Circuit Court for Prince George's County
Case No. CAL17-31338

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 923

September Term, 2018

RAYMOND OCHIGBO

v.

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

Graeff,
Arthur,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: February 18, 2020

Raymond Ochigbo, appellant, challenged his termination as a correctional officer with the Department of Public Safety and Correctional Services (the "Department"). An administrative law judge ("ALJ") granted the Department's motion for summary decision on the ground that Ochigbo had not filed a timely grievance. Ochigbo sought judicial review in the Circuit Court for Prince George's County, which affirmed the decision.

Representing himself in this appeal, Ochigbo presents two questions, which we have rephrased:

1. Did the ALJ err in finding that Ochigbo had not filed a timely grievance?

2. Is the grievance process set forth in Maryland Code (1993, 2015 Repl. Vol.), sections 12-101 to -105 of the State Personnel & Pensions Article ("SPP") unconstitutional?[1]

For the reasons that follow, we shall affirm.

FACTUAL BACKGROUND[2]

On July 27, 2016, Ochigbo's father died, in Nigeria. On August 1, 2016, Ochigbo requested a leave of absence from his appointing authority, Warden Tina Stump, to attend

[1] Ochigbo formulated his questions as follows:

a. Did the trial judge err in ruling by ignoring, pertinent misrepresented and/or misinterpreted details in the decision by the ALJ and testimony by Appellee, specific to days to appeal and testimony given by Ochigbo?

b. Whether Md. Code Ann. State Pers. & Pens. § 12-203(B) Is Unconstitutional As Applied To The Termination Of A State Employee's Job.

[2] The factual recitation derives largely from the ALJ's factual findings.

to his father's estate in Nigeria. It appears that Ochigbo originally intended to return to the United States around October 4, 2016, because he booked a return flight for that date.

On October 10, 2016, several days after what appears to have been his intended date of return, Ochigbo sent an email to Warden Stump. In the email, Ochigbo wrote that he was encountering problems with his father's estate and would "return to work around" November 18, 2016.

On November 10, 2016, about one week before his intended date of return, Ochigbo and Warden Stump spoke over the telephone. During the call, Ochigbo requested more time. The warden denied the request and told Ochigbo that she would not extend his leave beyond November 18, 2016. He agreed to report to work on that date.

Ochigbo booked a return flight to the United States for November 18, 2016, but three days before the flight was to depart, he became ill with ebola-like symptoms. He was admitted to a hospital in Nigeria, where he remained until November 26, 2016. During his hospitalization and during the time when he remained in Nigeria after he had left the hospital, he did not attempt to notify the warden or anyone else at his place of employment about what had happened to him. He returned to the United States on Saturday, December 3, 2016.[3]

On December 5 and December 7, 2016, Ochigbo called Warden Stump's cell phone number to request an assignment, but he was unable to reach her. On December 8, 2016, Ochigbo emailed Warden Stump, explaining why he had not returned to work as

[3] Even if he had not become ill, Ochigbo's scheduled flight would not have arrived in the United States until November 19, 2016, the day after his final day of leave.

agreed and informing her that he would return to work on Monday, December 12, 2016. He immediately received an automatic reply stating that the warden was out of the office and would return to work on December 12, 2016. The reply went on to state, "Should you need immediate assistance, please contact AW [Assistant Warden] Smith" at a specific telephone number or "Chief Jones" at another specific telephone number.

The next day, December 9, 2016, Ochigbo telephoned the assistant warden, who informed him that he was no longer employed with the Department.

On December 10, 2016, Warden Stump filed an "Unsatisfactory Report of Service" form with the Department of Budget and Management. The form stated that Ochigbo's employment had ended on November 18, 2016. The form contains several boxes for the warden to check to designate how Ochigbo's employment had ended: resignation, resignation without proper notice, resignation in lieu of termination, termination without prejudice, termination with prejudice, and "other." The Warden checked "other." She explained:

> In August the employee was granted leave without pay to go to Africa to attend a personal matter. He gave several return dates. In the last conversation with the warden he provided a return date of November 18, 2016. The warden informed him that she would not approve any additional leave after that date. As of December 9, 2016, Officer Ochigbo had not returned to duty nor had he made contact with the warden/designee.

On December 12, 2016, the report was sent by certified mail to Ochigbo's address of record. On December 15, 2016, Warden Stump sent a certified letter to Ochigbo's address of record. The letter, which was dated November 30, 2016, informed Ochigbo

that he was considered to have "resigned without notice" on November 18, 2016. The letter cited and quoted COMAR 17.04.04.03D:

> An employee who is absent from duty without notifying the supervisor of the reasons for the absence and the employee's intention to return to duty shall be absent without leave. After 5 working days from the first day of absence, the appointing authority shall advise the employee by certified and regular mail to the employee's last address of record that the employee is considered to have resigned without notice. A resignation without notice may be expunged by the appointing authority when extenuating circumstances exist, and the employee had good cause for not notifying the appointing authority.

The warden's letter informed Ochigbo to direct any questions to the Personnel Office at a specified telephone number.

Because Ochigbo had changed his home address without notifying the Department, he did not receive the "Unsatisfactory Report of Service" form or the warden's certified letter until December 23, 2016, when both documents were faxed to his union representative.

Ochigbo wrote to the Commissioner for the Division of Corrections in a letter dated January 6, 2017. The letter quoted Title 11 of the SPP, which sets forth the procedures to appeal disciplinary actions, and COMAR 17.04.04.03D, which governs an employee's absence from duty without authorization. Ochigbo requested that his resignation without notice be expunged and that he be reinstated.

On March 9, 2017, Ochigbo's union representative challenged the termination of his employment by filing a written grievance pursuant to SPP § 12-205. The grievance alleged that Ochigbo was wrongly considered to have resigned without proper notice.

An ALJ conducted a hearing concerning Ochigbo's grievance. After the first day of the hearing, during which Ochigbo alone had testified, the Department moved for summary decision. In support of its motion, the Department argued that under SPP § 12-203(b) the grievance should be dismissed because Ochigbo had not filed it within 20 days of when he acquired knowledge of the facts giving rise to the grievance. The Department specifically argued that Ochigbo knew of his termination on December 9, 2016, when the assistant warden told him that he was no longer employed, but that he did not file a grievance until March 9, 2017.

On October 6, 2017, the ALJ issued a written opinion, agreeing with the Department and granting the motion for summary decision. Ochigbo appealed the ALJ's ruling to the Circuit Court for Prince George's County, which affirmed the decision.

DISCUSSION

I.

Ochigbo argues that the ALJ improperly granted the Department's motion for summary decision on the ground that he filed his grievance more than 20 days after he learned of the factual basis for it. Ochigbo attacks the ALJ's finding that the 20-day period began with his call to the assistant warden on December 9, 2016, which, he says, is "unsupported by competent, material, and substantial evidence and was arbitrary and capricious." In addition, Ochigbo argues that the ALJ should have tolled the time required to file a grievance under the doctrine of unclean hands. The Department responds that there is "substantial evidence in the record" to support the ALJ's findings and conclusion that Ochigbo filed an untimely grievance.

After reviewing the record and arguments, we shall uphold the ALJ's ruling that Ochigbo filed his written grievance action outside the 20-day time period allowed under SPP § 12-203(b).

A. Standard of Review

In an appeal from a petition for judicial review of the decision of a state administrative agency, this Court reviews the action of the agency, rather than the decision of the circuit court. *See, e.g., Maryland Ins. Comm'r v. Centr. Acceptance Corp.*, 424 Md. 1, 14 (2011). Our review of the administrative agency's factual findings is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions. *See, e.g., Kim v. Maryland State Bd. of Physicians*, 423 Md. 523, 536 (2011). We must affirm the decision if there is sufficient evidence such that "'a reasoning mind reasonably could have reached the factual conclusion'" that the agency reached. *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 573 (2015) (quoting *Consumer Prot. Div'n v. Morgan*, 387 Md. 125, 160 (2005)); *accord Priester v. Bd. of Appeals of Baltimore Cty.*, 233 Md. App. 514, 534 (2017). "In general, however, the reviewing court exhibits no such deference where it determines that the agency decision is based on an erroneous conclusion of law." *Priester v. Bd. of Appeals of Baltimore Cty.*, 233 Md. App. at 534.

B. Analysis

When state employees challenge the termination of their employment, their remedies vary depending on whether the termination was for a disciplinary reason or whether they were deemed to have resigned because of an unauthorized absence. If an

employee has been terminated for a disciplinary reason, the process is governed by Title 11 of the SPP, which concerns "Disciplinary Actions, Layoffs, and Employment Terminations." By contrast, if the employee is deemed to have resigned, the process is governed by the grievance procedures in Title 12 of the SPP. *See Dep't of Pub. Safety & Corr. Servs. v. Thomas*, 158 Md. App. 540, 553-54 (2004). Because Ochigbo was deemed to have resigned without notice, the correct course for him to pursue was the grievance process under Title 12. *See id.*

Under Title 12, an employee may initiate the grievance process "by filing a written grievance with the grievant's appointing authority." SPP § 12-203(a). The employee must initiate the grievance process "within 20 days after: (1) the occurrence of the alleged act that is the basis of the grievance; or (2) the employee first knew of or reasonably should have known of the alleged act that is the basis of the grievance." SPP § 12-203(b). The ALJ found that Ochigbo knew of the basis for the grievance on December 9, 2016, when the assistant warden advised him that he was no longer employed by the Department.

Ochigbo challenges this finding on the ground that, by his account, the assistant warden told him only that he was no longer employed and not that he was considered to have resigned without notice. Under SPP § 12-203(a), however, Ochigbo's 20 days did not begin to run only when he had full knowledge of the bases for a grievance. Rather, the 20 days began to run when Ochigbo "first knew of or reasonably should have known of the alleged act that is the basis of the grievance." As of December 9, 2016, Ochigbo unquestionably knew that he was no longer employed with the Department (because the

assistant warden told him). In addition, Ochigbo unquestionably knew that he had been absent from work for three full weeks after Warden Stump had ordered him to return. For those reasons, there is substantial evidence in the record as a whole to support the ALJ's conclusion that Ochigbo knew of the basis for the grievance on December 9, 2016

But assuming solely for the sake of argument that the record does not adequately support the ALJ's conclusion, Ochigbo certainly knew that he was considered to have resigned without notice by December 23, 2016, when his union representative received the warden's letter dated November 30, 2016. He did not file a formal grievance, however, until more than two months later, on March 9, 2017. The ALJ, therefore, did not err in concluding that Ochigbo failed to meet the 20-day deadline prescribed in SPP § 12-203(b).

In the proceedings before the ALJ, Ochigbo claimed to have sent a letter to the Commissioner of Corrections on January 6, 2017, within the 20-day deadline. Nonetheless, the ALJ reasonably concluded that this letter was not a grievance, but was "quite clearly an appeal of a disciplinary action." because it referred to Title 11 of the State Personnel and Pensions Article as a basis for reinstatement. In any event, as the ALJ observed, the record contains nothing (such as a postmark, an email, or a fax ledger) to indicate when Ochigbo actually sent the letter, and it was not stamped as "received" by the Employee Relations Unit of the Department of Public Safety and Correctional

Services until January 19, 2017.[4] Furthermore, the Commissioner was not the "appointing authority" to whom the grievance ought to have been directed under SPP § 12-203(a). Rather, according to the Unsatisfactory Report of Service and Warden Stump's November 30, 2016 letter, Warden Stump was Ochigbo's appointing authority.

Ochigbo argues that the ALJ should have tolled the time to file a grievance under the doctrine of unclean hands. Most notably, Ochigbo argues that Warden Stump misled him about how to pursue a grievance because she erroneously informed him that she was not his appointing authority. The ALJ, however, did not find that the warden had misled Ochigbo. Rather, the ALJ reasonably found that Ochigbo "may have assumed" she was not his appointing authority because sometime in January 2017 she told him that "there was nothing she could do about the decision." Furthermore, even if we were to agree that Warden Stump misled Ochibgo into thinking that she was not his appointing authority, he was still required to initiate the grievance process by filing a grievance with *someone* within the required 20-day time period. As explained above, Ochigbo never did.

For the above reasons, we shall affirm the ALJ's ruling granting the Department's motion for summary dismissal.

[4] In a discussion on the record on the second day of the hearing, the Department's advocate stated that the letter was postmarked on January 12, 2017. The envelope and postmark, however, are not part of the record. Even if the January 6, 2017, letter could qualify as a written grievance, it was not "filed" in a timely fashion, because it appears not to have been received until almost a month after Ochigbo unquestionably knew of or reasonably should have known of the alleged act that is the basis of the grievance. *See, e.g., Cherry v. Seymour Bros.*, 306 Md. 84, 92 (1986) (quoting *Levy v. Glens Falls Indem. Co.*, 210 Md. 265, 273 (1956)) (stating that, "[i]n modern usage, the 'filing' of a paper consists in placing it in the custody of the proper official who makes the proper indorsement thereon'").

II.

Ochigbo argues that SPP § 12-203(b), which sets forth when a grievant must initiate the grievance procedure, is unconstitutional as applied to him for three reasons. He argues that procedural due process requires written notice of his termination, not oral notice. He also argues that the written notice of termination must explain how to challenge his termination. Lastly, he argues that SPP § 12-203 is unconstitutional because it does not provide for a pre-termination hearing.

Ochigbo's first argument is moot because he did receive written notice. Ochigbo was notified by letter dated November 30, 2016, that he was considered to have resigned without notice. It is only because Ochigbo did not inform his employer of his new home address that he did not receive the written notice until December 23, 2016, when it was faxed to his union representative.[5]

The crux of Ochigbo's second argument is that because the letter failed to advise him *how* to challenge his termination, it violated his procedural due process rights. Ochigbo cites no authority for his bald argument that the letter had to inform him of his rights on how to appeal his termination. Rather, according to the Unsatisfactory Report of Service and Warden Stump's November 30, 2016 letter, Warden Stump was Ochigbo's appointing authority.

[5] Even if Ochigbo's argument were not moot, it would lack merit, because due process does not require a showing that an interested party received actual notice. *See, e.g.*, *Griffin v. Bierman*, 403 Md. 186, 198 (2008).

We decline to address Ochigbo's last argument about a pre-termination hearing because he never raised it before the ALJ and, therefore, it is not properly before us. *See* Md. Rule 8-131(a). *Sturdivant v. Maryland Dep't of Health & Mental Hygiene*, 207 Md. App. 33, 59 (2012), *aff'd*, 436 Md. 584 (2014). We cannot fault the ALJ for failing to consider an argument that was not made.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.