Circuit Court for Prince George's County
Case No. CAL20-07298

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0953

September Term, 2021

GLEN K. DOTY

v.

OFFICE OF THE COMPTROLLER
OF MARYLAND

Shaw,
Tang,
Albright,

JJ.

Opinion by Albright, J.

Filed: August 2, 2022

The State Personnel and Pensions ("SPP") Article establishes a detailed process by which non-temporary[1] state employees in Maryland's Executive Branch may be disciplined for misconduct. This process includes several layers of internal and external review (we are one), and it affords employees several procedural rights. In this appeal, Appellant, Glen K. Doty ("Appellant"), a skilled service employee,[2] claims that the Office of the Comptroller of Maryland (the "Comptroller" or "the Agency") failed to follow the SPP Article when it terminated his employment at the Agency's Human Resources Office ("HR"). Appellant also claims that, in reaching its decision to terminate his employment, the Comptroller discriminated against him because he is male. Appellant presents three specific questions for our consideration, which we have rephrased:[3]

[1] Non-temporary State employees include all State employees other than "contractual," "emergency," and "special appointment" employees. *See* Md. Code Ann. (1993, 2015 Repl. Vol.), State Pers. & Pens. §§ 1-101(q); 6-406.

[2] There are multiple categories of non-temporary State employees, including skilled service employees, management service employees, and others. *See* State Pers. & Pens. §§ 6-401–6-406. Within the Executive Branch, all non-temporary State employees who are not classified into a different category are considered skilled service employees. State Pers. & Pens. § 6-401(a).

[3] As originally phrased, Appellant's questions were as follows:

1. Whether the "appointing authority" for the agency failed to comply with every requirement of [State Personnel and Pensions Article] § 11-106 prior to the 30-day deadline, where the only member of management who took responsibility for the decision admitted that the agency did not consider mitigating circumstances and was not interested in the employee's response to the allegations prior to reaching a decision.

1. Whether the "appointing authority" for the agency failed to comply with every requirement of SPP Article § 11-106 prior to the 30-day deadline.

2. Whether the ALJ's conclusion that the disciplinary action did not violate Title VII's prohibition against discrimination was supported by substantial evidence.

3. Whether the ALJ erred in his application of Title VII law to the substantially supported facts.

We answer each question in the negative and affirm the judgment of the circuit court. In so holding, we will review the pertinent provisions of the SPP Article, what happened before the matter came to us, and the standards that govern our review.

Title 11, Subtitle 1 of the SPP Article governs disciplinary actions concerning all non-temporary State employees. *See* Md. Code Ann. (1993, 2015 Repl. Vol.), State Pers. & Pens. § 11-101 *et seq*. Under this subtitle, employee discipline is generally within the purview of an agency's "appointing authority," which is defined as the "individual or a unit of government that has the power to make appointments and terminate employment." State Pers. & Pens. § 1-101(b). In disciplining an employee for misconduct, which is defined in Section 17.04.05.04 of the Code of Maryland Regulations ("COMAR"), an appointing authority may choose a disciplinary action from a menu of possibilities, including termination. *See* State Pers. & Pens. § 11-104. Any termination of employment under Section 11-104, however, must have the prior approval of the head of the principal

2. Whether the ALJ's conclusion that the disciplinary action did not violate Title VII's prohibition against discrimination was supported by substantial evidence.

3. Whether the ALJ erred in his application of Title VII law to the substantially supported facts, where the ALJ analyzed direct evidence of discriminatory bias related to the adverse action under a *McDonnell Douglas* burden-shifting analysis.

unit.[4] State Pers. & Pens. § 11-104(6). Termination may be "with" or "without prejudice," the difference being that a "with prejudice" termination precludes future State employment and requires an additional finding that the employee "does not merit employment in any capacity with the State." State Pers. & Pens. § 11-104(6).

Additionally, some kinds of employee misconduct warrant automatic termination under a different section of the SPP Article. *See* State Pers. & Pens. § 11-105. For example, "intentional conduct" that is "without justification" that "seriously injures another person," prompts an automatic termination. *See* State Pers. & Pens. § 11-105(1)(i).

The statute also sets forth certain procedures that the appointing authority must follow before taking disciplinary action against an employee:

> (a) Before taking any disciplinary action related to employee misconduct, an appointing authority shall:
>
> (1) investigate the alleged misconduct;
>
> (2) meet with the employee;
>
> (3) consider any mitigating circumstances;
>
> (4) determine the appropriate disciplinary action, if any, to be imposed; and
>
> (5) give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.

[4] As is relevant here, "principal unit" is defined as "a principal department or other principal independent unit of State government . . . ." State Pers. & Pens. § 1-101(k). The Office of the Comptroller of Maryland is a principal unit of the Executive Branch of State government. Md. Const., Art. VI, § 1. Accordingly, the Comptroller of Maryland is the head of a principal unit.

> (b) [A]n appointing authority may impose any disciplinary action no later than 30 days after the appointing authority acquires knowledge of the misconduct for which the disciplinary action is imposed.

See State Pers. & Pens. § 11-106. This procedure applies to all disciplinary actions, including automatic terminations.[5] *See Danaher v. Dep't of Labor, Licensing & Regulation*, 148 Md. App. 139, 158 (2002). In meeting with the employee, the appointing authority must provide "a meaningful opportunity" to respond to the accusations. *Danaher*, 148 Md. App. at 169-70; *see also* State Pers. & Pens. § 11-106(a)(2). There is not, however, any requirement that the appointing authority "personally conduct an investigation of alleged misconduct." *Ford v. Dep't of Pub. Safety and Corr. Servs.*, 149 Md. App. 488, 499 (2003). Rather, an appointing authority may acquire knowledge of misconduct directly "or indirectly, through imputation of the knowledge of an agent." *McClellan v. Dep't of Pub. Safety and Corr. Servs.*, 166 Md. App. 1, 24 (2005).

After the appointing authority takes a disciplinary action against a skilled service employee, that employee may file an internal appeal with the head of the principal unit within 15 days after the employee "receives notice of the appointing authority's action."[6]

[5] COMAR provides that, "[e]xcept for automatic terminations under State Personnel and Pensions Article, §11-105 . . . the appointing authority, head of the principal unit, the Secretary, and the Office of Administrative Hearings shall consider mitigating circumstances when determining the appropriate discipline." Code of Md. Regs. § 17.04.05.02(B).

[6] Other categories of non-temporary State employees enjoy different rights, which are contained in different sections of the SPP Article. *See*, *e.g.*, State Pers. & Pens. § 11-113 (governing internal appeals for management service employees and certain other categories of employees).

State Pers. & Pens. § 11-109(c). In reviewing the appointing authority's action, the head of the principal unit may uphold the disciplinary action, rescind it, or modify it (including restoring any lost time, compensation, status, or benefits). State Pers. & Pens. § 11-109(e)(1). In so doing, the head of the principal unit must issue a written decision that responds to each point raised in the employee's internal appeal. State Pers. & Pens. § 11-109(e)(2). After that, either party may take a further administrative appeal to the Secretary of Budget and Management, who will then either mediate a settlement or refer the appeal to the Office of Administrative Hearings. State Pers. & Pens. § 11-110.

If the appeal is referred to the Office of Administrative Hearings, an Administrative Law Judge ("ALJ") will hold a hearing to determine whether the agency proved a valid basis for the disciplinary action by a preponderance of the evidence. State Pers. & Pens. §§ 11-103, 11-110. In so doing, the Office of Administrative Hearings may either (i) uphold the disciplinary action; (ii) rescind or modify the action and restore any lost time, compensation, status or benefits; or (iii) order reinstatement and/or full back pay and benefits.[7] State Pers. & Pens. § 11-110(d)(1). The ALJ must issue a written decision, which becomes the final administrative decision concerning the disciplinary action. State Pers. & Pens. § 11-110(d)(2), (3).

[7] COMAR provides that, "[t]he Office of Administrative Hearings may not change the discipline imposed by the appointing authority, as modified by the head of the principal unit or Secretary, unless the discipline imposed was clearly an abuse of discretion and clearly unreasonable under the circumstances." Code of Md. Regs. § 17.04.05.02(C).

Under the State Government ("SG") Article, after the ALJ issues a written decision, the employee, the agency, or both may seek judicial review of the ALJ's decision by the circuit court for a county where any party resides. *See* Md. Code Ann. (1993, 2021 Repl. Vol.), State Gov't § 10-222. The circuit court's decision may then be appealed to this court. State Gov't § 10-223(b).

BACKGROUND

I. APPELLANT'S MISCONDUCT

Appellant, who was classified as a skilled service employee, worked as an Administrative Officer II in the Comptroller's HR Office. He reported to the HR Director and HR Deputy Director. For much of the time before Appellant's termination, Steven Barzal served as director, and Kara Blouin as deputy. Appellant performed clerical and administrative duties, including supporting HR's payroll team and responding to employment verification requests.

On December 17, 2018, Appellant set in motion the events that would lead to his termination. He walked to Mr. Barzal's office with multiple items to discuss. At least in the beginning, the conversation progressed without incident. Appellant mentioned his father's health and recent surgery, and he also asked Mr. Barzal for additional access privileges in the "Workday" computer program,[8] something that he had requested before.

[8] The Workday program includes various tools and applications that support human resources management, including "timekeeping access," which allows a Workday user to view and edit other employees' time records, including work hours, leave hours, and leave designations.

Appellant once had those privileges, but an agency-wide initiative to move the timekeeping function to a different department cancelled Appellant's access. Appellant noted his desire for access, and he told Mr. Barzal that he needed that access to do his job more efficiently. Another employee overheard that the discussion had turned to Workday. She informed Ms. Blouin, who approached Mr. Barzal's office to listen outside the door. Ms. Blouin then walked inside.

After Ms. Blouin entered, the tone of the discussion changed. Appellant soon became animated, and he started yelling. Multiple employees heard his voice from outside Mr. Barzal's office. Appellant was up and down from his chair; in a loud, aggravated tone, he told Mr. Barzal and Ms. Blouin "this is bullshit," "I need the tools to do my job," and "I can't believe we're having this conversation." At some point, Appellant's shouting took on a more physical dimension—he stood and rounded on Ms. Blouin. Advancing toward her until they were standing face to face, he shouted at her: "What's really going on here?" When Ms. Blouin responded that Appellant was not a timekeeper, Appellant slammed both of his hands on Mr. Barzal's desk. He then shouted again, "what's really going on here?"

Ms. Blouin retreated from Mr. Barzal's office. She was shaken and disturbed, and she worried that Appellant might start throwing loose objects. Throughout her career in State government, she had never encountered anything like Appellant's conduct on December 17, 2018. Indeed, the atmosphere of the entire HR office became tense; one supervisor requested that employees evacuate because of Appellant's behavior. Another

employee texted others, asking if they were safe. Mr. Barzal asked Appellant to leave for the day and suggested that he obtain counseling, but Appellant refused. Mr. Barzal then ordered him to leave the HR office by 5:00 pm. Appellant ignored that order and remained until 6:00 pm.

Appellant reported for work at his usual time the next day. When other employees noticed that he was in the building, several left their desks and retreated to a different floor, secreting themselves in a restroom out of concern for their safety. Mr. Barzal told Appellant that he was not allowed in the office, and Ms. Blouin confiscated Appellant's identification badge and keys. Appellant then left work and was placed on administrative leave.

Before these events, and although his reputation was not perfect, Appellant enjoyed a generally good reputation at the Comptroller. He stayed late at the office, and he frequently volunteered to assume other employees' duties. That said, on several occasions, Appellant also approached his supervisors to ask for fewer tasks. Although his supervisors reassigned some of Appellant's work, they also had to remind Appellant to focus on completing the tasks within his own job description, rather than on performing the duties of other employees. Despite those instructions, Appellant continued to take on other employees' work. He also redid the work of another employee multiple times (when he considered it substandard).

While Appellant was on administrative leave, Mr. Barzal and Ms. Blouin discussed Appellant's behavior. Mr. Barzal acknowledged that many employees were

upset by Appellant's conduct, and he told Ms. Blouin that he thought they were particularly upset because they were all women. Mr. Barzal referenced his time in the Navy, reminiscing that Navy men typically voiced their concerns and then moved on.[9] Ms. Blouin challenged Mr. Barzal about whether Appellant's behavior was truly similar, and Mr. Barzal conceded that he did not mean that subordinates in the Navy ever acted like Appellant. Rather, Mr. Barzal explained that he only meant to reference other power dynamics, such as how superiors addressed their subordinates.

Later, on January 4, 2019, Mr. Barzal met with Appellant for about 45 minutes to discuss Appellant's employment with the Comptroller. Mr. Barzal was aware of Appellant's history of government service and good work, as well as Appellant's personal and professional stress and father's health. At the meeting, Appellant had a chance to further explain his personal circumstances and behavior, and he mentioned that his father's health was failing. Mr. Barzal said that he expected to recommend terminating Appellant's employment because of Appellant's misconduct, and he provided Appellant with a written explanation. Mr. Barzal again referenced his time in the Navy, this time telling Appellant that men may sometimes tolerate behaviors that women will not. Mr. Barzal suggested that Appellant could resign to avoid termination, but Appellant opted instead to contest his termination if and when it occurred.

[9] Another employee recounted what might have been the same (or a similar) conversation, noting that Mr. Barzal said that Appellant's behavior likely would have been viewed as less severe among male peers in the Navy.

Four days after the meeting, Mr. Barzal sent an email to Leonard Foxwell, who was then serving as the Comptroller's Chief of Staff, stating that he needed permission to proceed with termination of Appellant's employment. Ms. Blouin was copied on the email. Mr. Foxwell then responded, "[t]he Comptroller concurs with the recommendation to terminate. Please proceed."

II. APPELLANT'S TERMINATION

On January 15, 2019, Appellant was issued a notice of termination with prejudice, which was signed by Ms. Blouin as the "Appointing Authority." The notice charged six violations of the misconduct provisions of COMAR 17.04.05.04(B):

> (1) Being negligent in the performance of duties;
> (2) Engaging in intentional misconduct, without justification, which injures another person, causes damage to property, or threatens the safety of the workplace;
> (3) Being guilty of conduct that had brought, or if publicized, would bring the State into disrepute;
> (4) Being unjustifiably offensive in the employee's conduct toward fellow employees, wards of the State or the public;
> (12) Violating a lawful order or failing to obey a lawful order given by a superior, or engaging in a conduct violating a lawful order, or failing to obey a lawful order which amounts to insubordination;
> (15) Committing another act, not previously specified when there is a connection between the employee's activities and an identifiable detriment to the State[.][10]

[10] The numbering of the charges in the notice of termination corresponds to the numbering of the respective COMAR misconduct provisions. *See* Code of Md. Regs. § 17.04.05.04(B).

The notice also charged a violation of the Governor's Executive Order 01.01.2015.08. Among other things, this executive order prohibits State employees from taking actions that create "the appearance of any impropriety or that violate applicable laws, regulations, and ethical standards," and allows for disciplinary action in the event of a violation. *See* Md. Executive Order 01.01.2015.08 (Jan. 23, 2015). At the merits hearing, the

The notice also attached an explanation that summarized the bases for the termination action and referenced certain mitigating factors that were considered, including Appellant's "work performance and history with the Comptroller's Office[.]" The notice further advised that Appellant could appeal his termination "[i]n accordance with SPP § 11-109(c)"[11] to Mr. Foxwell.

III. APPELLANT'S INTERNAL APPEAL

On January 30, 2019, pursuant to the statutory procedure referenced in the notice of termination, Appellant appealed his termination to the head of the principal unit. After a hearing, a Management Decision reduced Appellant's sanction to termination without prejudice. The Management Decision was prepared by Mr. Foxwell,[12] who specifically noted Appellant's tenure with the Comptroller, his dedication to his roll, and his reputation as an effective employee. Mr. Foxwell also acknowledged that Appellant's job became more challenging after his timekeeping access was restricted, and that Appellant was dealing with his father's declining health.

Comptroller declined to offer evidence supporting this charge, and the ALJ found that it was not proven.

[11] As discussed earlier, this provision of the SPP Article provides for an internal appeal of a disciplinary action to "the head of the principal unit[.]" *See* State Pers. & Pens. § 11-109(c).

[12] Mr. Foxwell was acting as the delegate of the head of the principal unit. *See* Code of Md. Regs. §17.04.01.04(A)(5).

Mr. Foxwell, however, further determined that Appellant responded inexcusably to his circumstances and that termination without prejudice was appropriate. He referenced Appellant's "inexcusably insubordinate, disrespectful and threatening" conduct toward Ms. Blouin, as well as Appellant's refusal to leave work as directed that day. Mr. Foxwell explained that the Comptroller's response had to be "sufficiently strong" to avoid the risk of normalizing Appellant's behavior within the Agency.

IV. PROCEEDINGS IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Appellant appealed again to the Office of Administrative Hearings ("OAH"), where an ALJ conducted a one-day motions hearing and a four-day merits hearing to determine whether the Comptroller proved a valid ground to support employee discipline.

At the motions hearing, the ALJ considered the Comptroller's motion to prohibit specific discovery, which sought to limit discovery of various other disciplinary actions that the Comptroller had taken against other employees. Appellant sought this discovery to pursue his defense that his termination was based on his sex, and that the Comptroller's reasons for firing him were pretext. The ALJ considered that sex discrimination is prohibited under Section 2-302 of the SPP Article, that Section 2-302 "recognizes the rights and protections afforded to . . . employees under federal law[,]" and that both Appellant and the Comptroller relied upon cases interpreting Title VII law in arguing the Comptroller's motion. After reviewing the parties' cited Title VII cases, the ALJ reasoned that the appointing authority bears the burden of proof in proving a ground for discipline, and that the employee bears the burden of proof in demonstrating a

Title VII *pima facie* case of discrimination. To reconcile the two competing burdens and order the proof that he anticipated, the ALJ adopted the following rubric:

1. The Comptroller will present evidence on the bases for Appellant's termination. Appellant may challenge the facts supporting each basis, and may explore issues of discriminatory motive during cross-examination.
2. Appellant may present evidence in opposition to the Comptroller's factual bases, and the Comptroller may present rebuttal evidence.
3. After both parties have presented on the merits, the ALJ will determine whether Appellant demonstrated a *prima facie* inference of discrimination. If not, Appellant may present evidence supporting a *prima facie* showing of discrimination, which the Comptroller may challenge. The ALJ will then determine whether Appellant has succeeded in demonstrating a *prima facie* showing of discrimination.
4. If Appellant succeeds, the Comptroller may present additional evidence that the disciplinary action had a legitimate, non-discriminatory basis.
5. Then, if the Comptroller demonstrates a legitimate basis free from discrimination, Appellant may show that the legitimate basis was a pretext for discrimination.

6. The Comptroller may demonstrate that any comparator evidence presented by Appellant did not involve similarly-situated employees, and may oppose any pretext evidence presented by Appellant.[13]

At the merits hearing, the ALJ heard testimony from 15 different witnesses, ten presented by the Comptroller, and five by Appellant. The ALJ also reviewed over 40 exhibits that were admitted into evidence. Ultimately, in a 44-page written opinion, the ALJ concluded that the Comptroller proved the three most-serious grounds for discipline: intentional conduct without justification that threatened the safety of the workplace; unjustifiably offensive conduct toward fellow employees; and failure to obey a lawful order by a superior, engaging in conduct amounting to insubordination.[14]

Yet the ALJ also concluded that the Comptroller proved only half of its alleged grounds for discipline, finding the proof wanting as to three other grounds: negligent performance of duties, conduct that would bring the State into disrepute, and some other act causing an identifiable detriment to the State. The ALJ also rejected other theories by the Comptroller, even concerning some of the grounds for discipline that the Comptroller ultimately proved. For example, though the ALJ agreed with the Comptroller that Appellant was insubordinate by failing to leave the office by 5:00 pm (as ordered by Mr.

[13] After adopting that rubric, the ALJ granted in part and denied in part the Comptroller's motion. The ALJ required the Comptroller to produce certain disciplinary records to Appellant, but not the records of *every* employee terminated with prejudice between 2016 and 2019 (as originally requested by Appellant).

[14] These grounds are contained in Title 17 of COMAR. *See* Code of Md. Regs. 17.04.05.04(B).

Barzal), the ALJ rejected the Comptroller's argument that Appellant was insubordinate by failing to attend counseling. Instead, the ALJ characterized insubordination as conduct requiring willfulness and intentional defiance, "of greater severity than simple failure to obey an order." The ALJ also held that the counseling request was merely a suggestion, not an order.

Once the ALJ's decision issued, it became the final agency decision concerning Appellant's termination without prejudice.[15]

V. JUDICIAL REVIEW IN THE CIRCUIT COURT

Appellant sought judicial review of the ALJ's decision in the Circuit Court for Prince George's County. The Comptroller also filed a cross-petition for judicial review, disputing the ALJ's refusal to find certain additional grounds for Appellant's discipline. The Circuit Court issued a 23-page memorandum opinion and order, rejecting both Appellant's and the Comptroller's arguments, and affirming the ALJ's decision in its entirety. Appellant then timely appealed to this Court.

THE PARTIES' CONTENTIONS

In contesting the ALJ's decision on this appeal, Appellant no longer disputes the ALJ's conclusion that the Comptroller proved three grounds for Appellant's discipline. In so doing, Appellant essentially concedes that his behavior threatened the safety of the workplace, was unjustifiably offensive, and was insubordinate. Appellant challenges the ALJ's decision instead on relatively narrow grounds. *First*, he argues that the ALJ

[15] *See* State Pers. & Pens. § 11-110(d)(3).

incorrectly identified the appointing authority (who effected Appellant's termination), and incorrectly found that this appointing authority followed the required procedural steps in Section 11-106 of the SPP Article. *Second*, he disputes the ALJ's factual findings that Appellant's termination was not discriminatory. *Third*, he takes issue with the ALJ's legal analysis of his discrimination arguments, contending that the ALJ relied upon the wrong framework.

In opposition, the Comptroller emphasizes that the ALJ's factual determinations are entitled to deference and argues that those findings are supported by substantial evidence. The Comptroller also contends that, in his legal analysis of Appellant's discrimination arguments, the ALJ considered and addressed the question that he needed to: whether Appellant's termination was the result of sex discrimination. Pointing to Appellant's concessions regarding his misconduct, as well as Appellant's failure to show that the Comptroller's proven grounds for discipline were pretextual, the Comptroller argues that the ALJ correctly analyzed whether Appellant had proved his discrimination allegations.

STANDARD OF REVIEW

An employee who contests discipline by an administrative agency may obtain judicial review of the agency's final decision. *See* State Gov't § 10-222. In conducting our review, we look through the circuit court's opinion, reviewing the decision of the agency directly (here, the ALJ's decision). *Richardson v. Md. Dep't of Health*, 247 Md. App. 563, 569 (2020). We assess whether there is "substantial evidence in the record as a

whole" to support the agency's findings and conclusions, and whether the agency's decision rests upon an erroneous conclusion of law. *Milliman, Inc. v. Md. State Ret. and Pension Sys.*, 421 Md. 130, 151 (2011). We also bear in mind that "decisions of administrative agencies are prima facie correct and carry with them the presumption of validity." *Baltimore Lutheran High Sch. Ass'n v. Emp't Sec. Admin.*, 302 Md. 649, 662-63 (1985). As such, we will not substitute our own judgment for the expertise of the administrative agency. *Maryland-National Capital Park and Plan. Comm'n v. Anderson*, 395 Md. 172, 180-81 (2006). The precise standards of our review vary, depending on whether we are reviewing an agency's factual findings, legal conclusions, or discretionary acts.

In assessing an agency's factual findings, we apply the substantial evidence test by reviewing the record "in a light most favorable to the administrative agency," to determine "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115, 128 (2008) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68 (1999)); *see also* State Gov't § 10-222(h)(3)(v) (providing for "substantial evidence" review). We defer to the agency's assessment of witness credibility, resolution of conflicting evidence, and inferences drawn from the evidence. *Richardson*, 247 Md. App. at 570.

In assessing an agency's legal conclusions, we have (at times) also afforded some deference, such as when the agency is interpreting a statute that it administers. *See Kim v.*

Md. State Bd. of Physicians, 423 Md. 523, 535 (2011); *see also Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 445-46 (1997) (listing several factors to consider in determining how much deference to give an agency's construction of a statute). But our review of an agency's legal conclusions is less deferential than our review of its factual determinations. *People's Counsel for Baltimore Cnty. v. Surina*, 400 Md. 662, 682 (2007). We also typically give no deference to an agency's legal conclusions when they are based upon an error of law. *Belvoir Farms Homeowners Ass'n v. North*, 355 Md. 259, 267 (1999).

Finally, in assessing an agency's discretionary acts, we apply an even higher level of deference than to the agency's factual findings or legal conclusions. *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 529 (2004). The severity of employee discipline is just such a discretionary act, and there is no abuse of discretion review. *See Md. Transp. Auth. v. King*, 369 Md. 274, 290-91 (2002) (citing State Gov't § 10-222(h)). Instead, when the severity of employee discipline is a matter of discretion, our review must ignore any perceived mismatch between the severity of the agency's final sanction and the employee's offense—except in the rare case where "the abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary or capricious." *King*, 369 Md. at 291 (quotation omitted); *see also Md. State Police v. Zeigler*, 330 Md. 540, 557-58 (1993) ("[A]s long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due

process and other constitutional requirements, it is ordinarily unreviewable by the courts.").

DISCUSSION

I. COMPLIANCE WITH SECTION 11-106 OF THE STATE PERSONNEL AND PENSIONS ARTICLE

In his first question presented, Appellant asks us to consider whether the ALJ identified the correct "appointing authority" that terminated Appellant's employment, and whether that appointing authority followed the necessary statutory steps. That formulation, however, elides a critical component: the applicable standard of review. Adding back the missing piece, the question becomes more restrictive: whether substantial evidence supports (A) the ALJ's identification of the appointing authority, and (B) the ALJ's determination that the appointing authority followed the necessary statutory procedures.

A. The Identity of the Appointing Authority

Appellant argues that the ALJ was wrong to conclude that the Agency complied with Section 11-106(a) before terminating him. Asserting that Mr. Foxwell was the Agency's appointing authority, Appellant argues that Mr. Foxwell failed to consider mitigating circumstances and Appellant's response to the Agency's allegations prior to terminating him. As a consequence, goes the argument, the ALJ's conclusion about compliance with Section 11-106(a) is not supported by substantial evidence. This argument is based on an incorrect assumption: the ALJ never concluded that Mr. Foxwell was the Agency's appointing authority.

Instead, the ALJ found that Mr. Barzal and then Ms. Blouin, both of whom served as HR Director, were the appointing authority here.[16] This finding is well supported by the evidence. To start, it was the HR Director (then Ms. Blouin) who signed the January 15, 2019 notice of termination. That notice also expressly listed Ms. Blouin as the appointing authority.[17] Prior to that day, it was Mr. Barzal (then the HR Director) who issued the memorandum explaining Appellant's termination, and who met with Appellant before the termination decision was made.

Mr. Foxwell's role in Appellant's termination was different. Mr. Foxwell was the delegate of the head of the principal unit. To that end, Mr. Foxwell provided approval for

[16] Specifically, the ALJ stated that "Mr. Barzal, and later Ms. Blouin" was the appointing authority. Mr. Barzal was the HR Director for much of the period at issue, but he was pressured to leave the Agency for his handling of Appellant's misconduct. Ms. Blouin was promoted after Mr. Barzal's departure in January 2019. As such, both Mr. Barzal and Ms. Blouin served as HR Director during the relevant time.

To the extent that Appellant takes issue with the ALJ's phrasing of that finding—*i.e.*, that it was arguably phrased as an assumption rather than an express finding of fact—that argument is unavailing. *See Md. Sec. Com'r v. U.S. Sec. Corp.*, 122 Md. App. 574, 588 (1998) ("All legal intendments will be indulged in favor of the administrative decision . . . It will be presumed to be correct and valid, as long as the parties involved have been given a reasonable opportunity to be heard."). If Appellant sought more specificity in the ALJ's factual finding, he could have submitted a proposed finding concerning the identity of the appointing authority, but he did not do so. *See* State Gov't § 10-221(b)(4) (requiring that the final agency decision state a ruling on each proposed finding of fact, *if submitted by a party*). Indeed, Appellant's proposed findings of fact submitted to the ALJ did not address the identity of the appointing authority.

[17] The notice of termination listed Ms. Blouin's former position as Deputy Director of HR. Mr. Barzal's responsibilities had effectively ended by that time, and Ms. Blouin was functioning as the HR Director. Before assuming her new role, Ms. Blouin received necessary information from Mr. Barzal concerning his discussions with Appellant.

the termination, as required by the SPP Article. *See* State Pers. & Pens. § 11-104(6). He then conferred with Appellant before deciding Appellant's internal appeal, *see* State Pers. & Pens. § 11-109(d), and he prepared the written Management Decision that modified the appointing authority's disciplinary action (reducing Appellant's termination to without prejudice), *see* State Pers. & Pens. § 11-109(e). In short, Mr. Foxwell performed the statutory steps that the head of the principal unit—and not the appointing authority—must complete.

Appellant even acknowledged that Mr. Foxwell was the delegate of the head of the principal unit—and not the appointing authority—when Appellant took his first steps to challenge the appointing authority's termination of his employment. Specifically, when Appellant filed his internal appeal from the disciplinary action of the appointing authority (then Ms. Blouin), Appellant did so by letter addressed to Mr. Foxwell, expressly invoking the internal appeal provisions of Section 11-109 of the SPP Article. In that appeal, which was timely under Section 11-109(c)(2) of the SPP Article, Appellant specifically asked Mr. Foxwell to "rescind the Agency's disciplinary action," an option under Section 11-109(e)(1)(ii) of the SPP Article that *presupposes* an existing disciplinary action under Section 11-106.[18]

[18] It appears that Appellant shifted positions after Mr. Foxwell testified before the ALJ. Although Appellant consistently treated Mr. Foxwell as a delegate of the head of the principal unit before Mr. Foxwell testified, he subsequently asserted that Mr. Foxwell was actually the appointing authority.

That Mr. Foxwell was not functioning as the "appointing authority" was again evidenced on March 29, 2019, when, following a hearing, Mr. Foxwell issued a written Management Decision regarding Appellant's appeal.[19] In his decision, Mr. Foxwell addressed the points raised by Appellant on January 15, 2019 and "modified" the appointing authority's disciplinary action to termination without prejudice, an option available under Section 11-109(e)(1)(ii) of the SPP Article.

Mr. Foxwell's and Mr. Barzal's testimony at the merits hearing before the ALJ do not undermine the ALJ's conclusion that Mr. Barzal and Ms. Blouin were the "appointing authority." Mr. Foxwell said, "my exact words at the time were [Appellant] cannot come back into the building" and that "I didn't think that [Appellant] could continue in that job." Although these comments could indicate that Mr. Foxwell exercised some control over the HR Director's termination decision, they could also merely indicate Mr. Foxwell's concerns over Appellant's physical presence in the building (without any attempt to control discipline). Indeed, Mr. Foxwell testified that no final employment decision was made after Appellant's misconduct, and that he "didn't give any specific guidance" about how to keep Appellant out of the building. Similarly, though Mr. Barzal testified that he was directed by Mr. Foxwell to terminate Appellant, emails introduced at the hearing show that—after Mr. Barzal met with Appellant—Mr. Barzal asked Mr.

[19] Although a Management Decision must typically issue within 15 days after receiving an internal appeal, this window can be extended by agreement of the parties. *See* State Pers. & Pens. §§ 11-108(c), 11-109(e)(2). Neither party asserts that the Management Decision here was untimely.

Foxwell to provide approval for Appellant's termination. This further supports that Mr. Foxwell was performing as a delegate of the head of the principal unit, *see* State Pers. & Pens. § 11-104(6) (requiring head of principal unit to approve terminations of employment), and it allows for the inference that Mr. Foxwell did not direct the termination. In considering conflicting reasonable inferences, we must look to the record as a whole and take the inferences in favor of the ALJ's decision.

In sum, the HR Director was named as the appointing authority in documentary evidence, the HR Director performed tasks that an appointing authority should complete, and the HR Director's decision was ultimately contradicted by Mr. Foxwell on an internal appeal (suggesting that Mr. Foxwell did not control the initial termination decision). Moreover, Mr. Foxwell performed a different set of statutory steps that was required of a different individual: the head of the principal unit (or the delegate thereof). The ALJ was entitled to credit such evidence, and his findings are supported by substantial evidence.

B. The Appointing Authority's Compliance with Statutory Procedures

We now turn to the statutory steps that an appointing authority must follow before taking disciplinary action for employee misconduct. *See* State Pers. & Pens. § 11-106(a). Of course, the proper inquiry is *not* whether we think that the HR Director here followed the necessary statutory steps. Our review is more deferential: whether there is substantial evidence to support the ALJ's finding that the HR Director complied with the statute.

In assessing compliance with the statute, the ALJ found that the appointing authority investigated the alleged misconduct and meaningfully met with Appellant.

Substantial evidence supports those findings. Both Mr. Barzal and Ms. Blouin investigated the alleged misconduct by witnessing it firsthand. Indeed, on December 17, 2018, they were the only people in the room with Appellant.[20] A meeting between Appellant and Mr. Barzal also occurred on January 4, 2019, and Appellant had the chance to dispute the veracity of the allegations against him (though he did not attempt to do so, even after receiving additional time to respond). The meeting between Mr. Barzal and Appellant lasted approximately 45 minutes and was not hurried or rushed, a timespan which implies that the meeting was not perfunctory or a mere formality. Mr. Barzal also noted other investigative efforts in his memorandum recommending termination: he discussed Appellant's conduct with Ms. Blouin, and he solicited the opinions of other staff members (who felt "uncomfortable and fearful" because of Appellant's conduct).

Moreover, Appellant's termination did not occur until January 15, 2019, which was over a week after the meeting between Appellant and Mr. Barzal. Considering that the entire disciplinary process must occur no later than 30 days after the appointing authority learns of the relevant conduct, *see* State Pers. & Pens. § 11-106(b), the time period here is substantial. This permits the inference that termination was not a foregone conclusion before the meeting.

To be sure, we do not take lightly Mr. Barzal's testimony that Mr. Foxwell instructed him to terminate Appellant, and that Mr. Barzal did not agree with the

[20] Only Ms. Blouin directly witnessed Appellant's failure to leave by 5:00 pm that day, but she informed Mr. Barzal of this before Mr. Barzal's meeting with Appellant to discuss his discipline.

decision. In context, however, that testimony does not sufficiently undermine the substantial evidence supporting the ALJ's findings. Mr. Barzal sought Mr. Foxwell's permission to proceed with termination after meeting with Appellant, an action inconsistent with Mr. Foxwell controlling the termination decision. Mr. Barzal also testified that he fully upheld his professional responsibilities in meeting with Appellant, and that he drafted the memorandum recommending termination himself (without exaggeration or falsity). Further, Mr. Barzal testified that he agreed with everything in the memorandum except the disciplinary action. To that point, Mr. Barzal revealed that—one day before his meeting with Appellant—he was pressured to leave the Agency because of his handling of Appellant's misconduct. Ms. Blouin was promoted to Mr. Barzal's former role, and Mr. Barzal saw this as "treachery that had been going on behind my back . . . ." Viewed in the light most favorable to the Agency (and deferring to the ALJ's assessments of credibility), that admission casts doubt on Mr. Barzal's suggestion that Mr. Foxwell controlled Mr. Barzal's decision. Instead, the admission permits a different inference: Mr. Barzal's recommendation to terminate Appellant was Mr. Barzal's own decision, because at that point Mr. Barzal knew that he would be leaving the Agency and had little (if any) incentive to abdicate the decision to Mr. Foxwell.

The ALJ also found that the appointing authority considered mitigating circumstances. Appellant argues that, even if Mr. Barzal and Ms. Blouin were the appointing authority, the ALJ was wrong to conclude that they considered mitigating circumstances as required by Section 11-106 of the SPP Article. Specifically, Appellant

argues that while the ALJ found that Mr. Barzal was "well aware of" mitigating circumstances for Appellant, knowledge is not enough. Appellant argues that the ALJ never found that anyone actually "considered" the mitigating circumstances before deciding that termination was appropriate.

The record shows otherwise. Before the ALJ, Mr. Barzal testified that he was aware of the requirement that he consider mitigating circumstances in determining disciplinary action. Mr. Barzal said that the quality of Appellant's work was uniformly outstanding, that Appellant had received a certificate of appreciation for his efforts in 2017, that Appellant's father was going through severe health issues, that Appellant's father's prognosis did not appear good, and that Appellant "apparently" had difficulty "letting go" of his prior responsibility regarding timekeeping. Mr. Barzal testified that he discussed some of these issues with Appellant at the January 4, 2019 meeting. The termination notice Appellant received also confirmed that "all mitigating factors" were considered.

Similarly, Mr. Foxwell also testified that, though he anticipated that Mr. Barzal would likely recommend termination, he knew that Mr. Barzal would first meet with Appellant in person to allow Appellant to present "his side of the story" and offer any "circumstances that might mitigate the issue . . . ." This testimony corroborates the language in Mr. Barzal's memorandum recommending termination, which notes that Mr. Barzal considered and addressed mitigating factors and mentions Appellant's "work performance and history with the Comptroller's Office . . . ." Even though Ms. Blouin

testified that she did not verbally discuss the January 4, 2019 meeting with Mr. Barzal, she nevertheless received Mr. Barzal's memorandum (which included a statement of reasons and mitigation factors), and she included those same mitigation factors in the January 15, 2019 notice of termination issued to Appellant.

Appellant's citations to Mr. Foxwell's other testimony do not change our view, either. Mr. Foxwell testified that he did not consider mitigating circumstances after reviewing the HR Director's recommendation. This does not undermine the ALJ's finding that the HR Director considered mitigating circumstances in *making* the recommendation and taking disciplinary action. As previously discussed, Mr. Foxwell was not found to be the appointing authority, and his opportunity to consider mitigating circumstances necessarily came later—when he prepared the Management Decision as a delegate of the head of the principal unit, after Appellant's internal appeal. The ALJ was entitled to (and did) credit the substantial evidence showing that the appointing authority complied with Section 11-106 of the SPP Article.[21]

Moreover, the record here is unlike the one before us in *Danaher*, on which Appellant heavily relies. *See* 148 Md. App. 139 (2002). The employee in *Danaher* was in the management service (rather than the skilled service), so no administrative hearing

[21] The statute also requires the appointing authority to determine the appropriate disciplinary action and provide written notice to the employee. *See* State Pers. & Pens. § 11-106(a)(4)&(5). We do not discuss those last two requirements further here; we have already concluded that substantial evidence supported the ALJ's finding that the HR Director determined Appellant's initial discipline, and Appellant does not dispute that he received adequate notice.

before an ALJ was required, no evidence was presented at the agency level, and our review necessarily differed from our review here. *Id.* at 145-46 & n.1. The employee in *Danaher* was also terminated based upon unverified statements of other employees, without sufficient investigation or a meaningful opportunity for the employee to contest the allegations. *Id.* at 169-70. The termination occurred a mere hour after the employee met with the appointing authority, suggesting that the decision had already been made before meeting with the employee. *Id.* at 170. The agency in *Danaher* further failed to interview a witness and an alleged victim, which proved to be a significant oversight: the purported victim later "flatly repudiated" the allegations of misconduct. *Id.* at 168. As such, and given the record before us, *Danaher* is inapposite.

II. SEX DISCRIMINATION

Appellant next presents two questions concerning the ALJ's analysis of Appellant's allegations of sex discrimination: whether substantial evidence supports the ALJ's finding that Appellant's termination was not the result of sex discrimination, and whether the ALJ correctly applied Title VII law in assessing Appellant's sex discrimination allegations.[22]

[22] Appellant also cites to Section 20-606 of the SG Article. Among other things, this section prohibits discharging an employee "because of" any of several protected characteristics, including sex. State Gov't § 20-606. The parties focused their presentations on Title VII, and neither argues that Section 20-606 alters the analysis here. We will likewise center our discussion on Title VII. *Cf. Taylor v. Giant of Md., LLC*, 423 Md. 628, 652 (2011) ("[W]e recognize the dearth of our own jurisprudence . . . as well as our history of consulting federal precedent in the equal employment area.").

Preliminarily, we note that neither party disputes the ALJ's reliance on Title VII law in determining the order of (and standards for) proof.[23] We will adopt this approach as well for purposes of this appeal (without deciding whether it is correct). Thus, before addressing Appellant's specific questions, we first provide an overview of the relevant standards and proof under Title VII.

A. Overview of Title VII Standards and Methods of Proof

Title VII, which prohibits employers from discriminating against employees because of "race, color, religion, sex, or national origin," provides that a party can prove a violation by demonstrating that a protected characteristic was a "motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2. Under that relaxed causal standard, "liability can sometimes follow

At various times, the parties and the ALJ have used the phrases "gender discrimination" and "sex discrimination" interchangeably. Title VII, however, does not expressly list "gender" as a prohibited basis for discrimination, *see* 42 U.S.C. § 2000e-2, and the State Government Article separately prohibits discrimination based on "sex" and discrimination based on "gender identity," *see* State Gov't § 20-606(a). We perceive that Appellant's discrimination allegations relate to his sex, and we will refer to them as such.

[23] From our review, it appears that Title VII entered the proceedings in the context of a discovery dispute before the ALJ. Both parties cited Title VII case law in arguing the relevance of certain comparator evidence (that is, evidence of how other employees at the Agency were disciplined), and Appellant asserted that he needed such evidence to make out a *prima facie* case and show that the Comptroller's stated reasons for his termination were pretextual. In deciding the dispute, and before issuing his final decision, the ALJ noted that the parties relied upon Title VII law. The ALJ also explained that employees at the Comptroller enjoy "a fair opportunity to pursue their careers in an environment free of discrimination or harassment prohibited by law[,]" State Pers. & Pens. § 2-302(a), and that "[t]he State recognizes the rights and protections afforded to its employees under federal law[,]" State Pers. & Pens. § 2-303(a).

even if sex [or another protected characteristic] wasn't a but-for cause of the employer's challenged decision." *Bostock v. Clayton Cnty.*, -- U.S. --, 140 S. Ct. 1731, 1740 (2020).[24]

Of course, though an employee may prove a Title VII violation without showing but-for causation, not all remedies will be available. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 284 (4th Cir. 2004), *abrogated in part by Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009). In a Title VII action, if the employer demonstrates that it would have taken the same action even without the impermissible motivating factor (that is, if the employer negates but-for causation), the plaintiff cannot obtain reinstatement. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (allowing only for declaratory and injunctive relief, attorney's fees, and costs). There are two avenues of proof to show a Title VII violation: either (a) indirectly, through the burden-shifting scheme established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or (b) directly. *See Schafer v. Md. Dep't of Health and Mental Hygiene*, 359 Fed. Appx. 385, 388 (4th Cir. 2009).

We first address the indirect method. This method relies upon the burden-shifting analysis in *McDonnell Douglas*, which was designed to address special problems of proof in employment discrimination lawsuits. Employees are typically "in the difficult position of having to prove the state of mind of the person making the employment decision." *Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999). As such, employees need not offer direct evidence of discriminatory intent. Rather, the *McDonnell Douglas*

[24] The "but-for" standard requires a plaintiff to demonstrate that "but for the defendant's unlawful conduct, [the] alleged injury would not have occurred." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, -- U.S. --, 140 S. Ct. 1009, 1014 (2020).

framework allows employees to use suitable evidence of how others were treated (i.e., "comparator" evidence), which can then raise an inference of discrimination that the employer must produce some evidence to explain. In the context of employee discipline, the Fourth Circuit has provided a roadmap of the applicable *McDonnell Douglas* analysis:

> To establish a prima facie case . . . the plaintiff must show: (1) that he is a member of the class protected by Title VII, (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against those other employees. *See* [*Moore v. City of Charlotte*, 754 F.2d 1100, 1105-06 (4th Cir. 1985)]. If the plaintiff succeeds in proving a prima facie case, the burden of going forward shifts to the employer, who must articulate a non-discriminatory reason for the difference in disciplinary enforcement. Should the employer articulate such a non-discriminatory reason, the burden shifts back to the plaintiff to demonstrate that the employer's reasons are not true but instead serve as a pretext for discrimination. The plaintiff, however, always bears the ultimate burden of proving that the employer intentionally discriminated against him.

Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993).

Because its shifting burdens were designed to reduce difficulties when direct evidence is unavailable, the *McDonnell Douglas* test typically does not apply when the plaintiff presents direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *see also Pinchback v. Armistead Homes Corp*., 907 F.2d 1447, 1452 (4th Cir. 1990) ("Because she proved purposeful discrimination directly, largely through the testimony of former board members . . . the *McDonnell Douglas* method of proof is irrelevant.").

The *McDonnell Douglas* test is also not particularly useful once the ultimate issue of discrimination is before the factfinder. Indeed, as the Supreme Court has explained, the *McDonnell Douglas* analysis technically "drops from the case" at that stage:

> Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a *prima facie* case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.
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> * * *
>
> [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption 'drops from the case,' [*Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981)], and 'the factual inquiry proceeds to a new level of specificity.' [*Id.* at 255]. . . . The District Court was then in a position to decide the ultimate factual issue in the case.

U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-15 (1983) (footnotes omitted).

Put another way, once the employee makes out a *prima facie* case of discrimination, the employer provides some admissible evidence of a non-discriminatory explanation, and the employee provides some admissible evidence of pretext, there is a genuine dispute of material fact. The *McDonnell Douglas* analysis then places the ultimate question of discrimination before the factfinder, leaving the employee with the burden of proof. *See Aikens*, 460 U.S. at 714-15.

We now turn to the direct method, which essentially skips to the ultimate question of discrimination. As its name suggests, this method can involve direct evidence, such as the employer's own statements. *Moore v. City of Charlotte*, 754 F.2d 1100, 1105 (4th Cir.

1985). It can also involve certain circumstantial evidence (other than the comparator evidence in a *McDonnell Douglas* analysis), such as "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

Once the employee reaches the factfinder on the ultimate question of discrimination, it does not matter whether the employee proceeded under the direct or indirect method, or whether the employee introduced different types of evidence. The analysis reaches the same place, and the ultimate question remains the same: whether the employee proved, "more probably than not, that the employer took an adverse employment action . . . on the basis of a protected personal characteristic." *Wright v. Southland Corp.*, 187 F.3d 1287, 1291 (11th Cir. 1999).

B. *The ALJ's Sex Discrimination Analysis*

We now address Appellant's questions concerning (1) the ALJ's finding that Appellant was not terminated because he is male, and (2) the ALJ's application of Title VII law.[25] As we explain below, substantial evidence supports the ALJ's factual findings

[25] Appellant's argument appears to concern not only that he was disciplined, but also how severely. Generally, so long as an agency had the discretion to order the discipline that it did, the *magnitude* of that discipline is beyond our review. *See* State Gov't § 10-222(h)(3). Nonetheless, there are exceptions. For instance, an exercise of discretion based upon sex discrimination might well be "so extreme and egregious" as to be arbitrary and capricious. *See* State Gov't § 10-222(h)(3)(vii); *King*, 369 Md. at 291. We assume that

that Appellant's termination did not occur because Appellant is male. We also think that there is no reversible error in the ALJ's legal analysis under the SG Article.

1. The ALJ's Factual Findings

Appellant first disputes the ALJ's factual findings. The ALJ found that Appellant failed to prove that he was discriminated against, specifically concluding that Appellant failed to show that "the Comptroller's legitimate basis for discipline was pretext or illegitimate" and that Appellant failed to show that he "was being terminated because he was male." We review the ALJ's findings only to determine if they are supported by substantial evidence.

Appellant asserts that one exhibit and the prior comments of one witness sufficiently undermine the ALJ's findings, arguing that a reasonable mind must conclude that Appellant's termination was because of his sex. *First*, Appellant points to a single piece of comparator evidence concerning a female employee who received a reprimand for misconduct.[26] *Second*, he also cites to Mr. Barzal's prior comments: on the day that Mr. Barzal met with Appellant to discuss Appellant's employment, Mr. Barzal said that Appellant was "the only male present" in the HR office and that Appellant needed to take account of that. Mr. Barzal also testified that he told Appellant that other female

Appellant's challenges here go to the imposition of discipline itself *and* its severity, and we consider both issues.

[26] That employee had sought approval from Mr. Barzal to participate in a research study. When Mr. Barzal refused, the employee threatened legal action and told Mr. Barzal that he was responsible for poor morale in the office. Shortly afterward (and before she was disciplined), she wrote Mr. Barzal an apology for her behavior.

employees had "emotional outbursts" in Mr. Barzal's office, and that Mr. Barzal remembered one receiving a reprimand. In separate statements to Ms. Blouin (when Appellant was not present), Mr. Barzal discussed how men in the Navy dealt with disagreements and suggested that the HR office employees might have been particularly upset by Appellant's behavior because they were all women.

To assess Appellant's cited evidence properly, we view it in the context of the entire record. Over the course of a four-day hearing, the ALJ heard testimony from 15 different witnesses and reviewed over 40 exhibits that were admitted into evidence. After considering all the evidence, the ALJ concluded that the Comptroller proved three of the most-serious violations of COMAR's misconduct provisions—each of which would have been sufficient to warrant Appellant's termination (and which Appellant no longer disputes). *See* Code of Md. Regs. 17.04.05.04(B). Next, the ALJ specifically considered Appellant's evidence of discrimination. He found, however, that Appellant's comparator evidence was "factually very distinguishable" and did not support that Appellant's termination was based on his sex. The ALJ further found that Mr. Barzal's comments demonstrated only that Appellant "failed to take the reaction of his audience into account" not that he was terminated because he is male.

As to the comparator evidence, a reasonable mind could have reasonably found that this evidence was factually distinguishable. The female comparison employee received a reprimand, but she did not engage in any physical conduct in Mr. Barzal's office, such as pounding her hands on his desk or approaching to shout face-to-face. Her

conduct was brief and purely verbal, and she even followed-up with a written apology. There was also no evidence that employees in the office felt threatened by the female employee, were asked to evacuate, or remained concerned the next day because of her conduct. The female employee also did not disobey any order to leave the building.

As to Mr. Barzal's statements, they admittedly give us some pause. Nonetheless, we also think that a reasonable mind could have reasonably adopted the ALJ's findings: Mr. Barzal's comments merely reflected Mr. Barzal's belief that female employees in the HR office were particularly *affected* by Appellant's behavior, not that he thought a woman who engaged in the same conduct should not be terminated. In context, Mr. Barzal acknowledged that Appellant's conduct was insubordinate and that such conduct would have been insubordinate even in the Navy among men. Further, Mr. Barzal did not actually sign Appellant's notice of termination—Ms. Blouin signed the notice. At that time, Mr. Barzal was being forced to leave the Agency and presumably had little remaining influence over Ms. Blouin or the notice of termination itself. Appellant has not pointed to any evidence in the record to suggest that *Ms. Blouin* believed Appellant should be terminated because he is male.

In sum, Appellant does not challenge here that he engaged in insubordinate, threatening conduct toward two different superiors (both verbally and physically), or that he then ignored a direct order to leave the HR office. In that context, Appellant does not persuade us that a reasonable mind could not have reasonably disregarded his alleged evidence of discrimination as distinguishable and ambiguous. Instead, a reasonable mind

could have reasonably reached the ALJ's ultimate finding: Appellant's termination was because of his (now-conceded) misconduct, not his sex.

2. The ALJ's Legal Analysis

Appellant next asserts that the ALJ misapplied Title VII law in analyzing Appellant's discrimination allegations. Specifically, Appellant contends that the ALJ mistakenly assessed his arguments under the burden shifting scheme of *McDonnell Douglas*, which is not designed to address direct evidence or decide the ultimate merits of a discrimination claim.[27] As a result, Appellant asserts that he was held to an improperly high standard. As we understand Appellant's argument, he contends that he was forced to prove that the Comptroller's reasons for terminating his employment were pretextual under the final step of *McDonnell Douglas*, when he should have only been required to prove that sex discrimination was a motivating factor for his termination (even if there might have been other motivations, such as Appellant's admitted misconduct).

We do not reach this specific contention because Appellant has made it for the first time on appeal. *See* Md. Rule 8-131(a). In his arguments before the ALJ, Appellant asserted simply that discrimination caused his termination. His most precise formulation of that argument came one day before the end of the ALJ's merits hearing; in opposing

[27] Applying *McDonnell Douglas*, the ALJ found that Appellant had presented a *prima facie* Title VII case by presenting some admissible evidence of discrimination. He then found that the Comptroller proved a legitimate, non-discriminatory basis for Appellant's termination. Next, the ALJ assessed whether Appellant proved that this legitimate basis was pretext or illegitimate (and concluded that Appellant had failed to make that showing).

the Comptroller's motion to admit additional evidence, Appellant stated that, "[Appellant's] argument, that he was unlawfully terminated on the basis of his sex, and that he would not have received the same extreme disciplinary action if he were female, *has not changed at any point during this case*." (emphasis added). Likewise, in Appellant's proposed findings of fact and conclusions of law—submitted to the ALJ *after* the merits hearing (and representing Appellant's final word on the matter)—Appellant again characterized his argument the same way: "The disciplinary action imposed on [Appellant] was not legally permissible, because the violations of COMAR alleged and the discipline imposed on [Appellant] for his conduct on December 17, 2018, were based on his [sex] *rather than* severity of his conduct, in violation of Title VII[.]" (emphasis added).

In short, Appellant did not argue that the ALJ needed to reach and consider whether discrimination might have been a mere motivating factor in Appellant's termination.[28] Appellant also never took issue with the ALJ's Title VII rubric (as

[28] We also note that Appellant's unpreserved argument faces another hurdle. In an affirmative suit for Title VII discrimination, proof that Appellant's sex was a motivating factor might entitle Appellant to attorney's fees, costs, or injunctive relief, but Title VII expressly does *not* allow for reinstatement if there is no but-for causation. *See* 42 U.S.C. § 2000e-5(g)(2). Here, on judicial review of an administrative decision, it is not clear why the result should be any different. Appellant effectively seeks reinstatement; it would be the necessary result if Appellant secures any reversal or modification of his termination without prejudice. *See* State Pers. & Pens. §§ 11-104, 11-110(d); State Gov't § 10-222(h)(3). Appellant does not explain why he should be entitled to reinstatement on a mere "motivating factor" showing here, when such a showing would *not* entitle him to reinstatement in an affirmative Title VII suit. Regardless, because the issue has not been preserved (nor has it been briefed by either party), we do not reach whether Appellant could be entitled to reinstatement upon a motivating-factor showing.

announced at the motions hearing), which guided the ALJ's analysis of Appellant's discrimination arguments. As such, we address only the preserved argument before us: whether the ALJ correctly assessed whether discrimination was a but-for cause of Appellant's termination.

In considering that argument, we first look to the proper legal standards for our review. An ALJ's error of law is not entitled to deference, and our review is *de novo*. *See Belvoir Farms*, 355 Md. at 267. To obtain reversal or modification of the ALJ's decision, however, it is not enough that Appellant point us to some error of law—even if he is correct. We must also conclude that the error "affected" the ALJ's decision such that a "substantial right" of Appellant "may have" been prejudiced. State Gov't § 10-222(h)(3)(iv). This aspect of our review is echoed in the harmless error doctrine, which applies with equal force in judicial review proceedings. *See, e.g.*, *Washington Suburban Sanitary Comm'n v. Lafarge North Am., Inc.*, 443 Md. 265, 288-89 (2015) (applying harmless error doctrine on judicial review, noting that it "is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all cases to show prejudice as well as error.") (quotation and citation omitted); *accord Siegel v. Comptroller of Md.*, 186 Md. App. 411, 424 (2009).[29]

[29] Similarly, we have also upheld trial court decisions that applied incorrect legal frameworks, so long as the resulting analysis was sufficient in the context of the case, and the decision appeared to be correct. *See, e.g.*, *Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 457-58 (2012) (affirming grant of permanent injunction when trial court incorrectly relied upon the standards for a preliminary injunction, because the record nonetheless demonstrated that the decision of the trial court was correct).

Bearing these principles in mind, we turn to the ALJ's legal analysis. We agree with Appellant that the ALJ's decision unnecessarily relied upon the language of *McDonnell Douglas*. The *McDonnell Douglas* burden-shifting analysis applies at the summary judgment stage, and the ALJ heard the case on the merits.[30] Appellant also introduced direct evidence, to which *McDonnell Douglas* does not apply. As such, *McDonnell Douglas* did not supply the relevant framework here. Neither party, however, objected to the ALJ's reliance on *McDonnell Douglas* when he set forth an order of proof (and foreshadowed how he would consider the evidence presented at the merits hearing). Indeed, it appears that the ALJ adopted that order of proof at the parties' behest. Moreover, a mere reliance on *McDonnell Douglas* at the merits stage does not necessarily mean that the ALJ improperly considered (or failed to consider) the evidence.

We need not decide that question, because—even if we assume that reliance on *McDonnell Douglas* was legal error—our inquiry must also assess whether that error affected the ALJ's decision, such that a substantial right of Appellant may have been prejudiced. We conclude that it did not. Looking to the ALJ's analysis, we note that the ALJ concluded that the Comptroller proved three separate, non-discriminatory grounds for disciplining Appellant, each of which could support termination. In so doing, the ALJ necessarily concluded that discrimination was not a but-for cause of Appellant's

[30] Indeed, neither party requested summary judgment, even though there is a procedure to do so. Specifically, under the OAH's internal rules, a party may request a "summary decision" on all or part of an action, "on the ground that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law." *See* Code of Md. Regs. § 28.02.01.12(D).

termination. The ALJ then addressed all of Appellant's purported evidence of discrimination—including direct evidence—to see if it could alter that conclusion, and he specifically found that Appellant was not terminated because he is male. As such, the ALJ's reliance on *McDonnell Douglas* did not cause him to evade the "ultimate question" of discrimination. *See Aikens*, 460 U.S. at 714. Appellant set out to prove that sex discrimination was the but-for cause of his termination, and once the Comptroller successfully proved three separate misconduct grounds supporting Appellant's termination, we cannot see how Appellant could show but-for causation *without* also showing that the legitimate, proven grounds for discipline were somehow pretextual.

In short, the ALJ considered what he needed to consider (all of Appellant's evidence of discrimination), he decided what he needed to decide (the ultimate question of discrimination), and he did not hold Appellant to an improper standard. Instead, the ALJ addressed the issue of discrimination as it was argued by Appellant (at the time). There is no indication that a legal error affected the ALJ's analysis such that a substantial right of Appellant may have been prejudiced. As a result, reversal is not warranted under the SG Article.

We affirm the judgment of the Circuit Court for Prince George's County, which affirmed the action of the Office of Administrative Hearings.

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