Circuit Court for Washington County
Case No. 21-C-14-051783

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 663

September Term, 2017

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JAMES MICHAEL DEVINE

v.

MARYLAND STATE DEPARTMENT OF LABOR, LICENSING & REGULATION

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Woodward, C.J.,
Kehoe,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

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PER CURIAM

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Filed: June 14, 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 2014, James Michael Devine, appellant, filed a petition for judicial review (and motions related thereto) in the Circuit Court for Washington County of the dismissal of an administrative proceeding in the Department of Labor, Licensing & Regulation ("the Department"), appellee. After the circuit court ruled in favor of the Department by upholding the decision of the Board of Appeals ("Board"), Devine noted this appeal. For the reasons stated below, we affirm.

## BACKGROUND

In November 2013, a Department claims specialist determined that the Department had overpaid unemployment benefits to Devine in the amount of $1,560. He appealed that decision to the Department's Lower Appeals Division ("the Division"). The Division scheduled a telephone hearing for December 30, 2013, which was postponed, at Devine's request, to January 13, 2014. Devine filed another request to postpone the January 13th hearing, but this was denied. Devine requested postponements of the telephonic hearings because he did not have cellular telephone reception at his worksite in Pennsylvania, and he stated that he could not miss work because he had used leave to attend a prior hearing.[1] Curiously, in his requests for postponement, Devine sought an in-person hearing. Notably, the document informing Devine of the hearing date warned him: "The appeal will be dismissed if the appealing party does not appear on time for the hearing." Additionally, should Devine request a postponement, the notice stated that he was "responsible for

[1] Devine's employer used a "point" system. According to Devine, if he incurred six points, he would be fired, and he had used two points in attending a prior hearing. Attending the January 13, 2014 hearing would have resulted in another two points, pushing him closer to being fired.

determining whether [his] case had been postponed. [The Department] will not notify if the postponement request is denied."

Devine failed to call in for the scheduled hearing or appear in person, and the chief hearing examiner dismissed the appeal. Devine requested to reopen his appeal, which the chief hearing examiner denied. Devine then appealed that decision to the Board, which affirmed the hearing examiner's decision.

On September 12, 2014, Devine filed a petition for judicial review in the circuit court.[2] The court held a hearing on Devine's petition for judicial review of the Board's decision on February 17, 2017. On March 23, 2017, the circuit court entered an order affirming the decision of the Board. Devine then filed a timely motion to alter, along with a motion for summary judgment. The circuit court denied Devine's motions, and he noted this appeal. Devine presents eleven questions for our review, from which we discern one issue: did the circuit court err in affirming the Board's decision.

## DISCUSSION

"When reviewing a decision of an administrative agency, this Court's role is 'precisely the same as that of the circuit court.'" *Stover v. Prince George's Cnty.*, 132 Md. App. 373, 380 (2000) (quoting *Dep't of Health & Mental Hygiene v. Shrieves*, 100 Md. App. 283, 303-04 (1994)). Accordingly, our review is "'narrow. The court's task on

[2] At the same time, Devine filed numerous motions in the circuit court. Included among these was a motion for an extension of time to file administrative mandamus and a motion to stay the decision of the Department. After the circuit court denied those motions, Devine noted an appeal to this Court. We dismissed the appeal because we lacked jurisdiction. *See Devine v. Dep't of Labor, Licensing & Reg.*, No. 2053, Sept. Term 2014 (filed Sept. 24, 2015).

review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency.'" *Id.* at 381 (emphasis omitted) (quoting *UPS v. People's Counsel for Balt. Cnty.*, 336 Md. 569, 576-77 (1994)). "'Rather, [t]o the extent the issues on appeal turn on the correctness of an agency's findings of fact, such findings must be reviewed under the substantial evidence test. The reviewing court's task is to determine whether there was substantial evidence before the administrative agency on the record as a whole to support its conclusions.'" *Capital Commercial Props., Inc. v. Montgomery Cnty. Planning Bd.*, 158 Md. App. 88, 95 (2004) (quoting *Stover*, 132 Md. App. at 381). "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Sugarloaf Citizens Ass'n v. Frederick Cnty. Bd. of Appeals*, 227 Md. App. 536, 546 (2016) (quoting *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 569 (1998)). "We are not bound, however, to affirm those agency decisions based upon errors of law and may reverse administrative decisions containing such errors." *Id.*

The appeal is governed by COMAR 09.32.11.02.[3] Subsection (O)(2) of the regulation provided:

> A request to reopen a case may be granted for the following reasons:
>
> (a) The party received the hearing notice on or after the date of the hearing as a result of:
>
> (i) An untimely or incorrect mailing of the hearing notice; or

[3] We note that COMAR 09.32.11.02 has been amended since the Board's decision in this case. We will cite to the regulations as they appeared at the time that the Board declined to reopen Devine's case.

> (ii) A delay in the delivery of a hearing notice by the United States Postal Service;
>
> (b) An emergency or other unforeseen and unavoidable circumstance that prevented a party from both attending the hearing and requesting a postponement of the hearing; or
>
> (c) A party requested a postponement for the reasons listed in § (O)(2)(a) or (b) [], but it was improperly denied.

When considering Devine's request to reopen the appeal, the chief hearing officer determined that subsection (a) of COMAR 09.32.11.02(O)(2) was inapplicable, and, upon its review, the Board agreed. Devine had received notice of the hearing prior to the hearing date. Subsection (b) of the regulation was, similarly, inapplicable because Devine did not suffer an unforeseen circumstance that kept him from attending the hearing **and** requesting the postponement. Accordingly, subsection (c) of the regulation is unavailing because the agency did not improperly deny a postponement.

We fail to see how the Board's decision was incorrect. Devine did not allege circumstances meeting any of the reasons listed in COMAR 09.32.11.02(O)(2), for which the Board could reopen his dismissed case. Notably, Devine had not demonstrated that he could not use a landline to attend the hearing from his worksite. Additionally, if Devine

wished to attend the hearing in person, he was free to do so.[4] We, therefore, perceive no error on the part of the Board.[5]

Devine also claims that the court erred in denying his motion for summary judgment. We perceive no error, mainly because he filed this motion after the court rendered its judgment, meaning that his motion was untimely. *See* Rule 2-501(a). Furthermore, Devine contends that the court erred in refusing to grant hearings on several of his motions. We agree with the circuit court that those motions were either moot or lacked merit. For example, Devine requested a hearing as to his petition for administrative mandamus. That remedy is, however, available where "review is not expressly authorized by law." Rule 7-401(a). Review of the Board's decision is, however, expressly authorized by law, *see* Maryland Code (1991, 2016 Repl. Vol.), Labor & Employment ("L&E"), § 8-5A-12, and administrative mandamus is inapplicable.

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

[4] *See* COMAR 09.32.11.02(S)(2) ("A party not wishing to present testimony and evidence by telephone has a right to appear at the hearing and present evidence in person at the location from which the telephone hearing is being generated.").

[5] We note that Devine raises several other issues in his brief. Those issues are, however, not properly before us. In deciphering Devine's brief, it appears that Devine believes that the administrative agency retaliated against him and refused to offer him a full and fair hearing to adjudicate his claims. He, however, had an opportunity to attend a hearing, and he chose not to.