Circuit Court for Wicomico County
Case Nos. C-22-CV-18-000369 & C-22-CV-18-000372

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 484 & 485

September Term, 2019

UNIVERSITY SYSTEM OF MARYLAND
SALISBURY UNIVERSITY

v.

SANDRA A. RAMSES

UNIVERSITY SYSTEM OF MARYLAND

v.

KAREN PENUEL

Fader, C.J.,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: May 28, 2020

These appeals, consolidated for purposes of this opinion, involve requests for reclassification of administrative staff positions at Salisbury University (the "University"). The appellees, Susan A. Ramses and Karen Penuel (the "Employees"), asked to be reclassified from Program Management Specialists to the higher level of Program Administrative Specialists. The University denied the requests for reclassification, and an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings affirmed. The Employees petitioned for judicial review in the Circuit Court for Wicomico County, which granted the petitions and ordered the Employees reclassified with back pay. The University appealed. We conclude that the ALJ's decisions upholding the University's denials of reclassification were supported by substantial evidence. Therefore, we will reverse the circuit court and remand with instructions to deny the petitions for judicial review.

BACKGROUND

Statutory Background

Job classifications for government employees have their roots in the civil service reforms of the Progressive Era. In 1883, the Pendleton Civil Service Reform Act, 22 Stat. 403, revolutionized federal employment by repudiating the spoils system[1] and providing "for open, competitive examinations for testing the fitness of applicants for the public service." *Id.* at 403. In 1920, Maryland became the ninth state to adopt a merit system of

[1] Under the "spoils" or "patronage" system that prevailed in nineteenth-century America, "political bosses and elected officials [] reward[ed] individuals who supported them" with government jobs. *See* Phillip S. Anthony et al., *Maryland State Personnel, Pensions, and Procurement*, 5 Legislative Handbook Series 9 (2014), *available at* https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/020000/020598/unrestricted/20141692e-005.pdf (accessed May 20, 2020).

employment for State personnel. *See* Phillip S. Anthony et al., *Maryland State Personnel, Pensions, and Procurement*, 5 Legislative Handbook Series 7 (2014), *available at* https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/020000/020598/unrestricted/20141692e-005.pdf (accessed May 20, 2020). The legislation that created Maryland's merit system described the reform as intended

> to provide candidates for appointment to positions in the classified service after determining by practical tests of the fitness of such candidates for the positions which they seek, without regard to the political or religious opinions or affiliations of such candidates, or of any other standard except the business efficiency of the classified service, and to provide adequate means for the prompt removal from positions in the classified service of all persons therein who may be indolent, incompetent, inefficient, or otherwise unfit to remain therein . . . .[2]

Id. at 11 (quoting Md. Laws 1920, ch. 41, § 27); *see also e.g.*, *Am. Fed'n of State, County & Mun. Emps., Council 31, AFL-CIO v. Dep't of Cent. Mgmt. Servs.*, 681 N.E.2d 998, 1006 (Ill. App. Ct. 1997) (explaining that "a fundamental purpose of a civil service system is to remove employment from the patronage system" by "offer[ing] . . . promotion for conscientious, faithful, honest, and efficient service").

Among other reforms, "[t]he original merit system law included provisions relating to . . . the establishment of position classes." Anthony et al., 5 Legislative Handbook Series at 11. Such classifications were "intend[ed] to avoid problems inherent in political spoils

[2] Similarly, in *Lilly v. Jones*, 158 Md. 260 (1930), the Court of Appeals described Baltimore City's merit system as having been "inaugurated, first, to secure the appointment of persons, after examination, suitable and qualified for the positions or offices to which they are applicants, and, second, . . . to place their removal beyond the control of the appointing power, who might, for political, religious, or other insufficient reasons, be disposed to remove them, and to appoint unsuitable and inefficient persons as their successors to the injury and detriment of the public." *Id.* at 270-71.

systems such as nepotism" by "provid[ing] standards of employment and advancement through testing." *Sec'y, Md. Dep't of Pers. v. Bender*, 44 Md. App. 714, 715 (1980), *aff'd*, 290 Md. 345 (1981). As currently defined by § 1-101(c) of the State Personnel & Pensions Article (2015 Repl.; 2019 Supp.), a job class is "a category of one or more similar positions." Those positions must be (i) "similar in their duties and responsibilities," and (ii) "similar in the general qualifications required to perform those duties and responsibilities," as well as subject to (iii) "the same standards and, if required, tests of fitness," and (iv) "the same rates of pay." *Id.* § 4-201(b). By mandating that the qualifications and compensation for analogous positions reflect "the similarity of duties performed and responsibilities assumed," classification is designed to ensure "equality of treatment within a class" and thereby insulate jobs from political influence. *See* 67 C.J.S. *Officers* § 108.

For most State employees, classifications are defined and administered by the Department of Budget and Management. *See Kram v. Md. Military Dep't*, 374 Md. 651, 658-62 (2003). A number of State entities have their own personnel systems, among the largest of which is that of the University System of Maryland. Chapter 246 of the Acts of 1988, which created the University System of Maryland, "authorized the Board of Regents . . . to establish personnel policies and procedures independent of" what is now the Department of Management and Budget. *See* Anthony et al., 5 Legislative Handbook Series at 20. "Except as otherwise provided by law, appointments of the University System of Maryland are not subject to or controlled by the provisions of the State Personnel and Pensions Article that govern the State Personnel Management System." Md. Code Ann.,

Educ. § 12-111(a) (2019 Repl.). Thus, the relevant classifying entity for the Employees is the Board of Regents of the University System of Maryland.

Factual Background

The University is a four-year public university located in Salisbury, Maryland. A member of the University System of Maryland, the University has over 8,700 students and employs approximately 1,500 people. Salisbury Univ., *Campus History* (2018), https://www.salisbury.edu/discover-su/campus-history/ (accessed May 20, 2020). Between 400 and 600 of those 1,500 employees are permanent nonexempt staff, of whom approximately 150 work in administrative support positions. About 30 employees are classified as Administrative Assistant I; 50 are classified as Administrative Assistant II; between 20 and 35 are classified as Program Management Specialist; and four are classified as Program Administrative Specialist. An Administrative Assistant II has a higher grade—and earns a higher salary—than an Administrative Assistant I, and so forth. As particularly relevant here, a Program Administrative Specialist has a higher grade—and earns a higher salary—than a Program Management Specialist.

The Employees both worked for departments within the University's Richard A. Henson School of Science and Technology (the "Henson School"). The Henson School has seven departments, each of which appears to be served by a single administrative support person. Three departments are served by employees classified as Program Management Specialists, while the other four are served by employees with the lower classification of Administrative Assistant II.

Only four Program Administrative Specialists work at the entire University, only one of whom works in an academic department; none work in the Henson School. The one Program Administrative Specialist in an academic department works in the Fulton School of Liberal Arts, where she reports to the Dean's Office. Among the others: (1) one is "responsible for managing the Tuition Residency Office and has the sole final decision making authority for tuition residency determinations"; (2) another is "a data analyst and statistician, . . . required to write programs and resolve programming problems" and "to possess working knowledge of analytical and statistical principles"; and (3) the last is "in charge of the Auxiliary Office staff" and "has a degree in accounting."

The Classifications

The Employees are both currently classified as Program Management Specialists and both sought reclassification as Program Administrative Specialists. A job class specification has three different parts: the job summary, the list of primary duties, and the job qualifications.[3] The job summary and list of primary duties for Program Management Specialist are:

> **JOB SUMMARY:**
>
> Under general supervision, performs a variety of routine professional and analytical assignments involving the practical application of management principles and techniques to routine operational activities.
>
> **PRIMARY DUTIES**

[3] We omit the job qualifications component of the job class specifications because it is not relevant to the issues raised on appeal. The University does not contend that the either of Employees fails to satisfy the minimum qualifications for the positions.

1. Assists in the management of assigned program or supervision of an operational unit. Assists in the planning and implementation of new or revised programs, procedures, practices and organization.

2. Assists in or conducts studies and analyses of programs, organizations, procedures, or systems of limited scope or assists senior specialists in more complex projects.

3. Collects, compiles, and organizes data pertinent to various ongoing studies. Analyzes, summarizes, and communicates this information to appropriate officials.

4. Assists in the preparation of final reports, recommendations, and other information resources for the improvement of the organizational element or its programs.

5. Assists in planning and coordinating administrative activities of a program, such as assisting in the formulation and preparation of the organization[]'s budgets, grant proposals, and project proposals.

6. Consults with program head and administrative officials regarding policies, trends, and interpretation of data and program needs following specific instructions.

7. Conducts basic efficiency, time and cost studies and analyses of work processes and systems. Prepares simple statistical tables and charts, staffing patterns, work flow and organization charts.

8. Establishes effective communication channels and acts as liaison between the program and officials within and outside the institution.

9. May supervise[] clerical personnel.

Univ. Sys. of Md., *Job Class Specification: Program Management Specialist* (Feb. 03, 2005), https://www.usmd.edu/usm/adminfinance/hr/umspp/jobspec.php?tc=N10PM1 (last accessed May 20, 2020).

The job class specification for a Program Administrative Specialist is:

JOB SUMMARY:

Under limited supervision, is responsible for work requiring specialized knowledge, or for the efficient operation of a program or unit. May supervise or coordinate the work of others to accomplish daily operations.

PRIMARY DUTIES

> 1. Performs a full range of clerical to paraprofessional duties related to the day-to-day operations of a program or office, or supervises an operational unit. Suggests, recommends, and implements new or revised procedures, practices or changes to the organization.
>
> 2. Follows established guidelines to collect, compile, and organize data for various ongoing studies or plans. May prepare statistical tables and charts.
>
> 3. Prepares draft reports, recommendations, and other information resources for use by the organizational unit or its management. Assists in preparation of final reports.
>
> 4. Gathers data for use in formulation of the organization's budgets, grant proposals, and project proposals.
>
> 5. Advises the program head and administrative officials regarding policies, trends, and interpretation of data and program needs.
>
> 6. Interacts with internal and external customers of the university. Handles sensitive and confidential information with tact and discretion.
>
> 7. Remains current with and maximizes the use of technology for efficient processing, generation of reports, and the like.
>
> 8. May supervise clerical personnel.

Univ. Sys. of Md., *Job Class Specification: Program Administrative Specialist* (Feb. 03, 2005), https://www.usmd.edu/usm/adminfinance/hr/umspp/jobspec.php?tc=N12PAS (last accessed May 20, 2020).

Procedural History

The factual differences between the Employees' cases are largely insignificant to our resolution of the interpretive issue at the heart of these appeals. Therefore, we will discuss the procedural history of their cases together.

Ms. Ramses currently works as a Program Management Specialist in the University's Department of Biological Sciences. Ms. Penuel performs the same role in the University's Department of Physics. Ms. Ramses and Ms. Penuel have worked at the University since 1990 and 1995, respectively. The University reclassified Ms. Ramses's

position to Program Management Specialist in 2006, and reclassified Ms. Penuel's position in the same manner the following year.

In October 2015, the Employees each requested job analyses through which they sought to be reclassified as Program Administrative Specialists. In response to their requests, two employees from the University's Office of Human Resources (the "Auditors") "conducted a desk audit[4] to assess the merits of [their] request[s] for reclassification." Following each of the audits, the Auditors recommended to Wendy Ringling, the University's Director of Human Resources Operations, that the Employees' "duties and responsibilities . . . d[id] not rise to the level of a [Program Administrative Specialist]." In each case, Ms. Ringling agreed with the recommendation.

In March 2018, Ms. Ringling informed each of the Employees that "no change in classification [was] recommended" because "the current classification sufficiently represent[ed] and encompasse[d] the majority of the duties of the position." Ms. Ringling explained:

> The [Program Administrative Specialist, or] PAS classification requires *specialized knowledge* to perform the functions of the job (for example, as a paralegal or medical assistant) or be responsible for the operation of a program/unit. Further, the PAS position necessitates a *working knowledge* of either, a) reference and research methods and techniques used in

[4] "A desk audit is a procedure . . . whereby an employee's work is reviewed to determine if he or she is performing responsibilities above those required for that individual's current grade, making the employee eligible for a promotion and/or a higher pay grade." *Ciafrei v. Bentsen*, 877 F. Supp. 788, 790 (D.R.I. 1995); *see also Jaburek v. Foxx*, 813 F.3d 626, 629 (7th Cir. 2016) ("A desk audit is when supervisory authorities assess an employee's duties and pay."); *Johnson v. Dist. of Columbia*, 947 F. Supp. 2d 123, 129 (D.D.C. 2013) ("[A] desk audit . . . is a process administered by [a] Human Resources department . . . to determine whether an employee's duties and responsibilities are commensurate with his [or her] position, grade, and salary.").

> collecting, compiling, and organizing data and information, or b) analytical and statistical principles and skills and techniques at the paraprofessional or professional level. The PAS position requires specific knowledge, skills and abilities as the work is more complex and broader in scope and the position is held accountable for outcomes, whereas the position of Program Management Specialist is more task oriented with ultimate responsibility for the program resting with the Department Chair/Co-Chair. Overall, [Ms. Ramses's and Ms. Penuel's] primary job duties are administrative in nature and are done in support of the department by providing assistance to management, not in the management of the department. By this analysis, this review concludes that the position does not meet the minimum standards for the PAS classification.

(all emphasis in original).

The Employees each timely filed grievances, which, by the parties' consent, "moved directly to a hearing before the Office of Administrative Hearings." The same ALJ presided over the hearings.[5] In both cases, the ALJ heard testimony from the Employees; the Auditors; Ms. Ringling; and Kenneth A. Vedder, the University's Associate Vice President of Human Resources. In Ms. Ramses's case, the ALJ also heard testimony from two of her former supervisors, Stephen Gehnrich, Chair of the Department of Biology until 2015; and Mark Holland, Chair from 2001 to 2007. In Ms. Penuel's case, the ALJ also heard testimony from her current supervisor, Mark W. Muller, Chair of the Department of Physics; one of her prior supervisors, Andrew Pica, former Chair of that department; Dawn Carey, Administrative Assistant II in the Department of Chemistry; Gail Welsh, Associate

[5] A substantial portion of the hearing transcript in Ms. Ramses's case is missing from the record, apparently because the ALJ's audio recorder stopped working. The parties agree that the testimony missing from Ms. Ramses's case—which was from the University's witnesses—was "very, very similar" to that in Ms. Penuel's case, for which we have a complete transcript.

Professor of Physics; and Karen Olmstead, the University's Interim Provost and Senior Vice President of Academic Affairs.

Ms. Ringling—whom the court qualified in both cases as an expert in classification and compensation—testified regarding the University's process for interpreting job class specifications. She explained:

> [E]ach job classification is broken into basically three primary sections: Job summary, primary duties, and minimum qualifications. So when reviewing a job specification, it is reviewed in totality when we do an analysis. . . . [W]e will look to the job summary to give us an idea of the scope of responsibilities and the expectations of the level of responsibilities for the position. Then we look to the primary duties that does list some of the duties that would be expected to be performed at that level based on the job summary. And then the minimum qualification section is the section that provides us with the knowledge, skills, and abilities or competencies that someone would need to have in order to execute the primary duties based on the job summary, so . . . the three [are] tied together.

Ms. Ringling testified that the Employees were not qualified for the Program Administrative Specialist classification because the job summary section of the job class specification stated that it requires either "specialized knowledge," or being "responsible for the efficient operation of a program or unit," and neither Employee satisfied either criterion.

Ms. Ringling testified that "specialized knowledge" means "a gained knowledge focused usually in a particular area or discipline," such as a medical assistant, a paralegal, accounting, data research, and other positions that "ha[ve] to function within very specific regulatory guidelines where they have to have intimate knowledge or complete knowledge of those regulations." She testified that "institutional knowledge" is not "specialized

knowledge," but rather "general knowledge," because "[i]t is knowledge that can be learned in a general atmosphere just by working at the institution. . . . It's not specific."

Ms. Ringling testified that being "responsible . . . for the efficient operation of a program or unit" means that "that position is held accountable and responsible for all of the operations of that unit." For academic departments at the University, she agreed, the Chair of the Department is the person "responsible for the efficient and effective operation of a program or unit."

Ms. Ringling testified that even though the Employees might perform some of the duties listed in the primary duties section of the job class specification for Program Administrative Specialist, those duties must "be evaluat[ed] in the context of having specialized knowledge or [responsibility for] the efficient operation of a program [or unit]." Because "[t]here was no evidence that [the Employees'] position[s] required specialized knowledge or [were] responsible for the efficient operation of a program or unit," neither was entitled to reclassification.

Following the hearings, the ALJ issued separate written decisions upholding the University's denials of the Employees' requests for reclassification. In both cases, the ALJ found—as the University conceded—that the Employees "ha[d] expansive institutional knowledge, . . . handle[d] an incredible volume of work and perform[ed] it efficiently," and were "respected by many other [University] employees," who "regularly turn[ed] to [them] to answer questions regarding [University] matters." The ALJ deemed Ms. Penuel "essential to the operation of the Department" and stated that for Ms. Ramses, "it [was] abundantly clear that she should be earning a higher salary." Nevertheless, the ALJ held

that each of the Employees "simply [wa]s not qualified to be classified as a [Program Administrative Specialist]."

The ALJ acknowledged that both Employees "perform[ed] many of the functions of a [Program Administrative Specialist]," but also observed that their "job functions . . . cross[ed] over between different job classifications," including the lower classifications of Administrative Assistant I; Administrative Assistant II; Budget Associate; Budget Analyst I; Accounting Associate; Accounting Clerk II; and Program Management Specialist. Relying on the testimony of Mr. Vedder and Ms. Ringling—as well as an internal University campus allocation plan—the ALJ concluded that neither of the Employees was responsible for work requiring specialized knowledge or for the efficient operation of a program or unit. Regarding "specialized knowledge," the ALJ concluded that "the [Program Administrative Specialist] position is appropriate only for individuals with specialized knowledge pertinent to the unit in which [they] work[]." The ALJ emphasized that "[t]here [were] only four employees at [the University] classified as [Program Administrative Specialists]," each of whom either "ha[d] . . . that type of specialized knowledge, or r[an] a unit or department." Because "there [was] no indication in the record that [either of the Employees] was employed in her position because of the specialized knowledge, over and above institutional knowledge, necessary to qualify for the [Program Administrative Specialist] position," and because neither of them was "ultimately accountable for all decisions made by and for the Department," the ALJ concluded that the University had not erred in denying their requests for reclassification.

Both of the Employees timely petitioned for judicial review by the Circuit Court for Wicomico County. The circuit court held a consolidated hearing, at the conclusion of which it ruled from the bench. The court agreed with the ALJ and the University in rejecting the Employees' claim that they had "specialized knowledge . . . in the context in which that term is used in the job summary." The court disagreed, however, with the University's position—and the ALJ's conclusion—that "in order to qualify for this position, [] the employee has to have ultimate decision-making authority." The court held that that interpretation was "contrary to the language" of the job class specification "and was a mistake of law on [the ALJ's] part." The court did not offer its own interpretation of the relevant language. Rejecting the University's contention that the proper remedy would be to remand the case to the ALJ, the court ordered that each of the Employees "be reclassified to the position of Program Administrative Specialist, with full back pay, retroactive to March 12, 2017."

The University timely appealed.

DISCUSSION

"In reviewing the decision of an administrative agency, this Court 'look[s] through' the decision of the circuit court and directly evaluates the decision of the agency." *Motor Vehicle Admin. v. Medvedeff*, 466 Md. 455, 464 (2019) (quoting *Brutus 630, LLC v. Town of Bel Air*, 448 Md. 355, 367 (2016)). Under § 10-222(h) of the State Government Article

(2018 Repl.),[6] *see Charles County Dep't of Soc. Servs. v. Vann*, 382 Md. 286, 295 (2004), our "role . . . 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." *Donlon v. Montgomery County Pub. Schs.*, 460 Md. 62, 74 (2018) (quoting *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 14 (2010)). We "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.* Nevertheless, "it is always within our prerogative to determine whether an agency's conclusions of law are correct," *Bd. of Liquor License Comm'rs v. Kougl*, 451

[6] Section 10-222(h) empowers a reviewing court to:

(1) remand the case for further proceedings;

(2) affirm the final decision; or

(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.

Md. 507, 513-14 (2017) (quoting *Adventist Health Care v. Md. Health Care Comm'n*, 392 Md. 103, 120-21 (2006)), and "[i]f an agency's conclusion is based on an error of law, it will not be upheld," *Kougl*, 451 Md. at 514.

In these cases, the Employees' job duties constitute a question of fact; the requirements of the job class specifications constitute a question of law; and whether the Employees were classified properly in light of those specifications constitutes a mixed question of law and fact.

I. THE UNIVERSITY'S INTERPRETATION OF THE JOB CLASSIFICATIONS IS ENTITLED TO DEFERENCE.

In both of these appeals, the ALJ concluded that the University acted properly in denying the reclassifications because the Employees were not "responsible for work requiring specialized knowledge, or for the efficient operation of a program or unit." *See* Univ. Sys. of Md., *Job Class Specification: Program Administrative Specialist*, *supra*. The ALJ accepted the University's interpretation of those criteria as requiring, respectively, "gained knowledge focused usually in a particular area or discipline" and "accountab[ility] . . . for all of the operations of th[e] unit." On appeal, the Employees no longer take any issue with the conclusion that they lack "specialized knowledge" for purposes of the job class specification. Instead, they now rely exclusively on the circuit court's rationale that they are "responsible . . . for the efficient operation of a program or unit."

The University contends that the ALJ correctly deferred to the University's interpretation of its job class specifications. The University interprets the key term "responsible" to require that the employee be "ultimately accountable for the decisions of

the unit." The Employees, conversely, seem to interpret "responsible" in a causal sense. That is, if an employee causes a program or unit to be efficient, then the employee is "responsible . . . for the efficient operation of a program or unit." The Employees also argue that even if "responsible" does require accountability, they are accountable in the sense that they would face employment repercussions if they did not perform their job duties acceptably.

A. An Agency's Interpretation of Its Own Regulation Is Entitled to Deference If the Regulation Is Ambiguous and the Agency's Interpretation Is Reasonable.

In considering which interpretation of "responsible" applies, we are mindful of the doctrine of deference to an administrative agency's interpretation of its own regulations, which was set forth by the United States Supreme Court in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and which has long been applied in Maryland, *see, e.g.*, *Comptroller v. Joseph F. Hughes & Co.*, 209 Md. 141, 148 (1956) (citing *Seminole Rock*, 325 U.S. at 414). Under that doctrine, "an administrative agency is entitled to deference in the interpretation of its own propounded regulations unless the agency's interpretation is clearly erroneous or inconsistent with the regulation."[7] *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 389 (2013) (citing *Auer*, 519 U.S. at 461)). Applying the *Auer*/*Seminole Rock* doctrine, we conclude that the ALJ

[7] We note that *Auer* deference is implicated, rather than the doctrines of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because the latter apply to "[a]n agency's . . . interpretation of statutes," rather than its "interpretation of its own regulations." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189 (9th Cir. 2002).

deferred properly to the University's reasonable interpretation of its job class specification.[8]

The Court of Appeals has stated repeatedly that courts should "accord an agency considerable deference in interpreting its own regulations." *Kougl*, 451 Md. at 515; *see also Md. Transp. Auth. v. King*, 369 Md. 274, 288-89 (2002) ("[A]n agency's interpretation of an administrative regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" (quoting *Seminole Rock*, 325 U.S. at 414)). In expressing that principle, the Court has relied on the Supreme Court's decisions in *Auer* and *Seminole Rock*. *See, e.g.*, *id.*; *Para*, 211 Md. App. at 389 (citing *Auer*, 519 U.S. at 461). The idea underlying *Auer*/*Seminole Rock* deference is that "the expertise of the agency in its own field of endeavor is entitled to judicial respect." *Kougl*, 451 Md. at 514 (quoting *Finucan v. Md. Bd. of Physician Quality Assurance*, 380 Md. 577, 590 (2004)). As the Court of Appeals explained in *King*:

> [A]gency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency. A question concerning the interpretation of an agency's rule is as central to its operation as an interpretation of the agency's governing statute.

King, 396 Md. at 289 (quoting *Md. Comm'n on Human Relations v. Bethlehem Steel Corp.*, 295 Md. 586, 592-93 (1983)). Indeed, because "the agency's expertise is more pertinent

[8] The University asserts that its job class specifications are not formal "regulations" but rather "simply the [University System]'s job classifications," and so its interpretation "should be entitled to even more deference than a State agency's interpretation of regulations it administers." Because *Auer*/*Seminole Rock* deference suffices to decide these appeals in the University's favor, we need not decide whether the University might be entitled to even greater deference in classifying its employees.

to the interpretation of an agency's rule than to the interpretation of its governing statute," *Kougl*, 451 Md. at 514 (quoting *Bethlehem Steel*, 295 Md. at 593), "[a]n agency is granted further deference when it interprets a regulation it promulgated, rather than a statute enacted by the Legislature," *Kougl*, 451 Md. at 514.

In reviewing an agency's interpretation of its regulations for legal error, we "apply[] our well-settled principles of statutory interpretation." *Id.* at 515. First, we look to "a regulation's plain language," which "is 'the best evidence of its own meaning.'" *Id.* (quoting *Total Audio-Visual Sys. v. Dep't of Labor, Licensing & Regulation*, 360 Md. 387, 395 (2000)). "We conduct this plain language inquiry within the context of the regulatory scheme, and 'our approach is a commonsensical one designed to effectuate the purpose, aim, or policy of the enacting body.'" *Kougl*, 451 Md. at 516 (quoting *Christopher v. Montgomery County Dep't of Health & Human Servs.*, 381 Md. 188, 209 (2004)). We "read each provision in the context of the regulatory scheme to ensure that 'no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.'" *Kougl*, 451 Md. at 521 (quoting *In re Kaela C.*, 394 Md. 432, 467 (2006)). If the regulation's "language is clear and unambiguous, our inquiry ordinarily ends there." *Kougl*, 451 Md. at 516 (quoting *Christopher*, 381 Md. at 209).

If the language of the regulation is ambiguous, however, then "we look to the agency's interpretation of its own regulation." *Kougl*, 451 Md. at 517. "We give deference to an agency's interpretation 'unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *King*, 369 Md. at 288-89); *see also Joseph F. Hughes & Co.*, 209 Md. at 148 ("[A]n administrative interpretation . . . is of controlling weight unless it is

plainly erroneous or inconsistent with the regulation."). Out of respect for the "agency's superior ability to understand its own rules and regulations," we "should not substitute [our] judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken.'" *Dep't of Health & Mental Hygiene v. Reeders Mem'l Home*, 86 Md. App. 447, 453 (1991) (quoting *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 513 (1978)).

Just last term, in *Kisor v. Wilkie*, __ U.S. __, 139 S. Ct. 2400 (2019), the Supreme Court reaffirmed *Auer* and *Seminole Rock*, while emphasizing the limitations on that doctrine that have been developed over decades of its application. Although *Kisor* is not binding on us and has not yet been cited in a majority opinion by our Court of Appeals, *cf. Md. Dep't of Env't v. County Comm'rs*, 465 Md. 169, 281 & n.1 (2019) (Getty, J., dissenting), its analysis is generally consistent with that employed by Maryland courts, and we think the structure of that analysis is useful here.

Surveying its precedent and that of other courts applying *Auer*/*Seminole Rock* deference, the Court in *Kisor* identified three criteria that inform the decision whether to defer to an agency's interpretation of its own regulation. The Court held that such an interpretation is entitled to deference if (1) the "regulation is genuinely ambiguous . . . . even after a court has resorted to all the standard tools of interpretation," *Kisor*, 139 S. Ct. at 2414; (2) the agency's interpretation is "reasonable," in the sense that it "come[s] within . . . the outer bounds of permissible interpretation" established by the regulation's "text, structure, history, and so forth," *id.* at 2416 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)); and (3) "the character and context of the agency interpretation

entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416. The last element demands that (i) "the regulatory interpretation . . . [is] the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views," *id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 257-59 & n.6 (2001) (Scalia, J., dissenting)); (ii) "the agency's interpretation . . . in some way implicate[s] its substantive expertise," either because the "rule is technical" or because it otherwise "implicate[s] policy expertise," *Kisor*, 139 S. Ct. at 2417; and (iii) the "agency's reading . . . reflect[s] 'fair and considered judgment,'" rather than "a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack.'" *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)),

With respect to the agency's "fair and considered judgment," the Court emphasized that deference should not be given "to a new interpretation . . . that creates 'unfair surprise' to regulated parties." *Kisor*, 139 S. Ct. at 2417-18 (quoting *Long Island Care at Home v. Coke*, 551 U.S. 158, 170 (2007)). Because such "disruption of expectations may occur when an agency substitutes one view of a rule for another," the Court noted that it "ha[d] . . . only rarely given *Auer* deference to an agency construction 'conflict[ing] with a prior' one." *Kisor*, 139 S. Ct. at 2418 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 515); *cf. Mining Energy, Inc. v. Dir., Office of Workers' Comp. Programs*, 391 F.3d 571, 574 n.1 (4th Cir. 2004) (concluding that agency's "interpretation of the regulation [was] entitled to 'considerably less deference' because [it] ha[d] taken essentially two contradictory positions." (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987))).

In short, a court should defer to an agency's interpretation of its own regulation if it answers three questions in the affirmative:

(1) Is the regulation "genuinely ambiguous"?

(2) Is the agency's interpretation "reasonable"?

(3) Is the interpretation worthy of deference?

B. The University's Interpretations of Its Job Classifications Are Entitled to Deference.

We conclude that the University's interpretation of its Program Administrative Specialist job class specification is entitled to deference. First, the specification is genuinely ambiguous because the phrase "responsible . . . for the efficient operation of a program or unit," Univ. Sys. of Md., *Job Class Specification: Program Administrative Specialist*, *supra*, "is susceptible to 'two or more equally plausible interpretations,'" *cf. Assateague Coastkeeper v. Md. Dep't of Env't*, 200 Md. App. 665, 710 (2011) (quoting *Wal Mart Stores v. Holmes*, 416 Md. 346, 361 (2010)). The key term "responsible" can mean both (1) "Morally or legally answerable for the discharge of a duty . . . or other obligation; specif[ically], marked by accountability to some higher authority for the execution of certain duties," or (2) "[h]aving caused" something.[9] "Responsible," *Black's*

[9] Other dictionaries also include alternative definitions of "responsible" reflecting accountability, causation, or both. *See, e.g.*, "Responsible," *Merriam-Webster's Collegiate Dictionary* 1062 (11th ed. 2014), (defining "responsible" as, among other things, (1) "liable to be called on to answer," (2) "liable to be called to account as the primary cause, motive, or agent," (3) "being the cause or explanation," and (4) "marked by or involving responsibility or accountability"); "Responsible," *New Oxford American Dictionary* 1488 (3d ed. 2010) (defining "responsible" as "having an obligation to do something, or having control over or care for someone, as part of one's job or role," "being the primary cause of something and so able to be blamed or credited for it," and "involving important duties, independent decision-making, or control over others").

Law Dictionary (11th ed. 2019). Thus, the phrase "responsible . . . for the efficient operation of a program or unit" could be understood to mean *accountable for* "the efficient operation of a program or unit," as the University argues, or *having caused*, to some extent, "the efficient operation of a program or unit," as the Employees contend.

Our ordinary tools of statutory construction do not dispel the ambiguity. The parties have not provided us with any relevant regulatory history. One familiar maxim of statutory construction favors the University's interpretation. That maxim, *noscitur a sociis*—"it is known from its associates," *Emmert v. Hearn*, 309 Md. 19, 25 n.3 (1987) (quoting *Black's Law Dictionary* 956 (5th ed. 1979))—holds that "one may discern meaning by examining the surrounding words," *Bainbridge St. Elmo Bethesda Apts. v. White Flint Express Realty Grp. Ltd. P'ship*, 454 Md. 475, 490 n.7 (2017). Here, the job summary establishes that a Program Administrative Specialist must be "responsible for work requiring specialized knowledge" or "responsible . . . for the efficient operation of a program or unit." The first criterion, "specialized knowledge," indicates that a Program Administrative Specialist has a higher degree of expertise than ordinary administrative personnel. The principle "that words grouped in a list should be given related meaning," *Manger v. Fraternal Order of Police, Montgomery County Lodge 35*, 227 Md. App. 141, 149 (2016) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989)), suggests that the second criterion also requires a higher degree of responsibility that goes beyond a mere causal relationship with the unit's efficiency. Indeed, if "responsible" merely requires some element of causation, then it could be met by any employee who is performing his or her job adequately.

The Employees claim support for their interpretation of "responsible" in some of the listed primary duties of the Program Administrative Specialist, such as the performance of "clerical to paraprofessional duties." Such duties, they assert, would not ordinarily be performed by someone who is ultimately accountable for the operation of a program or unit. The University counters by observing that employees may qualify to be Program Administrative Specialists based on either "specialized knowledge" *or* responsibility for the efficient operation of a program or unit, and that "clerical to paraprofessional duties" would be more applicable to the former. As Ms. Ringling testified, because a job class specification is "reviewed in totality," the primary duties must be understood in light of the job summary. Ultimately, none of these arguments resolves conclusively which construction of the language of the job class specification is correct.

Second, having accepted that the job class specification is genuinely ambiguous, we consider whether the University's interpretation is reasonable. *See Kougl*, 451 Md. at 517 ("To choose the appropriate definition, we look to the agency's interpretation of its own regulation."). Although we agree with the Employees that the job class specification could reasonably be read to mean that the Program Administrative Specialist need only *cause* "the efficient operation of a program or unit," the University's contrary reading is neither "plainly erroneous [n]or inconsistent with the regulation." *See Kougl*, 451 Md. at 517 (quoting *King*, 369 Md. at 288-89). "The agency's interpretation 'need not be the best or most natural one by grammatical or other standards,'" *Dist. Mem'l Hosp. of Sw. N.C. v. Thompson*, 364 F.3d 513, 518 (4th Cir. 2004) (quoting *Pauley v. BethEnergy Mines*, 501 U.S. 680, 702 (1991)), nor are we entitled to "decide which among several competing

interpretations best serves the regulatory purpose," *Humanoids Grp. v. Rogan*, 375 F.3d 301, 307 n.4 (4th Cir. 2004) (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512). The question is whether the University's interpretation is "*a* reasonable construction of the regulatory language." *Thompson*, 364 F.3d at 518 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 506 (emphasis in *Thompson*)); *see also, e.g.*, *Assateague Coastkeeper*, 200 Md. App. at 714 (holding that, because State agency's "construction of [a regulation] . . . [was] reasonable," this Court would "not substitute our judgment for that of the agency"). Here, the University's interpretation of its job class specification is reasonable.

Third, under the circumstances of this case, we conclude that the University's interpretation is worthy of deference. To be sure, Ms. Ringling's testimony regarding the job classifications was neither "a formal regulation [n]or an interpretative rule," *People of State of Cal. ex rel. Dep't of Transp. v. United States ex rel. Dep't of Transp.*, 561 F.2d 731, 734 (9th Cir. 1977), and did not "come from a source with the authority to bind the agency," *Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1040 (D.C. Cir. 2008); *cf. S. Goods Corp. v. Bowles*, 158 F.2d 587, 590 (4th Cir. 1946) ("It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department."). Nonetheless, courts have deferred even to comparatively informal agency expressions of opinion, such as (1) guidance documents, *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 213-15 (4th Cir. 2009); (2) policy memoranda, *Glover v. Standard Fed. Bank*, 283 F.3d 953, 962 (8th Cir. 2002); *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994);

People of State of Cal. ex rel. Dep't of Transp., 561 F.2d at 734, and even (3) amicus briefs, *Auer*, 519 U.S. at 462.

Here, Ms. Ringling's testimony was sufficiently authoritative to warrant deference. Not only was she the only expert to testify for either side, but also she is the University official in charge of implementing the job class specifications and sits on the University-System-wide committee that is responsible for drafting the job class specifications. In addition, Ms. Ringling's testimony was supported by evidence that the University's interpretation has been applied consistently over time and across units of the University.[10] *See Walz v. Montgomery County*, 49 Md. App. 125, 129 (1981) ("[W]here legislation is susceptible to differing constructions, the continued and unvarying construction of that regulation by the chief administrative officer should be strongly persuasive and not disregarded except for weighty reasons."). There are very few Program Administrative Specialists at the University—four administrative staff out of several hundred—and of those employees, all either have specialized knowledge, are actually accountable "for the efficient operation of a program or unit," or both. Nothing in the record indicates that the University's interpretation of the job class specification has been applied arbitrarily or that the University has capriciously "substitute[d] one view of a rule for another." *See Kisor*, 139 S. Ct. at 2418. Accordingly, we will defer to the University's interpretation of

[10] Neither party introduced evidence regarding the interpretation or application of the job class specification by the University System's Board of Regents or by any other member of the University System.

"responsible . . . for the efficient operation of a program or unit" as requiring accountability for the efficient operation of a program or unit.

II. THE ALJ'S DECISIONS TO UPHOLD THE UNIVERSITY'S CLASSIFICATIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

After accounting for the deference due to the University's interpretation of its job classifications, we conclude that the ALJ's decisions were supported by substantial evidence. The ALJ determined that neither of the Employees is ultimately accountable for the efficient operation of their Departments. Instead, each supports a department chair in ensuring that the Departments run efficiently.[11] Indeed, in Ms. Penuel's case, her own witness—the former Chair of the Physics Department, Andrew Pica—conceded that "technically, [the budget] was the responsibility of the department Chair, ultimately"; that he "was kept abreast of everything"; and that "ultimately on paper," the Department was "the Chair's ultimate responsibility." When asked, "[W]ho's responsible for the efficient operation of the department?" Dr. Pica replied, "The Chair." Likewise, during Ms. Penuel's own testimony, when asked, "Who has the ultimate responsibility for the budget of your department?" Ms. Penuel answered, "The Chair does." The Salisbury University Faculty Handbook also states explicitly that "[t]he Chair [of the Department] is

[11] At oral argument, counsel for the Employees advanced an alternative theory for why the Employees were "accountable," arguing that they could "be disciplined" or "stricken with an adverse performance evaluation" if they did not perform to their supervisors' satisfaction. That alternate understanding of "accountability" differs from the University's interpretation, however, and it is the latter to which we must defer. *See, e.g.*, *Kim v. Md. State Bd. of Physicians*, 423 Md. 523, 537 (2011) ("Reviewing courts are to accord some deference to an agency's interpretation of its own regulations.").

responsible for the efficient operation of the department as an administrative structure within the University."

Moreover, comparing the Employees' positions to those of the four employees who are classified as Program Administrative Specialists at the University, it is apparent that the roles are not similar.[12] As mentioned above, of the employees who were classified as Program Administrative Specialists, each either "ha[d] . . . specialized knowledge, or r[an] a unit or department." Substantial evidence thus supports the ALJ's decision to uphold the University's classification decision.

CONCLUSION

The ALJ's decision to uphold the University's denial of reclassification was not legally erroneous and was supported by substantial evidence. Therefore, we will reverse the judgment of the circuit court and remand with instructions to dismiss the Employees' petitions for judicial review.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

[12] The University's Associate Vice President for Human Resources, Kevin Vedder, testified that "an important aspect of our review process is [to] make sure that we're looking at positions across the brea[d]th and depth of the institution for consistency and ensuring that people . . . are doing similar duties or similarly classified." Accordingly, a comparison of the different positions is informative.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0484s19cn.pdf