

Circuit Court for Harford County
Case No. C-12-CV-19-000572

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0452

September Term, 2020

DALE LIVINGSTON

v.

HARFORD COUNTY BOARD OF
ELECTIONS

Beachley,
Shaw Geter,
Zic,

JJ.

Opinion by Zic, J.

Filed: August 13, 2021

*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.

Ms. Dale Livingston, appellant, appeals from the Circuit Court for Harford County’s decision affirming the order of the Office of Administrative Hearings (“OAH”) denying her right to appeal her termination from her position as Deputy Director of the Harford County Board of Elections (the “Board”). After receiving a Disciplinary Form from the Board advising her of her termination, Ms. Livingston signed a letter of resignation drafted by the Board’s attorney. Ms. Livingston filed an appeal of her termination. The Administrative Law Judge (“ALJ”) granted the Board’s Motion to Dismiss, or in the Alternative for Summary Judgment, finding that because Ms. Livingston signed the letter of resignation, she no longer had the right to appeal the termination. The Circuit Court for Harford County affirmed the OAH’s ruling. We shall vacate and remand because it is unclear whether Ms. Livingston was given written notice of her appeal rights upon being presented with the Disciplinary Form as required by § 11-106(a)(5) of the Maryland State Personnel and Pensions Article. We explain.

QUESTIONS PRESENTED

Ms. Livingston presents three questions for appellate review:

1. Whether OAH erred in denying the [a]ppellant her right to appeal the Agency’s [Board] termination of her employment on November 28, 201[8], finding that [a]ppellant’s involuntary resignation forfeited her right to appeal the Agency’s [Board] termination.
2. Whether OAH erred in denying [a]ppellant a hearing on the issue of whether her termination of employment occurred without proper advisement of appeal rights, including, whether such failure should nullify [a]ppellant’s execution of the resignation letter.

3. Whether OAH erred in failing to grant a hearing on the grievance of the decision of the Agency [Board] to refuse for [a]ppellant to withdrawal of resignation.

Because the record is deficient as to whether the Board gave Ms. Livingston written notice of her appeal rights as required by § 11-106(a)(5), our analysis ends there. We therefore decline to rule on the additional issues presented.

FACTS AND PROCEEDINGS

The Disciplinary Form

On November 28, 2018, Ms. Livingston was presented with and signed a Disciplinary Form indicating that the Board had decided to terminate her from her position as Deputy Director of the Board. As stated on the Disciplinary Form, the date of Ms. Livingston’s alleged misconduct was October 30, 2018. After receiving allegations of misconduct committed by Ms. Livingston, the Board placed her on administrative leave for 10 days beginning on October 31, 2018 in order to conduct an investigation. The Disciplinary Form includes a section titled “Disciplinary Action” under which the boxes for “Policy and/or Procedure Violation” and “Conduct” are checked.

The Disciplinary Form provides the following explanation of Ms. Livingston’s alleged misconduct: “You have been found to have committed misconduct under COMAR 17.04.05.04 (4) Being unjustifiably offensive in conduct toward fellow employees and (13) engaging in discrimination. You additionally violated the Use and Possession of Alcoholic Beverages in a County Building policy of the state Workplace Bullying policy.” Additionally, the Disciplinary Form includes a section titled

“Disciplinary Action Being Taken” and the box next to “Termination of Employment effective November 28, 2018 at 5:00 p.m.” is checked.

November 28, 2018 Meeting

On November 28, 2018, Ms. Livingston was called into a meeting where she was given the Disciplinary Form by both the Board’s Acting Director, Cynthia Remmey, and the Board’s attorney, Brian Young. Mr. Young informed Ms. Livingston that she could resign “in lieu of termination” and then provided her a resignation letter that he drafted, which Ms. Livingston signed and dated November 28, 2018. The resignation letter drafted by Mr. Young states “I hereby offer my resignation in lieu of termination from my position in state employment as the Deputy Director of the Harford County Board of Elections.” There is no evidence in the record to suggest that Ms. Livingston was given written notice of her appeal rights when she was given the Disciplinary Form.

Subsequent Procedural History

On December 10, 2018, Ms. Livingston filed an appeal of her termination with the Board. The Board interpreted Ms. Livingston’s appeal as a request to withdraw her resignation and subsequently denied that request. On January 3, 2019, Ms. Livingston noted her appeal of the Board’s decision to the Office of the Secretary of the Maryland Department of Budget and Management’s Employee Relations Division. In response, the Board filed a Motion to Dismiss, or in the Alternative for Summary Judgment. The ALJ granted the Board’s motion, finding that no issue of material fact existed because Ms. Livingston resigned, thereby foreclosing her ability to appeal her termination, and

concluding that the Board “is entitled to summary decision as a matter of law.”¹

Following the dismissal of her appeal, Ms. Livingston sought judicial review of the OAH’s decision in the Circuit Court for Harford County. The circuit court upheld the OAH’s decision, concluding, in relevant part, that Ms. Livingston resigned and thus forfeited her right to appeal.

STANDARD OF REVIEW

“As in any appeal from judicial review of an agency decision, we look through the decision of the circuit court to examine the agency’s ruling.” *Maryland Off. of People’s Couns. v. Maryland Pub. Serv. Comm’n*, 246 Md. App. 388, 400 (2020) (citing *Maryland Off. of People’s Couns. v. Maryland Pub. Serv. Comm’n*, 461 Md. 380, 391 (2018)).

When “reviewing a decision of an administrative agency, we directly evaluate that decision under the same standard of review as a circuit court” and thus inquire “whether there is substantial evidence in the record to support the decision and whether the decision is based upon an error of law.” *Motor Vehicle Admin. v. Krafft*, 452 Md. 589, 602-03 (2017). Additionally, summary judgment is appropriate “where ‘there is no genuine dispute as to any material fact and . . . the [moving] party is entitled to judgment as a matter of law.’” *State v. Rovin*, 472 Md. 317, 341 (2021) (alteration in original)

¹ The Board’s motion is titled “Motion to Dismiss, or in the Alternative for Summary Judgment.” However, the ALJ states in the opinion that “the [Board] is entitled to summary decision as a matter of law.” In its brief, the Board also refers to “summary decision” as opposed to “summary judgment.” This discrepancy is of no consequence, as this Court has previously determined that the entry of summary judgment and the entry of summary decision are interchangeable. See *I.B. v. Frederick County Dep’t of Soc. Servs.*, 239 Md. App. 556, 562 (2018).

(quoting Md. Rule 2-501(a)).

DISCUSSION

I. SECTION 11-106(A)(5) OF THE STATE PERSONNEL AND PENSIONS ARTICLE REQUIRED THE BOARD TO GIVE MS. LIVINGSTON NOTICE OF HER APPEAL RIGHTS.

Section 11-106(a) provides:

Before taking any disciplinary action related to employee misconduct, an appointing authority *shall*:

- (1) investigate the alleged misconduct;
- (2) meet with the employee;
- (3) consider any mitigating circumstances;
- (4) determine the appropriate disciplinary action, if any, to be imposed; and
- (5) *give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.*

(emphasis added).

The Board posits that because Ms. Livingston signed the resignation letter drafted by its attorney and did so prior to 5:00 p.m. November 28, 2018, when her termination was to become effective, she resigned and was not terminated. Consequently, she forfeited her right to an appeal.² Ms. Livingston argues that she was terminated prior to

² The Board, in its brief, also emphasizes the language used in the resignation letter that Ms. Livingston resigned “in lieu of termination,” language which was chosen by the Board’s attorney who wrote the letter. Additionally, the Board argues that Ms. Livingston was not terminated from her position because “there is no reference to a termination in her personnel file.”

submitting her resignation and that she was not given written notice of her appeal rights as required by § 11-106(a)(5). The Board maintains that, because Ms. Livingston resigned, it does not matter whether she was given her appeal rights. The Board further argues that “[Ms.] Livingston provides no citation for the position that a resignation may somehow be rendered void by procedural deficiencies in a disciplinary action.”

The OAH and the circuit court agreed with the Board’s arguments. The ALJ determined that it was immaterial whether Ms. Livingston was given written notice of her appeal rights. The ALJ reasoned as follows:

[T]he present case involves an Employee who knowingly resigned after meeting with [the Board] and learning of the agency’s intent to impose disciplinary action. I believe the Employee, the former Deputy Director, was well aware of the difference between a resignation and a disciplinary action such as termination. *I believe the Employee was aware of the appeal rights available as a result of the proposed termination and what was available as a result of a resignation.* The Employee’s argument of not being advised of the appeal rights may be true, but it does not change the ultimate result that on November 28, 2018, the Employee resigned from employment. The Employee did not offer any argument or facts to dispel me of the belief that she understood the clear difference between resignation and termination from State service.

(emphasis added). The circuit court upheld the OAH’s ruling, explaining that:

The court can find no provision in the State Personnel and Pensions Article which requires that an employee must be given advice of rights before her resignation may be accepted. The fact that Petitioner did not receive the advice of rights pertinent to the disciplinary action is not determinative of the agency’s ability to accept and stand upon Petitioner’s resignation.

We do not agree. The requirements enumerated in § 11-106(a) are mandatory. The statutory provision provides that “[b]efore taking any disciplinary action related to employee misconduct, an appointing authority *shall* . . . give the employee a written notice of the disciplinary action to be taken and the employee’s appeal rights.” Md. Code Ann., State Pers. & Pens. § 11-106(a)(5) (emphasis added). “The word ‘shall’ is ordinarily construed as mandatory.” *Parker v. State*, 193 Md. App. 469, 502 (2010) (citing *In re Najasha B.*, 409 Md. 20, 32-33 (2009)). At the meeting on November 28, the Board gave Ms. Livingston written notice of the disciplinary action to be taken—termination of her employment—but, as discussed below, it is disputed whether the Board gave her written notice of her appeal rights. The statute does not provide any exception to this notice requirement. *See* State Pers. & Pens. § 11-106(a). Neither the ALJ’s belief that Ms. Livingston was aware of her appeal rights nor Ms. Livingston’s act of signing the resignation letter written by the Board’s attorney prior to 5:00 p.m. on November 28, 2018, relieved the Board of its statutory obligation to give her written notice of her appeal rights.

II. THE RECORD IS DEFICIENT AS TO WHETHER MS. LIVINGSTON WAS GIVEN NOTICE OF HER APPEAL RIGHTS.

Ms. Livingston claims that she was not given notice of her appeal rights. For the first time at oral argument, the Board claimed that Ms. Livingston was given notice of her appeal rights at the November 28 meeting when she was told of her termination because the appeal rights were printed on the back of the Disciplinary Form. The back of the Disciplinary Form is not contained in the record. The dispute between the Board and Ms.

Livingston as to whether she was given her appeal rights conflicts with what was apparently before the circuit court considering the statement in its opinion referencing “[t]he *fact* that [Ms. Livingston] did not receive the advice of rights pertinent to the disciplinary action.” (emphasis added). While the ALJ did not make such a definitive statement in her opinion, she did note that “[Ms. Livingston]’s argument of not being advised of the appeal rights *may* be true.” (emphasis added).

Nevertheless, determining whether the Board complied with § 11-106(a)(5) would be a necessary first step in an analysis regarding the claims in this case. Unfortunately, the record is deficient in that regard because it does not reflect whether Ms. Livingston was given notice of her appeal rights. Ms. Livingston should, at the very least, be permitted to conduct discovery on that issue and potentially others. We shall therefore vacate the judgment of the circuit court and, in turn, the OAH for further proceedings not inconsistent with this opinion.

III. FOR GUIDANCE ON REMAND, WE PROVIDE A SUMMARY OF THE PERTINENT CASE LAW ADDRESSING VOLUNTARY AND INVOLUNTARY RESIGNATIONS.

Ms. Livingston argues that her resignation was involuntary and that, consequently, she was constructively discharged. The Board counters that Ms. Livingston’s resignation was voluntary and did not amount to a constructive discharge. While we decline to address the merits of these arguments, in the event this issue arises again before the Board, the OAH, and/or the circuit court, we provide the following summary of the pertinent case law for guidance.

Maryland courts have endorsed the concept of constructive discharge and “will

overlook the fact that a termination was formally effected by a resignation if the record shows that the resignation was indeed an involuntary one, coerced by the employer.”

Staggs v. Blue Cross of Md., Inc., 61 Md. App. 381, 386-87 (1985) (quoting *Beye v. Bureau of Nat’l Affs.*, 59 Md. App. 642, 649 (1984)). In *Staggs v. Blue Cross of Maryland, Inc.*, 61 Md. App. 381 (1985), Judge Wilner further explained:

The fact of discharge . . . does not depend upon the use of formal words of firing. The test is whether sufficient words or actions by the employer would logically lead a prudent man [or woman] to believe his [or her] tenure had been terminated Employees are often asked to resign as opposed to being fired. While this may be done for any number of reasons, the meaning is clear that the employee is being dismissed.

61 Md. App. at 387 (alterations in original) (quoting *Jackson v. Minidoka Irrigation Dist.*, 563 P.2d 54, 58-59 (1977)). To illustrate this concept, Judge Wilner cited *Cumberland & Pennsylvania Rail Road Co. v. Slack*, 45 Md. 161, 173-75 (1876), in which the Court of Appeals held that a constructive discharge occurred when an employee resigned in response to a notice from the employer indicating that the employment was being terminated. *Staggs*, 61 Md. App. at 387.

Another instructive case is *Board of Trustees of State Universities & Colleges v. Fineran*, 75 Md. App. 289 (1988). On September 5, 1985, the plaintiff, Mr. Fineran, was informed by his superior, Dr. Bellavance, that “he intended to terminate Mr. Fineran’s employment [as Director of Public Relations for Salisbury State College] but offered [Mr.] Fineran the opportunity to resign.” 75 Md. App. at 291-92. Dr. Bellavance, however, lacked the authority to terminate Mr. Fineran as that power resided with the

Board of Trustees of the State Colleges and Universities. *Id.* at 303. Mr. Fineran considered his options over the span of four days and ultimately submitted his resignation on September 9, 1985. *Id.* at 292. Subsequently, Mr. Fineran complained to the Board of Trustees that his resignation was coerced and invalid. *Id.* at 292. In response, on October 15, 1985, the Board offered Mr. Fineran the opportunity to withdraw his resignation, though it explained that if he did, Dr. Bellavance would ask the Board to approve his termination. *Id.* at 292-93. Mr. Fineran had until November 21, 1985 to withdraw his resignation; he consulted with counsel and decided not to withdraw the resignation. *Id.* at 293. Thereafter, Mr. Fineran filed an appeal. *Id.*

In holding that Mr. Fineran failed to state a claim for constructive and wrongful discharge and that the defendants were therefore entitled to summary judgment, Judge Wilner opined for this Court that:

Quite apart from anything that occurred in September, the situation as of November 8 was simply this. In lieu of proceeding with a recommended termination which, if approved, would likely take effect November 21, Fineran was offered the opportunity to resign and receive, among the other benefits of a resignation as opposed to a termination, an additional 40 days of compensation. He obviously weighed his options, with the advice of counsel, and elected not to withdraw the resignation. That is not, in our view, a constructive discharge forced upon Fineran by Dr. Bellavance, Mr. Archibald, the college, or the Board.

Id. at 305-306 (emphasis added). This Court concluded that Mr. Fineran's resignation was valid, emphasizing that he was afforded the opportunity to withdraw his resignation and to consult with counsel about that decision. *Id.* Noting deficiencies with the

procedure of the original resignation, (i.e., that Dr. Belavance did not have the authority to terminate Mr. Fineran or accept his termination) the Board afforded Mr. Fineran the opportunity to withdraw his resignation. *Id.* at 303. The important distinguishing factor in *Fineran* is that Mr. Fineran had the opportunity to withdraw his resignation and was also given the chance to discuss his options with counsel, opportunities that Ms. Livingston did not have in this case.

A final case worth noting is *Staggs v. Blue Cross of Maryland, Inc.*, 61 Md. App. 381 (1985). In that case, two former employees were informed of their termination for allegedly falsifying sales reports but were allowed to resign in lieu of termination. *Id.* at 384. The two employees decided to resign and later instituted an action for breach of contract. *Id.* at 384. They argued “that they were told by Blue Cross officials that the decision had been made to terminate their employment, that if they resigned they would be able to collect unemployment compensation benefits, but if they were discharged those benefits would be unavailable.” *Id.* at 387. And they “[b]oth claimed that they resigned only in response to that inducement.” *Id.*

Judge Wilner briefly discussed the concept of constructive discharge, explaining that employees who resign from employment generally do not have standing to challenge their termination but that the law “will overlook the fact that a termination was formally effectuated by a resignation if the record shows that the resignation was indeed an involuntary one, coerced by the employer.” *Id.* at 386-87 (quoting *Beye v. Bureau of Nat’l Affs.*, 59 Md. App. 642, 649 (1984)). Judge Wilner further stated that while the

factual scenario in *Beye* involved an employee resigning to avoid a hostile work environment, that is by no means the only factual scenario that can give rise to a constructive discharge. *Staggs*, 61 Md. App. at 387.

Turning to the facts in *Staggs*, Judge Wilner concluded that:

If [the employees'] averments are true, [their] terminations . . . would amount to constructive discharges; their resignations could be regarded as nothing more than coerced responses to decisions already made by Blue Cross and communicated to them. We therefore conclude, upon the record before us and for purposes of summary judgment, that [the] appellants have established sufficient standing to claim that they were, in fact, discharged by Blue Cross.

Id. at 387-88. This Court's decision in *Staggs* indicates that resignations may be considered coerced when an employee has no meaningful choice. *See id.*

We will not address the issue of whether Ms. Livingston's resignation was coerced and invalid because it is unclear whether the Board complied with § 11-106(a)(5). For the reasons stated in Sections I and II of this opinion, we vacate the judgment of the Circuit Court for Harford County with instructions as stated in the below order.

**JUDGMENT OF THE CIRCUIT COURT
FOR HARFORD COUNTY VACATED;
CASE REMANDED TO THE CIRCUIT
COURT WITH INSTRUCTIONS TO
VACATE THE FINAL DECISION OF THE
OFFICE OF ADMINISTRATIVE
HEARINGS AND REMAND THE CASE
TO THE OFFICE OF ADMINISTRATIVE
HEARINGS FOR PROCEEDINGS NOT
INCONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.**