (citing State Pers. & Pens. § 11-110(c)(2)). "The decision of the OAH is the final agency decision in such matters," *Wilson*, 389 Md. at 69 (citing State Pers. & Pens. § 11-110(d)(3)), and under the APA, the employee may petition for judicial review of that decision in an appropriate circuit court. *See* Md. Code Ann., State Gov't § 10-222(a) & (c) (Repl. 2018; Supp. 2019).

> On judicial review, the court may:
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> (1) remand the case for further proceedings;
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> (2) affirm the final decision; or
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> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> > (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;
> >
> > (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
> >
> > (vii) is arbitrary or capricious.

Id. § 10-222(h).

Factual Background[2]

Mr. Mobley worked for two institutions of the Department: he was employed part-time by the Department's Secure Evaluation & Therapeutic Treatment ("SETT") program,[3] and part-time by the Department's Clifton T. Perkins Hospital Center ("Perkins"). SETT, which is overseen by the Department's Developmental Disabilities Administration ("DDA"), houses intellectually disabled patients, *see* Md. Dep't of Health, *State Residential Centers and Secure Evaluation & Therapeutic Treatment (SETT)*, https://dda.health.maryland.gov/Pages/Facilities.aspx (accessed Feb. 14, 2020); Perkins, which is overseen by the Department's Behavioral Health Administration, "is a maximum-security psychiatric hospital reserved for patients who have committed violent felonies," *State v. Crawford*, 239 Md. App. 84, 101 (2018), or who are "charged with serious crimes," *see also Powell v. Md. Dep't of Health*, 455 Md. 520, 532 (2017). At both facilities, Mr. Mobley worked as a therapeutic recreator, in which capacity he "engage[d] with residents and patients in therapeutic recreational activities."

As part of his work at SETT, Mr. Mobley was trained in Behavioral Principles and Strategies ("BPS"), a curriculum developed by the DDA "to keep people safe when a client

[2] In our discussion of the facts, we "defer to the agency's fact-finding and drawing of inferences" to the extent that "they are supported by the record." *Milliman, Inc. v. Md. State Ret. & Pens. Sys.*, 421 Md. 130, 152 (2011) (quoting *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 14 (2010)).

[3] The SETT program operates at a facility called the Potomac Center. *See* Md. Dep't of Health, *State Residential Centers and Secure Evaluation & Therapeutic Treatment (SETT)*, https://dda.health.maryland.gov/Pages/Facilities.aspx (accessed Feb. 14, 2020). Because the parties consistently refer to the facility as SETT, however, we shall do so as well.

is out of control behaviorally." "BPS . . . teaches that when faced with an aggressive resident, staff should first verbally deescalate and create distance between him/herself and the resident and then, only if the aggression continues, staff should deploy blocking techniques." "BPS also trains [staff] to provide the least restrictive, non-injurious mechanisms of control over aggressive behavior." A similar curriculum, Prevention and Management of Aggressive Behavior ("PMAB"), has been developed by the Behavioral Health Administration for use at Perkins. PMAB "teaches that, absent a life threatening situation, physical intervention by staff on a patient is not to be attempted alone," but only by "at least two staff working as a team." Mr. Mobley had been trained in PMAB, as well.

On October 24, 2016, Mr. Mobley was on duty in the lobby at SETT when he was confronted aggressively by a patient, A.S. Mr. Mobley "failed to create distance" between himself and A.S., and A.S. "threw a punch at [Mr. Mobley]." Mr. Mobley "responded by punching [A.S.] back, hitting [A.S.] on the left side of the face," which is not permitted by BPS or PMAB. A.S. "then shoved [Mr. Mobley] down to the floor and repeatedly punched him in the head."

Two SETT police officers responded and "requested multiple times that [Mr. Mobley] disengage and leave the building so that the officers could intervene and deescalate [A.S.]." Mr. Mobley failed to leave the building and "continued to fight [A.S.], . . . hit[ting] [A.S.] two more times in the head." "The altercation escalated into a tug-of-war situation where[] some individuals were pulling and trying to disengage [Mr. Mobley] while others were trying to disengage [A.S.]"

Eventually, Mr. Mobley and A.S. were separated, but Mr. Mobley continued to "disregard[] all directions and requests for him to leave the building." When A.S. returned to the lobby shortly thereafter, he and Mr. Mobley "ended up on the floor, fighting again." "Staff again had to separate the two and they had to forcibly usher [Mr. Mobley] out of the facility, after he refused to exit at the request of the police officers."

Once he had been removed from the building, Mr. Mobley "attempted to push past" one of the police officers "in an effort to attempt to regain entry." The officer and other staff members blocked Mr. Mobley from reentering. Mr. Mobley "was argumentative and belligerent" in response. "Four staff members were needed to prevent [Mr. Mobley] from regaining entry."

The entire incident was recorded from multiple angles by SETT's security cameras.

The SETT Investigation

On November 2, 2016, Commanding Officer Patrick L. Morris of the DDA/SETT Police Department asked Officer Robert Patton—a former Baltimore homicide detective with over 30 years' experience—to investigate the fight between Mr. Mobley and A.S. Officer Patton read written statements and police incident reports produced by witnesses to the incident, interviewed the two police officers present during the altercation, and conducted a frame-by-frame review of the security camera footage. In a report dated November 7, 2016, Officer Patton stated that although A.S. "was the initial physical aggressor," "Mr. Mobley failed to utilize his Behavioral Principles and Strategies training" to deescalate and instead "engage[d] in full combat" with A.S., which led to him "punching patient [A.S.] three times in the head." Officer Patton also determined that Mr. Mobley

"was deliberate in his failure . . . to disengage and leave the facility." Ultimately, Officer Patton concluded that "Mr. Mobley acted in a reckless, belligerent and unprofessional [manner] that [was] highly unacceptable" and "placed the entire SETT facility in danger." Commanding Officer Morris forwarded Officer Patton's report to Robin L. Weagley, the Chief Executive Officer of SETT.

Ms. Weagley also received a report written by Jared Blakeslee, a health and safety officer at SETT who trains staff in BPS. Mr. Blakeslee reviewed the security camera footage and concluded that after being struck by A.S., Mr. Mobley "d[id] not appear to follow any Behavioral Principles and Strategies [ ] procedures." Mr. Mobley "str[uck] at the resident, which is not trained in BPS"; he "grab[bed] the resident and [did] not let go, which in the fashion it occurred, is not a BPS restraint"; upon reencountering A.S. after their initial separation, Mr. Mobley's "hands immediately move[d] into a fighting posture, which is not a BPS technique"; and he "grapple[d] the resident and slam[med] him to the ground, which is not a BPS technique." Mr. Blakeslee also noted that Mr. Mobley "appear[ed] to not want to leave the area, as demonstrated by . . . not following prompts and requests of police officers and co-workers, which is not a BPS technique," and that he "required co-workers to pull [him], using full force, to separate him from the resident, which is not trained in BPS." Mr. Blakeslee stated that he "did not observe BPS techniques being demonstrated by [Mr. Mobley] throughout the video," and that Mr. Mobley "appeared to be engaged in the altercation as opposed to be attempting to stop the aggressive behavior and maintain the safety of all involved."

As part of SETT's investigation, Mr. Mobley attended a mitigating circumstances conference with Cystale Dunham, SETT's human resources director. According to Ms. Dunham's notes of the conference, Mr. Mobley "denie[d] he punched client A.S." and insisted that he "use[d] [ ] a forearm block." He also denied body slamming A.S. Finally, Mr. Mobley insisted that "he was not instructed by anyone to leave the premises" after the initial fight and "was not trying to get back into the building" once he was escorted off the premises.

Ms. Dunham then recommended to Ms. Weagley that Mr. Mobley "be terminated." Ms. Weagley accepted Ms. Dunham's recommendation and sent a Notice of Termination to Mr. Mobley, dated November 18, 2016, which terminated Mr. Mobley's employment with prejudice effective the same date. The notice stated that Mr. Mobley was being terminated for violating § 11-105(1) & (8) of the State Personnel and Pensions Article;[4] COMAR 17.04.05.01(A)(1);[5] and COMAR 17.04.05.04(B)(1)-(4).[6] It explained that "Mr.

[4] Section 11-105 provides in pertinent part: "The following actions are causes for automatic termination of employment: (1) intentional conduct, without justification, that: (i) seriously injures another person; (ii) causes substantial damage to property; or (iii) seriously threatens the safety of the workplace; . . . [and] (8) wantonly careless conduct or unwarrantable excessive force in the treatment or care of an individual who is a client, patient, prisoner, or any other individual who is in the care or custody of this State[.]"

[5] COMAR 17.04.05.01(A) provides in pertinent part: "Disciplinary action may be taken because of an employee's: (1) Unsatisfactory performance of duties and responsibilities, as governed by State Personnel & Pensions Article, §§ 11-101, 11-102, 11-103(a), (c), and (d), 11-104, 11-105, 11-107 – 11-113, and 11-304, Annotated Code of Maryland[.]"

[6] COMAR 17.04.05.04(B) provides in pertinent part: "An employee may be disciplined for engaging in any of the following actions: (1) Being negligent in the performance of duties; (2) Engaging in intentional misconduct, without justification, which

Mobley did not follow Behavioral Principles and Strategies [ ] procedures" during his encounter with A.S., which "caused a serious disruption of the SETT and its clients." The notice concluded: "After review [of] the various investigative reports, the video of the incident, Mr. Mobley's mitigating circumstances, and his entire personnel record, it is determined that termination is the only appropriate disciplinary action."

The Perkins Investigation

At some point after the incident at SETT, Mr. Mobley told Jazmine Rich, Perkins's human resources director, that "he had been injured at his other job." After contacting Ms. Dunham and learning of the altercation at SETT, Ms. Rich began her own investigation on behalf of Perkins. Ms. Rich obtained a copy of the security camera footage of the SETT incident as well as the Patton Report. She also "reviewed . . . [Mr. Mobley's] performance evaluation" and "sp[oke] with his director briefly in regards to his behavior there working in the department."

According to Ms. Rich, she attempted to hold a mitigating circumstances conference with Mr. Mobley, but "he didn't make himself available." Ms. Rich stated that she had scheduled a mitigating circumstances conference with Mr. Mobley for November 22, 2016 at 11:00. When Mr. Mobley did not appear at the scheduled time, she attempted to contact him by telephone, but he did not answer. Ms. Rich also recalled that she and Mr. Mobley had spoken earlier in November, at which time she had "reiterated to him that [they] needed

injures another person, causes damage to property, or threatens the safety of the work place; (3) Being guilty of conduct that has brought or, if publicized, would bring the State into disrepute; [and] (4) Being unjustifiably offensive in the employee's conduct toward fellow employees, wards of the State, or the public[.]"

to have a mitigating [circumstances] conference" and that "it [was] scheduled for . . . the 22nd."

At the end of her investigation, Ms. Rich concluded that Mr. Mobley "was a very good employee." However, "considering the circumstances, [she] did say that termination would be appropriate, and [she] told that to [Perkins's] CEO, John Robison." Mr. Robison accepted Ms. Rich's recommendation and sent a Notice of Termination to Mr. Mobley dated November 22, 2016, which terminated Mr. Mobley's employment with prejudice effective the same date. The notice stated that Mr. Mobley was being terminated for violating § 11-105(8) and COMAR 17.04.05.04(B)(2)-(4), due his failure to "follow appropriate procedures" during the altercation at SETT. The notice concluded: "After reviewing the various reports of the incident, the video of the incident, Mr. Mobley's personnel record and his mitigation, it is determined that termination is the appropriate disciplinary action."

The Administrative Proceedings

Mr. Mobley timely appealed both terminations pursuant to § 11-110(a)(1). The appeals were forwarded to OAH for contested case hearings. On October 12, 2017, an ALJ consolidated the cases and conducted a hearing on both. Mr. Mobley represented himself.

At the hearing, neither party made an opening statement. The Department presented testimony from Commanding Officer Morris; Mr. Blakeslee, who was qualified as an expert on BPS; Ms. Dunham; Vivian Pompey, the director of education and training at Perkins, who was qualified as an expert on PMAB; and Ms. Rich. Mr. Mobley presented testimony from himself and David O'Neal, residential director for the SETT program. The

Department submitted the following exhibits: (1) a notice of an award of accidental disability retirement benefits to Mr. Mobley; (2) the Patton Report; (3) the Blakeslee Report; (4) Ms. Dunham's notes from her mitigating circumstances conference with Mr. Mobley; (5) incident reports from the two SETT police officers who witnessed the incident; (6) a report by Ms. Pompey regarding Mr. Mobley's failure to use proper PMAB techniques throughout the encounter; (7) the two Notices of Termination; (8) written statements by other staff members who witnessed the incident; and (9) a flash drive containing the security camera footage of the incident. The ALJ accepted into evidence one exhibit from Mr. Mobley, a letter from Mr. O'Neal conveying his opinion about the incident.

The Department played the security camera footage at several points throughout the hearing and authenticated it through Ms. Dunham. Mr. Mobley also referred repeatedly to the security camera footage during his questioning and testimony. Because the footage was being played from a flash drive, however, the Department retained the flash drive itself until after its closing argument, when the Department handed the flash drive to the ALJ for inclusion in the record.

When it was time for Mr. Mobley's closing argument, he attempted to introduce into evidence two written statements that had not previously been discussed or authenticated by any witness. The Department objected, and the ALJ sustained that objection, telling Mr. Mobley:

> You closed your case, you don't have a witness to offer these documents. How are you going to authenticate them? You don't have the people there

> to authenticate them to begin with, so it wouldn't be appropriate for me to accept them at this time since you've already close[d] your case.

The ALJ further explained why there was no inconsistency between her treatment of the Department's flash drive and Mr. Mobley's new written statements:

> With respect to the tape, it was understood that I was going to accept that as soon as [Department's Counsel] . . . closed down the computer. So the exhibit is admitted, the tape that I watched multiple times today, and so that's admitted . . . .

Mr. Mobley did not say anything in response.

Mr. Mobley then made the following closing statement:

> MR. MOBLEY: The allegation of, charge of wantonly careless conduct is a far stretch for the management of the Department to extending to the disciplinary action of termination. I didn't see that there was any witness statement or video that raised the behavior on that day on my part as classified by COMAR, wantonly careless conduct.
>
> I do believe that there was a number of inconsistent statements that were made by expert witnesses that do not coincide with what is in the video, both expert witnesses, i.e., Mr. Blakeslee, Ms.—
>
> [DEPARTMENT'S COUNSEL]: Pompey.
>
> Mr. MOBLEY: Ms. Pompey, as well as the officer. The statements that were documented by the officer of 20 years states specifically that I used the appropriate BPS techniques through this situation. It was validated by Ms. Pompey and it was documented in my statement, that the techniques that were used were appropriate.
>
> At this point, I pretty much would end my case, and that's the end of it.

The ALJ affirmed the Department's Notices of Termination by written decision dated November 6, 2017. In making findings of fact, the ALJ explicitly relied on the security camera footage and rejected Mr. Mobley's account, which the ALJ found to be "self-serving," "inconsistent with all the contemporaneous witness statements," and

"completely inconsistent with" the footage. The ALJ also relied on the expert testimony at the hearing to conclude that "[Mr. Mobley]'s behavior violated the principles of BPS and PMAB, which are designed to maintain the safety and security of residents/patients as well as staff at SETT and Perkins." The ALJ emphasized:

> Particularly in light of the setting, a facility housing developmentally disabled persons, this kind of violent behavior on behalf of a staff member is unjustified, highly risky and completely unprofessional. As a staff member, [Mr. Mobley]'s primary responsibility is the care and supervision of the residents at the center. It is reasonable for Management to expect him to be able to redirect and deescalate resident behavior without engaging in assaultive physical conduct. His out-of-control behavior could have provoked other residents to also become aggressive, and could have instigated an even more dangerous situation, particularly since staff members were redirected to subduing [Mr. Mobley], and were therefore not available to attend to any residents who might be acting out. [Mr. Mobley]'s behavior endangered the entire facility.

The ALJ found that Mr. Mobley's conduct violated (i) § 11-105(1), because "it was intentional, not justified and seriously threatened the safety of the facility"; (ii) § 11-105(8), because it "was wantonly careless" and entailed "excessive force, in violation of the BPS principles . . . [and] PMAB principles"; (iii) COMAR 17.04.05.04(B)(1), because "ignor[ing] BPS and PMAB principles designed to ensure the safety of the persons in the facility . . . constitute[d] negligence in the performance of duties"; (iv) COMAR 17.04.05.04(B)(2), because it "was intentional, without justification and threatened the safety of the workplace"; (v) COMAR 17.04.05.04(B)(3), because it "would bring the State into disrepute, if publicized"; and (vi) COMAR 17.04.05.04(B)(4), because it "was

unjustifiably offensive towards fellow employees and the residents of the facility."[7] Accordingly, the ALJ held that the Department "properly terminated [Mr. Mobley] for misconduct in the performance of his duties on October 24, 2016."

Mr. Mobley timely petitioned for judicial review in the Circuit Court for Baltimore City pursuant to § 10-222 of the State Government Article. *See* Md. Rule 7-203(a)(2). The court denied the petition on September 13, 2018, and Mr. Mobley timely appealed.

DISCUSSION

Mr. Mobley raises a number of objections to his terminations. He contends: (i) he was not terminated by the "appointing authorities," in violation of § 11-106(a) of the State Personnel & Pensions Article; (ii) in neither case did the appointing authority meet with him or personally consider mitigating circumstances, in violation of § 11-106(a)(2)-(3); (iii) his notice of termination from Perkins was untimely because he received it on the effective date of his termination, in violation of § 11-106(b); and (iv) the ALJ deprived him of a fair trial by refusing to permit him to enter evidence during closing argument despite allowing the Department to do so.

The Department responds that Mr. Mobley waived at least the first three arguments by failing to present them to the agency. Furthermore, the Department adds, even if we consider Mr. Mobley's arguments, they are without merit. We agree with the Department on both counts. We also conclude that substantial evidence supported the ALJ's decision

[7] The ALJ did not address COMAR 17.04.05.01(A)(1), which also was cited in the SETT Notice of Termination.

to uphold Mr. Mobley's terminations and, therefore, we will affirm the circuit court's decision denying Mr. Mobley's petition for judicial review.

I. MR. MOBLEY WAIVED HIS PROCEDURAL OBJECTIONS TO HIS TERMINATIONS BY FAILING TO PRESENT THEM TO THE AGENCY.

Because Mr. Mobley failed to raise any of his procedural objections to his terminations during the administrative proceedings, we conclude that those objections have been waived. "The Court of Appeals has repeatedly emphasized that a reviewing court 'may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.'" *Mesbahi v. Md. State Bd. of Physicians*, 201 Md. App. 315, 333 (2011) (quoting *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001)); *see also Ins. Comm'r v. Equitable Life Assur. Soc'y of U.S.*, 339 Md. 596, 634 (1995) ("[J]udicial review of administrative decisions is limited to the issues or grounds dealt with by the administrative agency."). "A contrary rule 'would allow the courts to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency,'" *Chesley v. City of Annapolis*, 176 Md. App. 413, 426 n.7 (2007) (quoting *Delmarva Power & Light Co. v. Public Serv. Comm'n*, 370 Md. 1, 32, *reconsideration granted on other grounds*, 371 Md. 356 (2002)), thereby "usurp[ing] the agency's function" and "depriv[ing] the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action," *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 519 (1978) (quoting *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)). Thus, "[a] party who [alleges] . . . that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way

or at any time during the course of the administrative proceeding, may not raise an objection for the first time in a judicial review proceeding." *Cicala v. Disability Rev. Bd.*, 288 Md. 254, 261-62 (1980).

Here, Mr. Mobley never raised with the ALJ his current arguments that the appointing authorities did not themselves make the decisions to terminate him, that those authorities did not meet with him or consider mitigating circumstances, or that his Perkins termination was untimely. When he had the opportunity to identify the bases for his challenge in closing argument, he focused exclusively on the sufficiency of the evidence to support the charges against him, arguing that the record was insufficient to demonstrate that he had engaged in "wantonly careless conduct," that witnesses had made inconsistent statements, and that one witness had validated that he had "used the appropriate BPS techniques through this situation." At no time did Mr. Mobley argue before the ALJ any of the procedural deficiencies he now raises on appeal.

"It is not our function as an appellate court to consider issues not raised, considered or decided in the [proceedings] below." *HNS Dev., LLC v. People's Counsel for Balt. County*, 200 Md. App. 1, 18 (2011) (quoting *Chertkof v. Dep't of Nat. Res., Water Res. Admin.*, 43 Md. App. 10, 17 (1979)). Our role—and that of the trial court—is "particularly [limited] in appeals from administrative bodies," *Chertkof*, 43 Md. App. at 17, where "judicial review . . . is restricted [ ] because of the fundamental doctrine of separation of powers," *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 530 (2003). Out of respect for a co-ordinate branch of government, reviewing courts are "restricted to the record made before the administrative agency," and are "confined to [deciding] whether, based upon the

record, a reasoning mind reasonably could have reached the factual conclusion reached by the agency." *Md. State Ret. & Pens. Sys. v. Martin*, 75 Md. App. 240, 246 (1988). Indeed, the trial court would have committed reversible error had it granted Mr. Mobley's petition for judicial review on the basis of claims that he "had not made . . . during the administrative proceedings." *Md. Reception, Diagnostic & Classification Ctr. v. Watson*, 144 Md. App. 684, 693-94 (2002) ("[H]aving failed to raise the mitigation issue in the course of the administrative proceedings, Watson has waived his claim that mitigating circumstances had not been considered, as required by [§ 11-106(a)(3)]. Consequently, it was reversible error for the trial court to reverse the ALJ's decision.").

Mr. Mobley acknowledges that he did not make directly any of the procedural challenges he has raised on appeal. He contends, however, that he nonetheless preserved those challenges for appeal by asking witnesses questions about the topics. Accepting that position would require us to impose upon an ALJ the obligations to (1) consider each question asked during an administrative hearing to identify whether it might possibly support a claim or defense not actually raised, (2) craft his or her own argument in support of that claim or defense, and then (3) rule on that claim or defense. Were we to do so, the requirement to make arguments at the administrative stage to preserve them for judicial review. We decline to adopt Mr. Mobley's view of preservation.

We are, of course, aware that Mr. Mobley was not represented by counsel during the administrative proceedings. But the fact that he "was representing himself *pro se* does not alter the requirements for preserving an objection for appellate review." *Gantt v. State*, 241 Md. App. 276, 302 (2019); *see also Tretick v. Layman*, 95 Md. App. 62, 86 (1993)

("[T]he procedural, evidentiary, and appellate rules apply alike to parties and their attorneys. No different standards apply when parties appear *pro se*."). Although "we recognize and sympathize with those whose economic means require self-representation, we also need to adhere to procedural rules in order to maintain consistency in the judicial system." *Pickett v. Noba, Inc.*, 122 Md. App. 566, 568 (1998). That is particularly so in the context of judicial review of agency action, where, as we indicated, due regard for the separation of powers "requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusion where supported by evidence." *Martin*, 75 Md. App. at 245 (quoting *Zeitschel v. Bd. of Educ.*, 274 Md. 69, 82 (1975)). Mr. Mobley is "bound to the theory he elect[ed] to pursue . . . before the proper administrative body." *Chertkof*, 43 Md. App. at 16. Therefore, his procedural objections have been waived.

II. EVEN WERE MR. MOBLEY'S PROCEDURAL OBJECTIONS PRESERVED, THEY LACK MERIT.

Had Mr. Mobley's objections been properly preserved, we still would conclude that they are without merit. First, Mr. Mobley argues that he was terminated improperly by someone other than the "appointing authorities." He bases that contention on: (1) testimony that the human resources directors for SETT and Perkins conducted the investigations and concluded that his employment should be terminated; and (2) the absence of direct evidence that the appointing authorities exercised independent discretion before they signed the notices of termination.

Of course, "there is no requirement [in § 11-106] that the appointing authority personally conduct an investigation of alleged misconduct." *Ford v. Dep't of Pub. Safety*

& Corr. Servs., 149 Md. App. 488, 498-99 (2003). Similarly, there is no requirement that the appointing authority arrive at his or her ultimate conclusion without the benefit of recommendations from subordinates. The record reflects that the appointing authorities for SETT and Perkins acted "within the[ir] executive authority" by "delegat[ing] the investigation of employee misconduct," and they were entitled "to rely on such an investigation" in making the ultimate decision to terminate Mr. Mobley. *Watson*, 144 Md. App. at 692. It is undisputed that the appointing authorities took the final actions in terminating Mr. Mobley's employment by signing the notices of termination. Absent any evidence to the contrary, the ALJ was permitted to infer from those actions that the appointing authorities fulfilled their statutory obligation to "determine the appropriate disciplinary action." Mr. Mobley's contention that they may have done so without exercising independent thought is based on nothing more than speculation.

Second, Mr. Mobley contends that the appointing authorities violated Maryland law by failing to consider mitigating circumstances (in both cases) or meet with him (in the case of Perkins) before terminating him. Section 11-106(a)(2)-(3) and COMAR 17.04.05.04(D)(3)-(4) both require the appointing authority—or his or her delegee—to "[m]eet with the employee" and "[c]onsider any mitigating circumstances" before disciplining or terminating the employee for misconduct. COMAR 17.04.05.04(D)(3) adds that an in-person meeting is not required, however, if "the employee is unavailable or unwilling to meet." The Court of Appeals has held that that addendum "adds nothing that is not implicit in the statute" because "[t]he statutory requirement to meet with the employee necessarily assumes a willingness on the part of the employee to meet in a timely

manner with the appointing authority and to make himself/herself reasonably available for that purpose." *Dep't of Pub. Safety & Corr. Servs. v. Donahue*, 400 Md. 510, 531-32 (2007).

Here, Ms. Rich, who conducted the investigation for Perkins, testified that she "was not able to have a mitigating [circumstances] conference with Mr. Mobley because he didn't make himself available." She testified that she had scheduled a mitigation conference with Mr. Mobley for 11:00 on the date on which he was terminated, but he did not show up. When she subsequently called Mr. Mobley, "[h]e didn't answer the phone." Although Ms. Rich could not recall precisely when she had scheduled the meeting with Mr. Mobley, she maintained that it had been scheduled in advance. The ALJ was permitted to credit Ms. Rich's testimony, and to conclude based on it that Mr. Mobley "may be regarded as unavailable to meet with the appointing authority" for purposes of § 11-106(a)(2). *See Donahue*, 400 Md. at 535.

Notwithstanding that Ms. Rich could not hold a mitigating circumstances conference with Mr. Mobley, she nonetheless testified that she considered mitigating circumstances in his record: "I reviewed pertinent information regarding his performance evaluation, I did speak with his director briefly in regards to his behavior there working for the department. He was a very good employee . . . ." Ms. Dunham, who did meet with Mr. Mobley for a mitigating circumstances conference, also testified to her consideration of mitigating circumstances. Thus, to the extent Mr. Mobley contends that mitigating circumstances were not considered, the record in both cases is to the contrary. And to the extent he contends that an appointing authority is precluded from delegating this aspect of

the process, state regulations provide otherwise. *See* COMAR 17.04.01.04. We therefore reject Mr. Mobley's mitigating circumstances contention.

Mr. Mobley's third procedural claim is that his notice of termination was untimely because it was not "given to [him] prior to its effective date." However, he fails to identify any requirement that a notice of termination be provided before the effective date in the notice. Section 11-106(a)(5) requires the appointing authority, or his or her delegee, to "give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights." Section 11-106(b) requires that any disciplinary action be imposed "no later than 30 days after the appointing authority acquires knowledge of the misconduct for which the disciplinary action is imposed." The plain language of these provisions thus requires the appointing authority to provide, by no later than the 30th day after she or he acquires knowledge of the relevant misconduct, a written notice of termination that is effective within that 30-day period. Nothing in the statute requires that the notice be provided at least one calendar day before it is effective.

In arguing to the contrary, Mr. Mobley's reliance on *Department of Juvenile Services v. Miley*, 178 Md. App. 99 (2008), is misplaced. In *Miley*, the Department *mailed* a notice of termination on the 30th day, and purported to make it effective that same date, but the employee did not *receive* the notice until days later. *Id.* at 104. That, we held, "d[id] not satisfy the appointing authority's obligation under § 11-106[(a)(5)] . . . [to] 'give the employee a written notice of the disciplinary action to be taken'" before the expiration of the 30-day period. *Id.* at 106 (quoting *WCI v. Geiger*, 371 Md. 125, 144-45 (2002)). We went on to state that "[h]ad timely notice pursuant to [ ] § 11-106(a)(5) been given to

the employee *before the close of business* on [the 30th day], the disciplinary action would have met the time limit imposed by [ ] § 11-106(b)." *Miley*, 178 Md. App. at 112 (emphasis added). Here, Mr. Mobley does not argue that he did not receive the notices within the 30-day period permitted by § 11-106(b). *Miley* is thus inapposite and the notices of termination were not untimely.

III. THE ALJ DID NOT DEPRIVE MR. MOBLEY OF A FAIR TRIAL.

Along with his unpreserved procedural objections, Mr. Mobley contends that the ALJ unfairly precluded him from introducing the unauthenticated witness statements he sought to introduce during his closing argument. Mr. Mobley argues that the ALJ's decision was especially unfair because she permitted the Department to enter the flash drive containing footage of the incident into evidence during its closing argument, thus "holding the [a]gency to a different standard." (emphasis omitted). We think Mr. Mobley misinterprets the record. We discern no abuse of discretion, and will affirm.

"[E]videntiary rulings . . . are entrusted to the sound discretion of the ALJ," *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 386 n.17 (2013), and "[w]e do not disturb such rulings absent an abuse of the ALJ's discretion," *Solomon v. State Bd. of Physician Quality Assur.*, 155 Md. App. 687, 705 (2003). Unlike courts, "administrative agencies generally are not bound by the technical common law rules of evidence," *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 31-32 (1996), "as long as the relaxed rules are not misapplied in an arbitrary or oppressive manner," *Para*, 211 Md. App. at 382. Thus, in administrative proceedings, "[e]vidence may not be excluded solely on the basis that it is hearsay." State Gov't § 10-213(c). Nevertheless, any "hearsay's admission into evidence [must] observe[]

the basic rules of fundamental fairness," *Para*, 211 Md. App. at 381, for the ALJ "may exclude evidence that is: (1) incompetent; (2) irrelevant; (3) immaterial; or (4) unduly repetitious." State Gov't § 10-213(d). In deciding whether to exclude hearsay evidence on those grounds, the ALJ "must consider the hearsay's reliability and probative value," and "must then consider whether the hearsay's admission contravenes due process." *Para*, 211 Md. App. at 381-82.

As an initial matter, Mr. Mobley reveals a misunderstanding of the record when he tries to draw an equivalence between the Department's introduction of its flash drive and his own attempt to introduce unauthenticated witness statements. The Department initially authenticated the flash drive through Ms. Dunham and announced its intent to offer the drive into evidence during her testimony. The Department did not hand the flash drive over at that time, however, because it intended to play the footage again:

> [DEPARTMENT'S COUNSEL]: . . . I would like to move the thumb drive or if you prefer, the CD into evidence, for the video.
>
> JUDGE: However you prefer.
>
> [DEPARTMENT'S COUNSEL]: I'll give you the thumb drive.
>
> JUDGE: Okay. So, do you need the video anymore?
>
> [DEPARTMENT'S COUNSEL]: I may just for one more witness, so at the end I'll make sure that you get it.
>
> JUDGE: Well, you have to offer it. I can't do anything with it until you offer it.
>
> [DEPARTMENT'S COUNSEL]: Okay, so I'll do that at the end, but I will ask Ms. Dunham to authenticate how we got the thumb drive.
>
> JUDGE: Okay.

Mr. Mobley did not object to that procedure,[8] *see Tretick*, 95 Md. App. at 69 ("The opposing party must raise a violation of a rule in order for it to be rectified."), and, indeed, he referred to the security camera footage himself at several points during the hearing. When the Department later offered the flash drive into evidence as previously discussed, the ALJ accepted it without objection.

Conversely, when Mr. Mobley sought to introduce two witness statements at the outset of his closing argument, and the Department objected, the ALJ offered two separate reasons for rejecting the statements: (1) Mr. Mobley had "closed [his] case" at the time he offered the evidence, and (2) he "d[id]n't have a witness to offer these documents" or "to authenticate them." With respect to timing, although the ALJ had discretion to accept additional evidence after the parties had initially completed their evidentiary presentations, *see Md. State Police v. Zeigler*, 330 Md. 540, 557 (1993), we cannot say she abused her substantial discretion in refusing to do so. "[A]s 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."

[8] One might argue—though Mr. Mobley has not—that because Mr. Mobley was unrepresented by counsel before the ALJ, he may not have understood the need to object. As we indicated above, however, Mr. Mobley's "obligation to follow procedural guidelines [was] no less simply because he proceed[ed] *pro se*." *Dep't of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 405 (1999). In any event, Mr. Mobley represented himself fairly sophisticatedly at the hearing: he successfully objected at one point to the Department's leading questioning, and he interrogated one of the Department's proposed expert witnesses before consenting to that witness's qualification as an expert. So far as the record shows, Mr. Mobley understood his responsibility to object to the introduction of evidence and chose not to do so.

Id. We identify no such violation in the ALJ's decision not to accept additional evidence that had not been presented before closing arguments.

Similarly, although a lack of witness authentication is not an absolute bar to the introduction of evidence in an agency hearing, we cannot say the ALJ abused her discretion under the circumstances. "[W]hether in judicial or administrative proceedings, the evidence presented must be considered, 'competent.'" *Travers v. Balt. Police Dep't*, 115 Md. App. 395, 412 (1997) (quoting *Dep't of Pub. Safety & Corr. Servs. v. Scruggs*, 79 Md. App. 312, 322 (1989)). "[T]he principal factors considered in the competency analysis" are "the evidence's probative value, reliability, and fairness of its utilization." *Travers*, 115 Md. App. at 413. Authenticity—i.e., "that the matter in question is what its proponent claims," Md. Rule 5-901(a)—is an important component of reliability. *See Cole*, 342 Md. at 30 ("Authenticating the videotape . . . should alleviate concern over reliability and accuracy."); *see generally Sublet v. State*, 442 Md. 632, 655-71 (2015) (explaining the concept of authentication). Here, the purported witness statements were mentioned for the first time after the Department's closing argument, and they were offered without any supporting witness to authenticate them or any opportunity for the Department to cross-examine the declarants.[9] The ALJ did not abuse her discretion in concluding that such

[9] The ALJ erred in not marking the statements Mr. Mobley offered for identification and retaining them within the record for appeal purposes. In many cases, the ALJ's failure to retain a copy of a rejected exhibit for the record would risk precluding effective judicial review, and so might require a remand on that basis. For the reasons described, however, that is not the case here. Due to the nature of the exhibits, the reasons provided by the ALJ for rejecting them, and the procedural posture of the proceedings when they were offered, the erroneous failure to include them in the record does not interfere with our ability to review the decision.

evidence was not "competent" and declining to admit it. *See Travers*, 115 Md. App. at 412-13.

In short, the ALJ admitted the Department's security camera footage because that evidence was timely introduced and sufficiently authenticated. She declined to admit Mr. Mobley's witness statements because they were belatedly introduced and insufficiently authenticated. We discern no abuse of discretion in either decision.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DECISION TO UPHOLD MR. MOBLEY'S TERMINATIONS.

Although Mr. Mobley does not challenge expressly on appeal whether substantial evidence supports the administrative ruling, we conclude that it does. "Substantial evidence review is narrow; the question is not whether we would have reached the same conclusions, but merely whether 'a reasoning mind' could have reached those conclusions on the record before the agency." *Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005) (quoting *Charles County v. Vann*, 382 Md. 286, 295 (2004)). Because "the agency's decision is prima facie correct and presumed valid," we "must review the agency's decision in the light most favorable to it." *Milliman, Inc. v. Md. State Ret. & Pens. Sys.*, 421 Md. 130, 152 (2011) (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)). We "must exercise a 'restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions.'" *Stover v. Prince George's County*, 132 Md. App. 373, 381 (2000) (quoting *State Admin. Bd. of Elec. Laws v. Billhimer*, 314 Md. 46, 58-59 (1988)).

The ALJ found that by engaging in a brawl with A.S., Mr. Mobley "violated the principles of BPS and PMAB, which are designed to maintain the safety and security of residents/patients as well as staff at SETT and Perkins." That conclusion was supported by the Blakeslee Report, the Patton Report, and both expert and lay witness testimony. Although Mr. Mobley testified to the contrary, the ALJ expressly found incredible Mr. Mobley's "account of what happened on October 24, 2016." As the trier of fact, the ALJ "had the opportunity . . . to observe the witness[e]s[']demeanor, judge [their] credibility, and pass upon the weight to be given to [their] testimony." *Loyola Fed. Savs. Bank v. Hill*, 114 Md. App. 289, 306 (1997). We give "great deference" to her "assessment of the credibility of the witnesses." *See Schwartz*, 385 Md. at 554. Thus, we conclude that substantial evidence supports the ALJ's finding that Mr. Mobley violated the principles of BPS and PMAB.

The ALJ also emphasized that Mr. Mobley worked at "a facility housing developmentally disabled persons." Particularly in that setting, the ALJ found, Mr. Mobley's "out-of-control behavior" and "assaultive physical conduct" were inconsistent with his "responsibility [for] the care and supervision of the residents at the center." The ALJ further reasoned that Mr. Mobley's misconduct "could have provoked other residents to also become aggressive" and "instigated an even more dangerous situation," especially because "staff members were redirected to subduing [Mr. Mobley], and were therefore not available to attend to any residents who might be acting out." Accordingly, the ALJ concluded that Mr. Mobley's "behavior endangered the entire facility."

The ALJ's rulings regarding the severity of Mr. Mobley's misconduct are supported by substantial evidence. Multiple witnesses testified that Mr. Mobley failed to deescalate during his fight with A.S. and needed to be restrained by multiple staff members. Similarly, the Patton Report stated that, in the view of the SETT police officers who responded to the incident, "Mr. Mobley's blatant disregard for BPS and safety protocols [ ] endanger[ed] patients, staff members and the overall security and safety of the SETT facility." Officer Patton concluded that "Mr. Mobley acted in a reckless, belligerent and unprofessional man[ner] that [was] highly unacceptable" and "placed the entire SETT facility in danger." The ALJ relied properly on his testimony in upholding Mr. Mobley's terminations.

CONCLUSION

The ALJ's decision was supported by substantial evidence and Mr. Mobley's objections to it are waived or without merit. We therefore will affirm the circuit court's decision to deny Mr. Mobley's petition for judicial review.

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