

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1838

SEPTEMBER TERM, 2014

MICHAEL MCKINNEY

v.

PERSONNEL BOARD OF ANNE ARUNDEL
COUNTY

Eyler, Deborah, S.,
Nazarian,
Wright,

JJ.

Opinion by Eyler, Deborah, S., J.

Filed: November 20, 2015

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Michael McKinney, the appellant, challenges a decision of the Personnel Board of Anne Arundel County (“the Board”), the appellee, to terminate him from employment with the Anne Arundel County (“the County”) Department of Public Works (“DPW”). McKinney was discharged for conduct unbecoming of his classification or position based on a finding that he had stolen scrap metal belonging to the County. On judicial review, the Circuit Court for Anne Arundel County affirmed the Board’s final decision.

McKinney presents one question for review, which we have rephrased: Was the Board’s decision to terminate him supported by substantial evidence in the record and legally correct? For the following reasons, we shall affirm the Board’s decision.

FACTS AND PROCEEDINGS

McKinney began working for the County on or about August 21, 2008. At all relevant times he was assigned to the Utility Operations unit of DPW as a Utility Support Worker II. His first line supervisor was David Watts, the Utility Administrator for DPW.

On October 25, 2011, around 11:40 a.m., McKinney and a coworker, Gallen Floyd, sold scrap metal to Baltimore Scrap Corporation (“Baltimore Scrap”). McKinney was paid \$378 in cash and Floyd was paid \$341.60 in cash.

The next day, Baltimore Scrap entered the scrap metal sales into the Regional Automated Property Information Database (“RAPID”), a statewide law enforcement database that tracks sales of certain metals, as well as pawn shop sales. Using a drop-down menu on the RAPID web portal, Baltimore Scrap identified the scrap metal sold by McKinney and Floyd as “manhole covers” valued at less than \$500.

Detective Robert Gibson with the Pawn and Precious Metal Squad of the Anne Arundel County Police Department (“AACPD”) monitored RAPID transactions. He investigated the October 25, 2011 transactions and discovered “through a routine check of [McKinney’s] wage[] records” that he was employed by the County.

Detective Gibson spoke to Joseph Ross, an employee at Baltimore Scrap, and obtained copies of the receipts for McKinney’s and Floyd’s transactions. He also informed Ross that, as of October 1, 2011, State law required any person selling “a public utility item” as scrap metal to provide a letter from a business or governmental agency attesting that the seller had permission to make the sale. *See* Md. Code (1992, 2015 Repl. Vol.), §§ 17-1011(d)(3) & 17-1001(e)(1)(ii)8 of the Business Regulation Article (prohibiting a “junk dealer or scrap metal processor” from purchasing “any . . . articles owned by a public utility” without “appropriate authorization from a relevant business or unit of federal, State, or local government specifically authorizing the individual to conduct the transaction”). Ross advised Detective Gibson that he had been unaware of this change in the law.

On October 28, 2011, Detective Gibson called DPW and spoke to David Watts, the Utility Operations Administrator for DPW. Watts confirmed that McKinney was a County employee who worked under his direct supervision. Watts also confirmed that Floyd worked for the County, though he was supervised by a different individual. Detective Gibson advised Watts that McKinney and Floyd each had sold manhole covers

to a local scrap dealer and asked if DPW was missing any manhole covers. Watts told Detective Gibson he would look into the matter and get back to him.

Watts later discovered that between 100 and 150 water meter lids were missing from the Public Works Yard located at 7409 Baltimore Annapolis Boulevard in Glen Burnie (“the Yard”). On October 24, 2011, Watts had been driving through the Yard when he observed a wire metal basket filled with water meter lids sitting next to the scrap metal dumpster. One week later, on October 31, 2011, he observed that the wire metal basket was inside the scrap metal dumpster, along with other scrap metal, but the water meter lids were nowhere to be found.

The water meter lids were made of cast iron and were between 6 and 10 inches in diameter.¹ They were not inscribed to show that they were County property. Since 2010, the County had been in the process of replacing the metal lids with plastic lids. The discarded cast iron water meter lids were to be sold by the County to scrap dealers, with the proceeds used for other County projects. Between July 2011 and June 2012, the County had replaced approximately 1,250 water meter lids.

As DPW employees installed the new plastic lids, the old metal lids were returned to the Utility Operations Meter Shop in Millersville. From there, the lids would be transported in bulk to the Yard in a wire basket. That basket would be placed next to a scrap metal dumpster. At a later point in time, a County employee at the Yard would use

¹ A manhole cover is approximately 24 inches in diameter.

a forklift to dump the wire basket into the scrap metal dumpster. The scrap metal dumpster would then be transported from the Yard by a County Waste Management Services (“WMS”) truck and delivered to a salvage yard to be sold as scrap metal. The salvage yard would issue a check to WMS based upon the weight of the dumpster.

Watts relayed this information and the information provided to him by Detective Gibson to Mark Tyler, the Personnel Officer for DPW. Tyler initiated an investigation into whether McKinney and Floyd had stolen County property. His investigation revealed that 100 to 150 cast iron water meter lids had been transported to the Yard on October 10, 2011. The scrap metal dumpster was not picked up by the WMS until sometime after October 31, 2011. By then, the 100-150 water meter lids were missing.

Tyler investigated whether McKinney and/or Floyd had accessed the Yard during the period between October 24, 2011 (when Watts observed the full wire basket) and October 31, 2011 (when Watts observed that the water meter lids were missing). Between 7 a.m. and 5 p.m. on weekdays, the Yard is unsecured and workers can come and go at will. After hours, however, the Yard only may be accessed via a padlocked gate or via an electronic gate by using an access card.

Tyler discovered that McKinney had accessed the Yard via the electronic gate the night before the two sales of “manhole covers” to Baltimore Scrap. He also had accessed the Yard late at night on October 27, 2011; and he *and* Floyd had accessed the Yard in the early morning hours on October 28, 2011. The dates and times were as follows:

October 24, 2011 10:43 p.m. McKinney

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|------------------|------------|----------|
| October 27, 2011 | 10:34 p.m. | McKinney |
| October 27, 2011 | 11:43 p.m. | McKinney |
| October 28, 2011 | 3:14 a.m. | McKinney |
| October 28, 2011 | 3:56 a.m. | Floyd |

McKinney and Floyd were not on paid status at any of those times. The electronic gate access records did not reveal that the gate had been accessed by any other DPW employee who was not on paid status.

Tyler relayed this information to Detective Gibson. Detective Gibson contacted Ross at Baltimore Scrap and learned that McKinney and Floyd attempted to sell more scrap metal to him on October 28, 2011, but he turned them away because they did not have a letter showing they had permission to sell the items in their possession. Ross also described the “manhole covers” sold to him on October 25, 2011 as being between 6 and 10 inches in diameter.

On February 14, 2012, Detective Gibson and Detective Jennifer Long, also with the Pawn and Precious Metal Squad, met with McKinney and Floyd in an office at the Yard to question them about the missing water meter lids. McKinney was interviewed first. He was asked if he ever had entered the Yard during non-working hours. He responded that he had done so on numerous occasions because he works as a home-improvement contractor and often brings his trash to the Yard dumpster. He stated that he ordinarily did so around 5 p.m. on weekdays or on Saturdays. He was asked about late night visits to the Yard. He replied that if he had a home improvement job, he might

come to the Yard late at night with trash. He denied having ever sold manhole covers or water meter lids for scrap. He stated that he would have needed a permission letter to do so. He stated that he usually sold old cars and their parts. Detective Gibson confronted McKinney with information that Baltimore Scrap had provided showing that he had sold brass, stainless steel, and manhole covers. McKinney stated he had “gotten them from side jobs he had worked at” and that he had “gotten manhole frames from behind Home Depots that were thrown out for trash.” After the detectives advised McKinney that he would not be criminally charged for any thefts in the past, he admitted to having taken “some manhole frames from the scrap metal dumpster in the yard.” He said that Floyd also had taken “frames from the dumpster.” He denied having taken any water meter lids, however. He stated that he did not believe taking the frames had been stealing because they were broken and in the dumpster.

Detectives Gibson and Long also asked McKinney if he ever had been turned away from a scrap metal dealer. He stated that he and Floyd had been turned away on one occasion when they were trying to sell frames they had taken from the scrap metal dumpster. He stated that that was when he had learned that he would need a letter of permission in order to sell frames for scrap. He said he and Floyd discarded the unsold frames by the side of the road.

Detectives Gibson and Long then interviewed Floyd. Floyd admitted to having taken water meter frames from the Yard on three or four occasions. He said that the frames had been inside the scrap metal dumpster. He did not believe he was doing

anything wrong because those items had been thrown away. He denied having taken any water meter lids.

On April 16, 2012, a copy of a 19-page criminal investigation report compiled by Detective Gibson, including his summary of his interviews with McKinney and Floyd, was provided to Tyler. No criminal charges were filed, however.

On June 7, 2012, Tyler met with McKinney and Floyd. Also present at the meetings were Watts and a union representative. During his interview, McKinney initially denied having taken any County property. He later admitted to having taken “some broken up manhole casing/frames . . . from the scrap metal dumpster” at the Yard on seven or eight occasions. He had sold these items to scrap metal dealers and received between \$500 and \$600 in cash.

In his interview, Floyd stated that he had come to the Yard after hours to dump trash and that sometimes McKinney was with him. He denied ever having taken any County property and denied having sold any County property to scrap dealers.

On July 12, 2012, Tyler forwarded an 11-page report detailing his investigation into McKinney and Floyd to Ronald Bowen, the director of DPW. He concluded that there was “sufficient evidence to prove that Michael McKinney and Gallen Floyd took County owned property without permission, sold County owned property to a scrap dealer and received payment by the scrap dealer for the County owned property, which constitutes theft.”

On July 19, 2012, Bowen gave notice to McKinney that he was suspended without pay for five days, effective immediately, “pending a recommendation to discharge [him] from employment.” A pre-discharge hearing was scheduled for July 25, 2012, before the Deputy Director for Utility Operations or his designee. The letter advised that the grounds for the recommendation of discharge arose under section 808 of the County Charter² and DPW Policy B12³; and the grounds were that McKinney had committed “an act on or off duty [that] amount[ed] to conduct unbecoming to [his] classification or position”; had “violated [a] lawful and official regulation or order”; and had misused County property.

On July 26, 2012, McKinney was terminated.

² Section 808 of the Charter states, in relevant part:

A permanent classified employee may be suspended, reduced in classification, or removed by the appointing authority for any of the following causes:

(b) That the employee has committed an act on or off duty which amounts to conduct unbecoming to the employee’s classification or position.

(d) That the employee has violated any lawful and official regulation or order, or failed to obey any lawful and reasonable direction made or given by the employee’s superior officer.

³ DPW Policy B12 states that “County tools and all other County equipment/property are to be used for the purpose of County business exclusively. Misuse may lead to disciplinary action up to and including termination.”

McKinney grieved his termination. After his Step III internal grievance was denied, McKinney requested a hearing before the Board. That hearing went forward on July 22, 2013. In its case, the County called Watts, Tyler, and Detective Long. It introduced into evidence Detective Gibson’s investigatory report; Tyler’s investigatory report; and electronic gate access reports and time sheets for McKinney.

Watts testified about his observations regarding the missing water meter lids. Tyler testified about his investigation into the missing lids. Detective Long testified about the criminal investigation. As relevant here, she explained that the web portal for entering information into RAPID did not include an option for “water meter lids” and that the “closest option to water meter lid is manhole cover.” She explained that scrap dealers use that descriptor for “any kind of utility cover.” She testified, moreover, that Detective Gibson spoke to someone at Baltimore Scrap and he described items much smaller than a manhole cover and consistent with a water meter lid.

In his case, McKinney testified and recalled Watts. McKinney testified that on October 25, 2011, he took a “broken up” manhole cover he had found behind a Home Depot on Mountain Road in Glen Burnie to Baltimore Scrap. He denied having stolen water meter lids from the Yard. On cross-examination, he was asked if Detective Long was lying about him having admitted taking water meter frames from the Yard. He replied, “She is lying.”

At the conclusion of the testimony, counsel for the County and McKinney argued that the case turned on credibility. McKinney’s counsel argued that Watts, Tyler, and

Detective Long all lacked credibility. He maintained that the fact that many other County employees had access to the Yard, but were not investigated, demonstrated that the investigatory process was unfair. He also argued that there was insufficient evidence to prove whether any County-owned manhole covers, water meter lids, or water meter frames actually were missing and whether the items sold to Baltimore Scrap on October 25, 2011, belonged to the County.

On December 20, 2013, the Board issued the final agency decision. By a three to one vote, the Board upheld the decision to terminate McKinney. A majority of the Board rejected McKinney’s “self-serving testimony” and credited the testimony of Detective Long that McKinney admitted to her and Detective Gibson that he had taken items from the scrap metal dumpster at the Yard and sold them to scrap dealers. The majority also found that it was “concerning and incriminating” that McKinney entered the Yard late at night immediately before he sold scrap metal to Baltimore Scrap that was consistent with water meter lids. The majority of the Board concluded that the theft of scrap metal from the Yard was conduct unbecoming McKinney’s classification or position and that termination was the appropriate sanction.

On January 6, 2014, McKinney petitioned for judicial review in the circuit court. On September 19, 2014, the circuit court entered an opinion affirming the decision of the Board. This timely appeal followed.

STANDARD OF REVIEW

Our standard of review in administrative appeals is well-established. We

“look through” the judgment[] of the [circuit court], and examine the agency’s decision. The reviewing court’s role is narrow, as “it is limited to determining if 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.” *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571, 873 A.2d 1145 (2005) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67–69, 729 A.2d 376 (1999)) (internal quotation mark omitted). In applying the test for substantial evidence, the reviewing court “decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Id.* (internal quotation mark omitted). The reviewing court defers to the agency’s factual findings, if supported by the record. *Id.* The reviewing court, moreover, “must review the agency’s decision in the light most favorable to it; . . . the agency’s decision is prima facie correct and presumed valid, and . . . it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.” *Id.* (alteration in original) (internal quotation mark omitted).

With respect to the agency’s conclusions of law, a certain amount of deference may be afforded when the agency is interpreting or applying the statute the agency itself administers. *Dep’t of Human Resources v. Hayward*, 426 Md. 638, 650, 45 A.3d 224 (2012) (quoting *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169 (2001)); *Dep’t of Natural Resources v. Heller*, 391 Md. 148, 166, 892 A.2d 497 (2006). “We are under no constraint, however, ‘to affirm an agency decision premised solely upon an erroneous conclusion of law.’” *Thomas v. State Ret. & Pension Sys.*, 420 Md. 45, 54–55, 21 A.3d 1042 (2011) (quoting *Ins. Comm’r v. Engelman*, 345 Md. 402, 411, 692 A.2d 474 (1997)); see *Marsheck v. Board of Trustees of the Fire & Police Employees’ Ret. Sys.*, 358 Md. 393, 402, 749 A.2d 774 (2000).

Emp. Ret. Sys. v. Dorsey, 430 Md. 100, 110-11 (2013).

DISCUSSION

McKinney offers several reasons to support his contention that the Board erred by finding that he sold County-owned property. First, the County “charged” him with theft of manhole covers, but later “changed its story and maintained that it had lost only water meter lids.” Second, the Board unreasonably inferred from the fact that he had accessed

the Yard after hours the day before and from his admission to having previously taken water meter frames from the scrap metal dumpster that he had sold stolen water meter lids to Baltimore Scrap. Third, the Board’s finding that he had admitted to taking metal frames from the scrap metal dumpster was not supported by any evidence that any frames ever had gone missing. Fourth, there was not substantial evidence in the record supporting a finding that between 100 and 150 water meter lids went missing because Watts’s testimony on this point was “contradictory and improbable.” Finally, the evidence showed that the water meter lids delivered to the Yard on October 10, 2011, could not have gone missing because the scrap metal dumpster had been picked up by WMS on October 13, 2011.

The Board responds that there was “ample competent, material, and substantial evidence” in the record to support its finding that McKinney stole County-owned scrap metal. In light of that finding, the Board did not err in determining that McKinney had committed conduct unbecoming his classification or position and in sanctioning him with termination. We agree.

The Board credited Detective Long’s testimony that McKinney admitted to having taken manhole frames from the scrap metal dumpster in the Yard on multiple occasions. The Board was free to credit this testimony even though there was no evidence before it that DPW ever had discovered the theft of these items. It also was free to reject McKinney’s testimony to the contrary. McKinney’s admission that he had stolen County-owned scrap metal and sold it for a profit was substantial evidence supporting the

Board’s finding that he committed conduct unbecoming his classification or position. On this basis alone, we would sustain the Board’s decision to terminate McKinney.

With respect to the missing water meter lids, the Board’s findings also were supported by substantial evidence in the record. McKinney attempts to cloud the issues by focusing on the description of the items sold to Baltimore Scrap in the RAPID system. Detective Long’s testimony was clear, however, that Baltimore Scrap chose the general category for “manhole covers” from a drop down menu in the RAPID web portal, but that its employee described the items actually sold to Baltimore Scrap as being consistent in size and shape with water meter lids. The testimony of Tyler and Watts, combined with Tyler’s investigative report, were evidence from which the Board reasonably could infer that 100-150 water meter lids were delivered to the Yard in a wire basket on October 10, 2011, and disappeared from that location sometime between October 24, 2011, and October 31, 2011.⁴ There was evidence before the Board that McKinney used his access card to enter the Yard at 10:43 p.m. on October 24, 2011, when he was not on paid status. The following day, around 11 a.m., McKinney and Floyd each sold over \$300 in scrap metal to Baltimore Scrap, later determined to be consistent with water meter lids. This

⁴ In Detective Gibson’s investigative report, he stated that he spoke to Tim Cluney, the solid waste supervisor with WMS and that he (Cluney) reported that WMS “picked up a full scrap metal dumpster and left an empty one at the . . . [Y]ard . . . on 9/14/2011, 9/15/2011 and 10/13/2011” and that it had not picked up a dumpster between October 13, 2011, and November 7, 2011. In contrast, Tyler’s investigative report stated that Cluney told him that the “scrap metal salvage dumpster had not been picked up [from the Yard] by WMS or transported to the salvage yard to be sold” between October 10, 2011, and October 31, 2011. The Board was free to rely on Tyler’s report with respect to this issue.

was evidence from which the Board reasonably could infer that McKinney and an accomplice, Floyd, stole the water meter lids from the wire basket on October 24, 2011, and sold them to Baltimore Scrap the next day. There also was evidence that McKinney used his access card to enter the Yard at 3:14 a.m. on October 28, 2011, that Floyd had done so at 3:56 a.m., and that they attempted to sell scrap metal to Baltimore Scrap later that day. This all was substantial evidence supporting the Board's final decision to terminate McKinney.

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