

Circuit Court for Baltimore City
Case No. 24-C-21-003230

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 0555

September Term, 2022

ADRIENNE CONGO

v.

MARYLAND DEPARTMENT OF HEALTH

Graeff,
Zic,
Salmon, James P.**
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: May 31, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

** Salmon, J., participated in the hearing of the case, and in the conference regarding the Court's decision, but he was no longer a member of the Court prior to the adoption of the opinion. The remaining judges sitting on the panel constitute a quorum. Because they agree as to the reasoning and outcomes of the appeal, there is a "concurrence of a majority of [the] panel." Md. Code Ann., Cts. & Jud. Proc., § 1-403(b) (2020 Supp.); *see also Jackson v. State*, 408 Md. 231, 239-40 (2009).

Appellant, Adrienne Congo, was employed by the Maryland Department of Health (MDH), appellee, until she was terminated in 2020. Ms. Congo's union representative filed an appeal with MDH contesting her termination. After initial proceedings, the appeal was referred to the Office of Administrative Hearings (OAH). The Administrative Law Judge (ALJ) dismissed Ms. Congo's appeal because it was untimely. The Circuit Court for Baltimore City affirmed the ALJ's decision. Ms. Congo appeals to this Court, asserting that the initial appeal of her termination was timely filed.

BACKGROUND

On July 30, 2020, Sharon Oliver, Ms. Congo's supervisor, called Ms. Congo to inform her that Ms. Congo's employment with MDH was terminated effective July 31, 2020. During that call, Ms. Oliver informed Ms. Congo that Ms. Oliver would provide the written Notice of Termination "shortly." Approximately ten minutes after the call, at 1:55 p.m., Ms. Oliver sent Ms. Congo an email titled "Notice of Termination of Employment," which contained two attachments: the "Notice of Termination" and an "Unsatisfactory Report of Service."

Ms. Congo contacted her union representative, William Wharton. Exactly when Ms. Congo contacted Mr. Wharton is not clear from the record, but it was evidently sometime not too long after her call with Ms. Oliver. Mr. Wharton advised Ms. Congo to contact him as soon as she received the written Notice of Termination.

On August 18, 2020, Ms. Congo received notice that her insurance coverage was terminated because she was no longer employed by the State. Ms. Congo contacted Mr.

Wharton regarding this issue. In an email dated August 18, 2020 to Dana Casparriello, Deputy Chief, Employee Relations Division of MDH,¹ Mr. Wharton wrote:

Ms. Congo said she received notification from DBM [Department of Budget and Management] concerning insurance coverage being terminated due to her not being employed by the State any longer. She has advised me that at no time has she received written notification that she has been terminated from Maryland State employment. Please contact me or forward any signed notification Ms. Congo may have received.

Ms. Casparriello responded to Mr. Wharton in less than an hour with the following:

Attached is a PDF of the email that was sent to Ms. Congo on July 30, 2020 from her supervisor regarding her Notice of Termination. There is a read receipt to the email that shows that Ms. Congo opened the email on July 30, 2020.

The next day, on August 19, 2020, Ms. Casparriello emailed Mr. Wharton the Notice of Termination and the Unsatisfactory Report of Service. On Ms. Congo's behalf, Mr. Wharton subsequently filed an appeal of the termination. The envelope in which Mr. Wharton mailed Ms. Congo's appeal documents was postmarked August 24, 2020.² Ms.

¹ Correspondence in the record reflects Ms. Casparriello's titles depending upon the time as "Deputy Chief" and "Acting Chief" of the Employee Relations Division of MDH.

² Mr. Wharton received an email with the following instructions on March 24, 2020 from Ms. Casparriello:

I know that your office typically files appeals of disciplines and second step grievances to our office by U.S. mail. Given that the Employee Relations Division staff is currently teleworking the majority of the time right now, I am requesting that you file your appeals directly to me or Harold Young, III (harold.young@maryland.gov). We will follow up a receipt of the appeal with a confirmation email.

Congo’s appeal was stamped received by MDH on August 27, 2020. We refer to this as a “first-step” appeal.

MDH failed to decide the appeal, which allowed Ms. Congo to file a “second-step” appeal to the Secretary of Budget and Management. Ms. Congo, through Mr. Wharton, sent a letter to the Secretary of Budget and Management dated September 16, 2020 noting a second-step appeal. A settlement conference was held on October 19, 2020 by the Employee and Labor Relations Division of the Office of Personnel Services and Benefits within the Department of Budget and Management. Because the matter was not resolved through this settlement conference process, Ms. Congo’s case was referred to the OAH on November 17, 2020.³ Following the OAH hearing, the ALJ concluded that Ms. Congo’s first-step “appeal [to MDH] was not timely filed and must be dismissed.” The ALJ also ordered that the Notice of Termination filed against Ms. Congo be affirmed. The Circuit Court for Baltimore City affirmed the ALJ. Ms. Congo then filed an appeal to this Court.

³ A remote motion hearing was held on February 9, 2021. On February 12, 2021, the ALJ issued a ruling denying MDH’s Motion to Dismiss, finding that “there was a genuine dispute of material fact concerning when [Ms. Congo] received the written notice of disciplinary action.”

A remote merits hearing was held on April 14 and 15, 2021 and May 5 and 6, 2021. On June 21, 2021, the ALJ issued her Decision and Order affirming Ms. Congo’s Notice of Termination.

QUESTIONS PRESENTED

Ms. Congo presents two questions for our review,⁴ which we have rephrased and recast into three questions:

1. Whether the ALJ erred in finding that Ms. Congo received her Notice of Termination in writing transmitted by a July 30, 2020 email.
2. Whether the ALJ erred in her conclusion that Ms. Congo’s initial appeal of her termination was not timely filed and in dismissing Ms. Congo’s appeal to MDH.
3. Whether the ALJ erred in finding that Ms. Congo violated MDH Policy 02.01.06, the Security Manual, and COMAR 17.04.05.04B(1).

⁴ Ms. Congo phrased her questions on appeal as follows:

1. Whether the ALJ below erred in finding that the Employee’s initial appeal of her termination was untimely[.]
2. Whether the ALJ erred in finding that the Employee violated MDH Policy 02.01.06, the Security Manual, and COMAR 17.04.05.04B(1)[.]

MDH presented the following questions:

1. Did substantial evidence in the record support the ALJ’s finding that Ms. Congo received written notice of her termination on July 30, 2020, which was a reasonable conclusion based upon the evidentiary record below?
2. Did the [ALJ] correctly grant [MDH]’s motion to dismiss or, in the alternative, for summary decision because MS. Congo’s appeal was untimely as a matter of law?

For the reasons that follow, we answer the first two questions in the negative, and need not and decline to answer the third question.⁵ We, therefore, affirm the judgment of the circuit court and the ALJ.

STANDARD OF REVIEW

This Court reviews the decision of the administrative agency rather than that of the circuit court in an appeal from the circuit court’s ruling upon a petition for judicial review of an administrative decision. *Dep’t of Health and Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001) (“[I]t is the final decision of the final decision maker at the administrative level, not that of the reviewing court, that is subject to judicial review.”); *Wallace H. Campbell & Co., Inc. v. Maryland Comm’n on Human Relations*, 202 Md.

⁵ While we do not address the third question presented, the ALJ wrote the following in her decision issued on June 21, 2021:

While Ms. Oliver considered a multitude of mitigating factors, the evidence plainly demonstrates that she utterly failed to consider the extraordinary circumstances brought on by the COVID-19 pandemic, namely its impact on [Ms. Congo]’s ability to work remotely from home. . . . I find the oversight of such a compelling mitigating factor to be fatal in Management’s determination of appropriate discipline. Moreover, Management failed to consider that [Ms. Congo] had no prior disciplinary infractions over the course of her career. I find Ms. Oliver’s lack of consideration of the extraordinary circumstances brought on by the pandemic, coupled with [Ms. Congo]’s lack of disciplinary infractions, severely undercuts the reasonableness of the discipline imposed: termination.

Had [Ms. Congo] prevailed on the Motion, I would have modified the discipline imposed, having found [Ms. Congo] to be in violation of MDH Policy 02.01.06, the Security Manual, and COMAR 17.04.05.04B(1).

App. 650, 661-62 (2011) (“When reviewing the decision of an administrative agency, . . . we review the agency’s decision directly, not the decision of the circuit court.”) (quotation marks and citations omitted).

This Court’s role in reviewing the decision of an administrative agency 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 on an erroneous conclusion of law.” *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (quotation marks and citations omitted). When reviewing an administrative agency’s factual conclusions, this Court is “not to substitute its judgment for the expertise of those persons who constitute the administrative agency.” *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68-69 (1999) (quotation marks and citations omitted). Rather, this Court determines “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached” by “defer[ing] to the agency’s fact-finding and drawing of inferences if they are supported by the record [because] it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.” *Banks*, 354 Md. at 68 (quotation marks and citations omitted).

“In reviewing an agency’s legal conclusions,” this Court must determine “whether the conclusions are affected by any [] error of law.” *Myers v. Dep’t of Pub. Safety and Corr. Servs.*, 162 Md. App. 272, 279 (2005) (citations omitted). Accordingly, we review legal conclusions *de novo*. *Id.* at 279-80 (citation omitted).

DISCUSSION

I. THE ALJ DID NOT ERR IN FINDING THAT MS. CONGO RECEIVED HER NOTICE OF TERMINATION IN WRITING TRANSMITTED BY A JULY 30, 2020 EMAIL.

Ms. Congo makes two arguments to support her contention that the ALJ erred in finding that she received her Notice of Termination in writing transmitted by a July 30, 2020 email. First, Ms. Congo argues that it was improper for Ms. Oliver to send the Notice of Termination electronically by email. Second, Ms. Congo argues that even if it was proper for Ms. Oliver to send the Notice of Termination by email, the emailed Notice of Termination was not received by Ms. Congo.

A. The ALJ Did Not Err In Concluding That It Was Proper For Ms. Oliver To Send The Notice Of Termination By Email.

The discipline and appeal process at issue in this case is governed by Title 11, Subtitle 1 of the State Personnel and Pensions Article.⁶ Section 11-106(a)(5) provides that:

- (a) Before taking any disciplinary action related to employee misconduct, an appointing authority^[7] shall:
 - (5) give the employee a written notice of the disciplinary action to be taken and the employee’s appeal rights.

Regarding how the “appointing authority” may give the employee the written notice, § 11-103(e) provides that:

⁶ All statutory references are to the State Personnel and Pensions Article.

⁷ “Appointing Authority” is defined as “an individual or a unit of government that has the power to make appointments and terminate employment.” § 1-101(b).

- (e) All written appeal documents and all decisions rendered under this subtitle may be transmitted electronically to the appropriate parties.

In support of her argument that it was not permissible for Ms. Oliver to send Ms. Congo the Notice of Termination by email, Ms. Congo invokes the canon of construction *expressio unius est exclusio alterius*: “to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICTIONARY 726-27 (11th ed. 2019). She argues:

The fact that the statute **only** allows appeal documents and decisions to be transmitted electronically necessarily, under firmly established precedent, requires that all other documents provided for in the statute be transmitted with service of actual documents. The fact that the General Assembly expressed that certain documents in this process can be transmitted electronically, pursuant to the above reference[d] law [§ 11-103(e)], necessarily excludes the other. The Agency is not permitted to provide written notice of agency action via electronic mail, and its efforts to have done so on July 30, 2020 were void *ab initio*.

(Emphasis in original).

MDH argues that “there is no statutory requirement concerning the method by which the written notice is transmitted.” Additionally, “§ 11-103(e) allows, but does not mandate, electronic transmission of certain documents, and it has no bearing on the method by which other documents are transmitted;” and “as the ALJ recognized, the notice of termination, in this context, is a decision within the meaning of §11-103(e).”

The ALJ succinctly analyzed the issue, stating:

[Ms. Congo] contends that section 11-106(a)(5) of the State Personnel and Pensions Article does not permit written notice of disciplinary action to be provided to an employee

electronically. However, [Ms. Congo]’s assertion is simply not supported by a plain reading of the statute. As noted above, section 11-106(a)(5) provides, “[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.” SPP § 11-106(a)(5). The statute simply notes that *written notice* must be provided to the employee; it does not indicate the method by which the written notice must be provided (i.e., hand-delivery, via process server, or via the United States Postal Service). In support of her claim, [Ms. Congo] cites to section 11-103(e), which states, “[a]ll written appeal documents and all decisions rendered under this subtitle may be transmitted electronically to the appropriate parties.” SPP § 11-103(e). Asserting that the written notice of termination does not constitute an appeal document or a decision pursuant to section 11-103(e), [Ms. Congo] posits that the notice of termination may not be transmitted electronically. However, the notice of termination is a *decision*; specifically, it is [MDH]’s decision notifying [Ms. Congo] of separation from State service. Accordingly, sending the written notice of termination via email to [Ms. Congo] comports with section 11-103(e) of the State Personnel and Pensions Article, which provides for electronic transmission. It is worth noting that [Ms. Congo] does not challenge the electronic transmission of the written notice of termination to [Ms. Congo]’s union representative *via email* on August 19, 2020.

(Emphasis in original).

We agree with the ALJ’s analysis that the Notice of Termination is a decision by MDH to terminate Ms. Congo’s employment. MDH, therefore, complied with § 11-103(e) when Ms. Oliver sent the Notice of Termination to Ms. Congo by email.

B. There Is Substantial Evidence In The Record To Support The ALJ’s Finding That Ms. Congo Received The Notice Of Termination By Email On July 30, 2020.

Ms. Congo contends that “[w]hile [she] asserts that any attempt at service of the notice of termination via email would have been unlawful, the assertion that [Ms. Congo] even received that notice on the date in question [(July 30, 2020)] is in dispute.” Ms. Congo reviews various facts in support of her argument. Ms. Congo does not present an argument, however, that there is not substantial evidence to support the ALJ’s finding that she received the Notice of Termination on July 30, 2020. MDH argues that because the ALJ’s “factual finding is supported by substantial evidence and a reasoning mind could determine that Ms. Congo was given written notice, this Court should not disturb the decision below.”

The ALJ summarized the relevant facts, her analysis, and findings regarding Ms. Congo’s receipt of the Notice of Termination as follows:

[Ms. Congo] disputes receipt of the notice of termination on July 30, 2020, notwithstanding the read receipt that was generated from her work email account at 2:33 p.m. In order for me to believe [Ms. Congo]’s story, I would have to find that [Ms. Congo] left her work computer powered on and unlocked, with her work email account opened, and that some unknown person from [MDH]’s pandemic reduced workforce, coincidentally opened two emails from [Ms. Congo]’s work email account that just so happened to deal with [Ms. Congo]’s termination. I simply do not find this to be plausible. While it is true that the read receipt does not indicate who opened the email, I reasonably infer, based on the foregoing, that [Ms. Congo] opened the July 30, 2020 email from Ms. Oliver

It is worth noting that Ms. Oliver’s email to [Ms. Congo] dated July 30, 2020 is clearly entitled “Notice of

Termination of Employee” in the subject line. The email plainly advises [Ms. Congo], “*attached* is the notice of the termination of employment effective 7/31/2020.” Moreover, the email visibly contains two attachments. I surmise that in [Ms. Congo]’s quest to change her office telephone’s voicemail message, notify various individuals about her termination via email, and craft an automated email response on her work account, that she simply, and very unfortunately, overlooked the attachments in Ms. Oliver’s email. In this case, I find the read receipt generated from [Ms. Congo]’s work email account to be akin to sending notice via certified mail, requiring the recipient’s signature.

* * *

Based on the foregoing, I find that [Ms. Congo] received notice of the appointing authority’s disciplinary action on July 30, 2020, in which case, the appeal should have been filed on or before August 24, 2020^[8] in order to be timely.

(Emphasis in original) (record citations omitted).

We agree with MDH that there is substantial evidence in the record, as recited in the above quote from the ALJ’s opinion, and based on our own review of the record, for the ALJ’s conclusion. The ALJ did not err in her finding that Ms. Congo received the Notice of Termination on July 30, 2020.

⁸ We explain in the following section why we agree with the ALJ that August 24, 2020 was the deadline for Ms. Congo to file her appeal.

II. THE ALJ DID NOT ERR IN FINDING THAT MS. CONGO’S APPEAL WAS FILED ON AUGUST 27, 2020 AND WAS UNTIMELY.

A. The Procedural History Of Ms. Congo’s Appeal

Pursuant to § 11-109(c) and the instructions on her Notice of Termination, Ms. Congo appealed her termination to the head of her principal unit within MDH, then-Secretary Robert R. Neall. This is the first step of the appeal process.

MDH failed to decide Ms. Congo’s § 11-109(c) appeal within the required time period. Because MDH failed to decide Ms. Congo’s § 11-109(c) appeal she was permitted to appeal to the Secretary of Budget and Management⁹ pursuant to § 11-110(a), which she did on September 16, 2020. We refer to this appeal as the “second step” of the appeal process. This second-step § 11-110(a) is also explained in Ms. Congo’s Notice of Termination.

As a result of Ms. Congo’s second-step § 11-110(a) appeal, the Department of Budget and Management, Office of Personnel Services and Benefits, Employee and Labor Relations Division scheduled a settlement conference to be held on October 19, 2020 with Ms. Congo and MDH “[i]n an attempt to resolve employee concerns through a less formal process.”

The settlement conference did not resolve the matter, and Ms. Congo’s case was referred to the OAH pursuant to § 11-110(b). The ALJ concluded that Ms. Congo’s first-step § 11-109(c) “appeal [to MDH] was not timely filed and must be dismissed.” Whether Ms. Congo’s first-step § 11-109(c) was filed timely is the issue we are called

⁹ “‘Secretary’ means the Secretary of Budget and Management.” § 1-101(m).

upon to decide. For the following reasons we agree with the ALJ that Ms. Congo’s § 11-109(c) appeal was untimely.

B. The ALJ Correctly Determined That August 24, 2020 Was The Deadline For Ms. Congo To File Her Appeal.

As required by § 11-106(a)(5), the Notice of Termination¹⁰ advised Ms. Congo of “the disciplinary action to be taken and [her] appeal rights.” Ms. Congo’s Notice of Termination read as follows:

Under the authority of Title 11 of the State Personnel and Pensions Article (“SPP”), I hereby terminate you from your . . . **Skilled Service**[] . . . position effective 07/31/2020 [sic]. This termination is . . . **Without Prejudice**.

In accordance with SPP § 11-109(c), you are advised that you may appeal, in writing, this termination **within fifteen (15) calendar days** after receipt of this notice to:

Name Dana Casparriello
Title: Acting Chief, Employee Relations
Address: 201 W. Preston Street, Room 112
 Baltimore, MD 21201

Should you file a timely appeal, your Cabinet Secretary or agency head^[11] shall issue to you a written decision on your appeal within 15 days of its receipt (SPP § 11-109(e)); however, the failure of your Cabinet Secretary or agency head to issue a written decision within 15 days constitutes a denial of your appeal. SPP § 11-108(b). Unless that decision is the final administrative decision, within 10 days of a denial you may appeal to the next level of the disciplinary process, where you will have the opportunity to

¹⁰ The Notice of Termination, dated July 30, 2020, was signed by Ms. Oliver as the “Appointing Authority” and then-Secretary Robert R. Neall as the “Head of Principal Unit.”

¹¹ While the Notice uses the terms “Cabinet Secretary” and “agency head,” for clarity, we will refer to the position as it is referenced in § 11-109(c): “head of the principal unit.”

have a hearing on your appeal if it is not resolved. SPP
§ 11-110.

(Emphasis in original).

The Notice of Termination summarizes what is potentially a two-step process.

Section 11-109(c) provides the procedure for the first step:

- (c) (1) An employee or an employee’s representative may file with the head of the principal unit a written appeal of a disciplinary action that states, to the extent possible, the issues of fact and law that the employee believes would warrant rescinding the disciplinary action.
- (2) An appeal under this subtitle must be filed within 15 days after the employee receives notice of the appointing authority’s action.

Whether Ms. Congo’s initial appeal was timely filed with the head of the principal unit pursuant to § 11-109(c) is the question before us. Ms. Congo contends that the appeal was filed when it was postmarked on August 24, 2020, and was timely. MDH contends that Ms. Congo’s appeal was filed on August 27, 2020 when it was received by MDH, and was untimely.

The ALJ concluded, and we agree as discussed above, that Ms. Congo received the Notice of Termination on July 30, 2020. The ALJ did not, however, start counting the 15 days from July 31. As discussed in the ALJ’s opinion, MDH “noted that due to the COVID-19 pandemic, time frames concerning disciplinary actions were tolled on March 30, 2020 until August 8, 2020.”¹² Accordingly, the ALJ started counting the 15 days on

¹² In her principal brief, Ms. Congo adopted the ALJ’s finding of fact that “[d]ue to the COVID-19 pandemic, time frames concerning appealing disciplinary actions were tolled on March 30, 2020 until August 8, 2020.”

August 9, 2020 to determine the August 24, 2020 deadline. We agree with the ALJ’s determination that August 24, 2020 was the deadline for Ms. Congo to file her appeal.

C. The August 24, 2020 Postmark Did Not Satisfy The Requirement That Ms. Congo’s Appeal Be Filed By The August 24, 2020 Deadline.

Assuming, without conceding, that August 24, 2020 was the deadline for filing the appeal, Ms. Congo argues that her appeal was timely filed because it was postmarked on August 24, 2020. Ms. Congo contends her initial appeal is actually an “initial *pleading*” under COMAR 28.02.01.04, and thus, COMAR 28.02.01.04D(1)(b) controls. Ms. Congo argues that:

The issue in the instant case is whether the employee complied with SPP 11-109, which requires that an appeal of that disciplinary action must be “**filed** within 15 days after the employee received notice of the appointing authority’s action.” (Emphasis added) “Filed,” as in this context, is actually defined in regulation, specifically, COMAR 28.0[2].01.04, which provides:

D. Filing. Unless otherwise provided by law:

(1) An initial pleading is deemed to be filed on the earlier of the date that a request for hearing, along with all required fees, necessary documents, and other information is **postmarked** or received by the

(a) Office, if required to be filed with the Office; or

(b) Agency, if required to be filed with the agency.

(Emphasis in original).

Ms. Congo’s principal brief does not provide any additional authority as to why COMAR 28.02.01.04 should apply.¹³

MDH responds to Ms. Congo’s argument that COMAR 28.02.01.04D(1)(b) applies by arguing the following:

[T]he regulatory framework specifically contemplates the possibility of conflicts between the regulations at issue and provide[s] that, in such a scenario, the Department of Budget and Management regulations prevail. COMAR 17.04.07.01D. Therefore, when it comes to determining whether an appeal is timely, Department of Budget and Management regulations require a finding that it is upon receipt of the appeal. COMAR 17.04.07.03C.

COMAR 17.04.07.03C provides that “[a]n appeal is considered received on the date it is date stamped by the Office.” The ALJ decided to apply that regulation, COMAR 17.04.07.03C, rather than COMAR 28.02.01.04D(1)(b),¹⁴ explaining that:

¹³ In an order for supplemental briefing, we instructed the parties to “[a]ssum[e], for the purpose of supplemental briefing only, that COMAR 17.04.07.03 and COMAR 28.02.01.04D do not apply to whether Ms. Congo’s appeal pursuant to § 11-109(c) . . . was timely filed.”

Ms. Congo, nonetheless, argued in her supplemental reply brief that MDH ignores the fact that an “initial pleading” is not limited to the date on which matters are submitted to the Office of Administrative Hearings (OAH). COMAR 28.02.01.04D addresses situations not otherwise provided for by law, that can start *either* with a filing to the OAH *or*, as here, ones which can be initiated by a filing with an Agency.

Ms. Congo cites no authority in support of this assertion, and we reject it.

¹⁴ The circuit court upheld the ALJ’s decision to apply COMAR 17.04.07, rejecting Ms. Congo’s argument that COMAR 28.02.01.04D(1)(b) applies:

[Ms. Congo’s] argument is not supported by the plain language of the controlling COMAR regulations. COMAR

(continued)

[Ms. Congo]’s reliance on COMAR 28.02.01.04D(1)(b) is misplaced. COMAR 17.04.07.01A states, “[t]his chapter applies to all conferences, hearings and *appeals* conducted pursuant to State Personnel and Pensions Article, *Titles 11 and 12*, Annotated Code of Maryland.” COMAR 17.04.07.01A (emphasis added). The regulation goes on to provide, “[h]earings are governed by this chapter and COMAR 28.02.01. *In the case of a conflict* between this chapter and COMAR 28.02.01, *this chapter* [referring to COMAR 17.04.07] *prevails*.” COMAR 17.04.07.1D (emphasis added). Finally, COMAR 17.04.07.03C states, “[a]n appeal is considered received on the date that is stamped by the Office.” COMAR 17.04.07.03C.

Based on the foregoing, it is clear to me that COMAR 17.04.07.03C dictates when an appeal is considered to be received in the instant case, as opposed to COMAR 28.02.01.04D(1)(b).

(Emphasis and all alterations, except first, in original).

We are not persuaded by the parties’ arguments nor the analysis by the ALJ. Although we come to the same conclusion as the ALJ that COMAR 28.02.01.04D(1)(b) does not apply, we do so for different reasons. Our review of the plain language of COMAR 17.04.07.01A and COMAR 17.04.07.01D, and the differences in the language

17.04.07.01A clearly states that “this chapter applies to all conferences, hearings and appeals” under Title 11 of State Personnel and Pensions Article. It further explains that “in case of conflict between this chapter and COMAR 28.02.01, this chapter prevails.” COMAR 17.04.07.01D.

Given this, the ALJ properly applied COMAR 17.04.07.01A, and therefore, she did not err as a matter of law in finding that Petitioner’s appeal was “received” on August 27, 2020.

In accordance with the standard of review, we do not review the circuit court’s opinion, but we reference it for the sake of completeness. *See Campbell*, 364 Md. at 123.

between the two, persuades us that COMAR 28.02.01 does not apply to the timeliness of appeals filed pursuant to § 11-109(c) because COMAR 28.02.01 is not incorporated into COMAR 17.04.07 for that purpose, not because there is a conflict and COMAR 17.04.07 prevails.

COMAR 17.04.07.01A provides: “This chapter applies to all *conferences, hearings, and appeals* conducted pursuant to State Personnel and Pensions Article, Titles 11 and 12, Annotated Code of Maryland.” (emphasis added). In contrast, COMAR 17.04.07.01D provides: “*Hearings* are governed by this chapter and COMAR 28.02.01. In the case of a conflict between this chapter and COMAR 28.02.01, this chapter prevails.” (emphasis added).

COMAR 17.04.07.01A references conferences, hearings, and appeals, while COMAR 17.04.07.01D references only hearings.¹⁵ COMAR 17.04.07.01D incorporates COMAR 28.02.01 with regard to hearings only, not with regard to appeals (or conferences). Based on our review of the briefs and record, neither Ms. Congo, nor MDH, nor the ALJ, addressed that COMAR 17.04.07.01D does not incorporate COMAR 28.02.01 with regard to appeals.¹⁶

The issue before us involves filing an appeal within MDH, not a hearing. Therefore, COMAR 28.02.01.04D(1)(b) does not govern whether Ms. Congo’s initial

¹⁵ COMAR 17.04.07.02 defines “Hearing” as “a contested case proceeding conducted by the Office of Administrative Hearings.”

¹⁶ The circuit court also did not address that COMAR 17.04.07.01D does not incorporate COMAR 28.02.01 with regard to appeals.

appeal to the “head of the principal unit” (then-Secretary Neall of MDH), pursuant to § 11-109(c), was timely.

COMAR 28.02.01 does not otherwise apply in this case because, except for its incorporation by COMAR 17.04.07.01D with regard to hearings, the scope of COMAR 28.02.01 “applies to all proceedings before the Office of Administrative Hearings.” COMAR 28.02.01.01. Ms. Congo’s case was referred to the OAH by the Secretary of Budget and Management after her second-step § 11-110(a) appeal from the MDH to the Secretary of Budget and Management, but the issue before us concerns the timeliness of her first-step § 11-109(c) appeal to the head of her principal unit, the Secretary of MDH, not an appeal to the OAH. Accordingly, COMAR 28.02.01 does not apply to Ms. Congo’s first-step § 11-109(c) appeal.

We, therefore, hold that COMAR 28.02.01.04D(1)(b) does not apply to Ms. Congo’s appeal.

D. COMAR 17.04.07.03C Does Not Apply To Ms. Congo’s Appeal To The Head Of The Principal Unit.

MDH contends that the timeliness of § 11-109(c) first-step appeals, such as Ms. Congo’s, is governed by COMAR 17.04.07.03C, arguing that “[a]n appeal is considered received on the date it is date stamped by the Office.” MDH relies on the language of COMAR 17.04.07.01A, which states that the “chapter applies to all conferences, hearings, and appeals conducted pursuant to State Personnel and Pensions Article, Titles 11 and 12, Annotated Code of Maryland.”

Ms. Congo contends that the ALJ incorrectly relied on COMAR 17.04.07.03C.¹⁷ She argues that COMAR 17.04.07.03C applies to the second step of the appeal process provided in § 11-110. Ms. Congo argues that to whom the second-step appeals are filed pursuant to § 11-110 and COMAR 17.04.07.03C (citing the definition of “Office” in the regulation), are different from a first-step § 11-109(c) appeal to the head of the principal unit in MDH, and that time periods to file the first-step appeals referenced in § 11-109(c) (15 days) as opposed to second-step appeals in § 11-110(a) (10 days) and COMAR 17.04.07.03C (10 days) are not the same.

We agree with Ms. Congo that COMAR 17.04.07.03C does not apply to her first-step § 11-109(c) appeal to the head of the principal unit. Although we ultimately conclude that Ms. Congo’s § 11-109(c) appeal was not timely because it was filed when it was received by MDH, we first address MDH’s argument regarding COMAR 17.04.07.03C.

¹⁷ The circuit court upheld the ALJ’s decision to apply COMAR 17.04.07, rejecting Ms. Congo’s argument that COMAR 28.02.01.04D(1)(b) applies:

[Ms. Congo’s] argument is not supported by the plain language of the controlling COMAR regulations. COMAR 17.04.07.01A clearly states that “this chapter applies to all conferences, hearings and appeals” under Title 11 of State Personnel and Pensions Article. It further explains that “in case of conflict between this chapter and COMAR 28.02.01, this chapter prevails.” COMAR 17.04.07.01D.

Given this, the ALJ properly applied COMAR 17.04.07.01A, and therefore, she did not err as a matter of law in finding that [Ms. Congo]’s appeal was “received” on August 27, 2020.

The statutory authority for the second step of the appeal is § 11-110(a)(1), which provides: [w]ithin 10 days after receiving a decision under § 11-109 of this subtitle, an employee or an employee’s representative may appeal the decision in writing to the Secretary.

COMAR 17.04.07.03 provides, in its entirety:

- A. An appeal shall be received by the Office not later than 10 calendar days after the date the appellant received the decision of the head of the principal unit or the unit head’s designee.
- B. Whenever service of a decision under §A of this regulation is by regular mail, 3 business days shall be added to the period for an employee to file an appeal.
- C. An appeal is considered received on the date it is date stamped by the Office.

The appeal at issue is a first-step appeal filed pursuant to § 11-109(c). The number of days to file the appeal is 15, and the appeal is to be filed with the head of the principal unit, MDH. Section 11-109(c). In this case, Ms. Congo was instructed to file the appeal with Dana Casparriello, Acting Chief, Employee Relations Division of MDH, presumably as the designee for the head of her principal unit, then-Secretary Neall of MDH.

In contrast, a second-step appeal pursuant to § 11-110(a)(1) does not apply until “*after* [an employee has] receiv[ed] a decision [or lack thereof] under § 11-109[.]” (emphasis added). Then, “an employee or an employee’s representative may appeal the

decision in writing to the *Secretary*.” Section 11-110(a)(1) (emphasis added).¹⁸

“Secretary” in § 11-110(a)(1) is defined as “the Secretary of Budget and Management,”¹⁹ just as “Secretary” referenced in COMAR 17.04.07.02B(8) is defined as “the Secretary of Budget and Management or the Secretary’s designee.”²⁰ Section 11-110 further reflects the language used in COMAR 17.04.07.03A and C, which refer to “the Office.”

COMAR 17.04.07.02B(8) defines “Office” as “the Office of Personnel Services and Benefits, Department of Budget and Management, which is the designated representative of the Secretary.” Accordingly, COMAR 17.04.07.03 and § 11-110 work in tandem to govern second-step § 11-110(a) appeals, which are handled by the Office of Personnel Services and Benefits, Department of Budget and Management, and therefore, do not govern Ms. Congo’s first-step § 11-109(c) appeal to MDH.

MDH argues that “[a]lthough the ‘Office’ is defined as the Office of Personnel Services and Benefits within the Department of Budget and Management, *see* COMAR 17.04.07.02B(8), the [MDH]’s employee relations division regularly receives notices of appeal.” MDH does not provide any cite to the record for this factual assertion. While Ms. Congo was instructed to send her appeal to Ms. Casparriello, Acting Chief, Employee Relations with MDH, that was a first-step appeal pursuant to § 11-109(c) to the head of the principal unit, MDH. MDH does not cite any statutory or regulatory

¹⁸ For an extensive discussion of this appeal process, see *Fisher v. E. Corr. Inst.*, 425 Md. Md. 699 (2012).

¹⁹ Section 1-101(m).

²⁰ COMAR 17.04.01.01B(8).

authority for the proposition that MDH is authorized to accept appeals for the Secretary of Budget and Management or the Office. We reject the argument. In this context, the Secretary and the Office are not the head of the principal unit referenced in § 11-109(c).

Section 11-110(a)(1) provides 10 days for an employee to file an appeal to the Secretary. COMAR 17.04.07.03 tracks § 11-110(a)(1) with the same 10-day time period for an appeal to be received by the Office, as opposed to the 15-day time period for an appeal to the head of the principal unit pursuant to § 11-109(c). Accordingly, we hold that the plain language of COMAR 17.04.07.03 read as a whole in conjunction with § 11-110(a)(1) indicates that COMAR 17.04.07.03 applies to second-step appeals to the Secretary of Budget and Management, and not to initial appeals to the head of the principal unit pursuant to § 11-109(c).

E. “Filed” In § 11-109(c) Means Received By The Head Of The Principal Unit.

In light of our holdings that neither COMAR 17.04.07.03 nor COMAR 28.02.01.04D(1)(b) apply, we look to other authority to decide what “filed” means in § 11-109(c). We ordered supplemental briefing regarding the definition of “filed.”²¹ In

²¹ We ordered supplemental briefing as follows:

Assuming, for the purpose of supplemental briefing only, that COMAR 17.04.07.03 and COMAR 28.02.01.04D do not apply to whether Ms. Congo’s appeal pursuant to § 11-109(c) of the State Personnel and Pensions Article (“SPP”) was timely filed:

1. Is there another regulation(s) or other authority that defines when an appeal under SPP § 11-109(c) is “filed”

(continued)

response, the parties did not identify additional regulations that apply to Ms. Congo’s appeal. Instead, MDH argues this Court should apply the plain meaning of the term “filed” and relies on case law to support its argument that “[courts] have invariably concluded that [‘filed’] means receipt by, or delivery to, the intended recipient.” Ms. Congo contends that the case law the MDH relies upon is inapplicable to her case. We agree with MDH.

When engaging in statutory interpretation, “we start with the cardinal rule of statutory interpretation—to ascertain and effectuate the General Assembly’s purpose and intent when it enacted the statute. . . . To ascertain the intent of the General Assembly, our analysis begins with the normal, plain meaning of the language of the statute.” *Wheeling v. Selene Fin. LP*, 473 Md. 356, 376 (2021) (citation omitted). *See also Price v. State*,

and is applicable in this case? If so, please cite that regulation(s) or other authority and provide analysis.

2. If the parties do not contend that there is another regulation(s) or other authority that defines when an appeal under SPP § 11-109(c) is “filed,” how should the Court resolve this appeal?

Ms. Congo states that she did not find any additional regulations that apply to her appeal but reasserts that COMAR 28.02.01.04D governs. She reiterates her argument that her § 11-109(c) appeal is considered to be an “initial pleading” under COMAR 28.02.01.04D because her appeal ultimately leads to a hearing with the OAH. Ms. Congo then reasserts that notices of termination cannot be sent electronically and argues, for the first time, that the notice of termination did not provide Ms. Congo proper instructions under § 11-106(a)(5) and *Hughes v. Moyer*, 452 Md. 77 (2017).

MDH correctly argues that an appeal under § 11-109, such as Ms. Congo’s, is not an “initial pleading” under COMAR 28.02.01.04D, and the regulation does not apply. MDH then contends that this Court should rely upon the plain meaning of “filed” to resolve the question of the timeliness of Ms. Congo’s appeal.

378 Md. 378, 387 (2003) (“[A]ll statutory interpretation begins, and usually ends, with the statutory text itself, for the legislative intent of a statute primarily reveals itself through the statute’s very words. A court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute.”) (cleaned up).

In the absence of an exception, long-standing precedent in Maryland is that a paper is considered filed when it is delivered to the proper officer and received to be kept on file. “A pleading or paper is filed by actual delivery to the clerk. This may be accomplished in person or by mail. However, the date of the filing is the date the clerk receives the pleading, not the date when the pleading was mailed.” *Molé v. Jutton*, 381 Md. 27, 34 (2004) (citation omitted). *See, e.g., Renehan v. Public Serv. Comm’n*, 231 Md. 59, 63 (1963) (“The mailing of the appeal to the Clerk is not made the equivalent of filing it with him.”); *Levy to Use of Walbrook Mill & Lumber Co. v. Glens Falls Indem. Co.*, 210 Md. 265, 273 (1956) (“[A] paper is said to be ‘filed’ when it is delivered to the proper officer and received by him to be kept on file.”); *Bush v. Public Serv. Comm’n of Maryland*, 212 Md. App. 127, 136 (2013) (“There is no ambiguity in the rule before us—‘mailing’ does not constitute ‘filing’ of a Petition.”). *See also File*, BLACK’S LAW DICTIONARY 772 (11th ed. 2019) (“To deliver a legal document to the court clerk or record custodian for placement into the official record[.]”).

An exception is the so-called prison mailbox rule. “A post-conviction petition by an unrepresented prisoner is deemed to be ‘filed’ at the moment the petition is formally submitted to prison authorities for forwarding to the circuit court.” *Hackney v. State*, 459

Md. 108, 132 (2018). The Court recognized that “[t]he physical mail delivery system provides an important avenue of access to the courts for those who do not or cannot, for one reason or another, use electronic mail, electronic filing systems, or the Internet at large.” *Id.* at 109; *see* Md. Rule 1-322(d). The exception does not apply here.

Ms. Congo’s appeal, therefore, was not “filed” until it was delivered to and received by MDH.

CONCLUSION

To be timely, Ms. Congo’s § 11-109(c) first-step appeal to the head of the principal unit needed to be delivered and received by MDH by August 24, 2020. It was not received until August 27, 2020, and was therefore, not timely filed. The ALJ did not err in dismissing her appeal and affirming her termination.

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

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

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0555s22cn.pdf>