Circuit Court for Howard County
Case No. 13-C-17-110590

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1094

September Term, 2017

CARMEILLA SEAY

v.

PATUXENT INSTITUTION

Wright,
Arthur,
Shaw Geter,

JJ.

Opinion by Wright, J.

Filed: August 6, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from the judgment of the Circuit Court for Howard County that affirmed the Patuxent Institution's, appellee, termination of Carmeilla Seay's, appellant, employment as a correctional officer at that facility. We have consolidated Seay's three questions into one pertinent question for ease of discussion:

> 1) Did the Warden lack the authority to terminate Seay from her position as a correctional officer?[1]

For the reasons stated below, we reverse the circuit court's judgment and remand the case to the circuit court with instructions to remand the case to the administrative agency.

Facts and Procedural History

On July 21, 2016, Seay received four disciplinary charges which were signed by Laura Armstead, the acting Warden ("Warden") at the Patuxent Institute ("Patuxent"), in regards to an incident which occurred at Seay's home on April 24, 2016. Seay requested

[1] Seay asked this Court:

> 1) Did the Circuit Court correctly conclude that the Warden lacked the authority to terminate Ms. Seay from her position as a correctional officer?
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> 2) Did the Circuit Court err in holding that Officer Seay was required for the petition for a show cause order?
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> 3) Did the Circuit Court err in holding that Officer Seay waived the issue of authority, thus to confer authority on the Warden to terminate her?

a Correctional Officer's Bill of Rights ("COBR)" hearing pursuant to Md. Code (1999, 2008 Repl. Vol.), Correctional Services Article ("CSA") § 10-908(c)(2).[2]

That hearing occurred on November 21, 2016. The board issued its decision on December 24, 2016, recommending that Seay be suspended for 90 days and then be transferred to a different Department of Correction facility. Seay met with the Warden on January 20, 2017, to review the board's recommendation. At that time the Warden increased the recommended punishment, pursuant to CSA § 10-910(b)(6),[3] and decided,

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[2] CSA § **10-908.(c)** *Appeal or request for hearing*. – On receiving charges which recommend termination, demotion, or suspension without pay of 10 days or greater, a correctional officer may:

> (1) file an appeal under § 11-109 of the State Personnel and Pensions Article; or
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> (2) within 15 days after receiving the charges, file a request for a hearing by a hearing board.

[3] CSA § **10-910.**(b) *Review and final order*. –

> (6) With the approval of the Secretary, the appointing authority may increase the recommended penalty of the hearing board if the appointing authority:
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> (i) reviews the entire record of the proceedings of the hearing board;
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> (ii) meets with the correctional officer and allows the correctional officer to be heard on the record;
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> (iii) at least 10 days before the meeting, discloses and provides in writing to the correctional officer any oral or written communication not included in the record of the hearing board on which the decision to consider increasing the penalty is wholly or partly based; and
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> (iv) states on the record the substantial evidence on which the appointing authority relied to support the increase of the recommended penalty.

after obtaining permission from Stephen Moyer, Secretary, Public Safety and Correctional Services ("Secretary"), to terminate Seay's employment. The Warden issued an order to that effect on January 26, 2016.

Seay filed a timely appeal of the Warden's decision to the Circuit Court for Howard County pursuant to CSA § 10-911(a).[4] Oral arguments were heard on July 6, 2017. Seay alleged, for the first time, that the Warden did not have the authority to terminate her employment on the basis that the Warden at Patuxent was not the appointing authority. Rather, Seay argued that the Director of Patuxent is the appointing authority under CSA § 4-203 and CSA § 4-204 and, as such, only the Director could have lawfully terminated Seay's employment.

Patuxent responded that the institution, while certainly unique, is a correctional facility under CSA § 1-101(d) and as such the Warden of the institution is the appointing authority pursuant to CSA § 3-215. Further, Patuxent argued that because Seay did not raise the issue during the administrative proceeding, she waived the right to challenge the agency's actions in this regard on appeal. Patuxent contends that Seay should have raised her argument that the Warden was not the appointing authority by applying for a show cause order to the circuit court pursuant to CSA § 10-906[5] prior to the commencement of the hearing board.

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[4] CSA § **10-911. Appeal.** (a) *Circuit court.* — An appeal from a decision made under § 10-910 of this subtitle shall be taken to the circuit court for the county in accordance with Maryland Rule 7-202.

[5] **CSA § 10-906. Order to show cause.**

The circuit court found that the Director of Patuxent is the appointing authority of that facility and, as such, the Warden lacked legal authority to increase the hearing board's recommended sanction. The court also found, however, that Seay waived this error by not objecting to it at the January 20, 2017 meeting with the Warden, or by applying to the court for a show cause order. Therefore, the circuit court affirmed Seay's termination.

Seay filed a timely appeal to this Court. Additional facts will be included as they become relevant to our discussion below.

Standard of Review

In an appeal from a judgment entered on judicial review of an administrative decision, we review "the agency's decision, and not that of the circuit court." *Assateague Coastkeeper v. Maryland Dep't of Env't*, 200 Md. App. 665, 691 (2011). Factual determinations made by the administrative agency are reviewed under the "substantial evidence" standard. *Kim v. Md. State Bd. of Physicians*, 423 Md. 523, 536 (2011) ("We

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(a) *In general.* – A correctional officer who is denied a right granted by this subtitle may apply to the circuit court of the county where the correctional officer is regularly employed for an order to show cause why the right should not be granted.

(b) *How and when.* – The correctional officer may apply for the show cause order:

(1) either individually or through the correctional officers' exclusive bargaining representative who shall have standing for that purpose; and

(2) at any time before the beginning of a hearing by the hearing board.

uphold the agency's factual conclusion if 'a reasoning mind could have reached' that conclusion.") (quoting *Bd. of Physician Quality Assurance v. Banes*, 354 Md. 59, 68 (1999)). Conclusions of law that are made by an administrative agency are reviewed *de novo*. *Schwartz v. Md. Dept. of Natural Res.*, 385 Md. 534, 554 (2005). Administrative agencies' interpretation of statutes are reviewed with a non-deferential standard of review. *Md. Ins. Comm'r v. Cent. Acceptance Corp.*, 424 Md. 1, 16 (2011).

Discussion

I.

Put simply, Seay asks this Court to determine who is the "appointing authority" for correctional officers at Patuxent, the Director or the Warden?

A.

An appointing authority is "an individual or a unit of government that has the power to make appointments and terminate employment." Md. Code (1993, 2015 Repl. Vol.), State Personnel and Pensions Article ("SPP") § 1-101(b). The authority to act on behalf of the appointing authority may be delegated, but only to an employee or officer under that authority's jurisdiction and only in writing. Md. Code (1984, 2014 Repl. Vol.), State Government Article (Title 1 to 9 Sub. 16) ("SGA") § 8-3A-01(c). The appointing authority may not, however, delegate the authority to terminate an employee. SGA 8-3A-01(d).

The CSA states that "[t]he warden of a correctional facility is the appointing officer for the officers and other employees of that facility." CSA § 3-215(3)(i). When defining the term "State correctional facility," the article further states in relevant part,

"State correctional facility includes: the Patuxent Institution [.]" CSA § 1-101(o)(2). Had the legislature stopped there this would be a much simpler analysis, however, Patuxent is especially unique in both function and structure because it has its own title under that article.

Patuxent is codified under title four of the CSA and has a unique function.[6] Patuxent is designed to "provide remediation programs and services to youthful

[6] It is noteworthy that it is the only individual facility given such treatment by the legislature. This is no doubt the product of its history.

> **1.2 The History of Patuxent Institution**
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> Patuxent Institution has the distinction of being the only institution for sentenced criminals in the State of Maryland that was not part of the Division of Correction. Its origin lies in the Maryland Public General Law, codified as Title 4 of the Correctional Services Articles. The predecessor of this statute, Article 31B of the Public General Laws of Maryland, was enacted in 1951 and Patuxent opened in 1955.
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> Patuxent was created to house Maryland's most dangerous criminal psychotherapeutic treatment of offenders who demonstrated persistent antisocial and criminal behavior. Designated "Defective Delinquents," these offenders were involuntarily committed by the Court to Patuxent Institution under an indeterminate sentence.
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> Patuxent Institution was unique in that it was explicitly designed to be a self-contained operation staffed by custody personnel as well as full-time clinicians inclusive of psychologists, social workers, and psychiatrists. It was also unique in that it was provided with its own admission, inmate review, and paroling authority separate from that of the Maryland Division of Correction (DOC). Thus, once designated as a defective delinquent and committed to Patuxent, an offender was to be released only upon the court finding that the inmate's release was for the "[inmate's] benefit and the benefit of society . . . . Md. Dep't of Public Safety and Corr. Services, Patuxent Inst. Annual Report, 2 (2013).

offenders, other eligible persons, and to mentally ill inmates including a range of program alternatives indicated by the current state of knowledge to be appropriate and effective for the population being served." CSA § 4-202(a).

Unlike the other correctional facilities in the State, Patuxent has a "Director" who is the chief administrative officer of the institution. CSA § 4-203(a). The Director is appointed by the Secretary and is charged with the management and supervision of the facility, as well as the implementation of its programs and services. CSA § 4-203(c). Among those duties is the Director's submission of an annual report to both the Secretary and the Governor. CSA § 4-203(d).

Patuxent has a number of specific staff positions: "two associate directors . . . a Warden; at least three additional psychiatrists or clinical psychologists; at least four State licensed certified social workers-clinical; and other professional staff, as provided in the State budget." CSA § 4-204(a). The associate directors are charged with assisting "primarily in discharging the diagnostic and remediation functions of the Institution," while the Warden is responsible for assisting in "discharging the custodial function of the Institution." CSA § 4-204(b). It is noteworthy that the statute, while naming the Director as the "chief executive officer," does not explicitly name the Director, or the Warden for that matter, as the appointing authority. The Director is charged with appointing the individuals who are "professional," which includes the associate directors and the rest of the medical and social workers, subject to approval by the Secretary. CSA § 4-204(d)(2). While it is clear that there are a number of correctional officers employed by Patuxent,

the statute does not mention those roles specifically, nor does it specify the manner in which they are hired or assigned to the facility.

This is especially relevant in the instant case because under the COBR it is only the appointing authority who may bring disciplinary charges against a correctional officer. CSA § 10-908. A correctional officer charged with certain disciplinary charges is entitled to a COBR hearing board in which at least three other correctional officers will hear the case and ultimately submit a report detailing the factual findings for each charge, as well as a verdict as to guilt. CSA § 10-909-10. The COBR hearing board also makes a recommendation as to what penalties it believes are appropriate when a correctional officer is found guilty. CSA § 10-910(a)(7). Only the appointing authority may review the findings, conclusions, and recommendations of the hearing board, which are not binding on the appointing authority when issuing a final order. CSA § 10-910(b). The appointing authority may increase the penalty recommended by the hearing board and terminate the correctional officer, but only *after* receiving permission from the Secretary to do so. CSA § 10-910(b)(3), (5), (6).

Herein lies the primary issue: if the Warden is not the appointing authority for correctional officers at Patuxent, then obviously a number of COBR violations occurred in Seay's proceedings, because it was the Warden who issued the initial charges, reviewed the COBR board's recommendations, conducted the penalty increase meeting, and ultimately issued the order to terminate Seay.

B.

Among the grounds, on which the decision of an administrative agency may be attacked on judicial review, are when the decision "exceeds statutory authority or jurisdiction of the final decision maker," or is affected by any other error of law. SGA § 10-222(h)(3)(ii) and (iv); *see also Soley v. State Comm'n on Human Relations*, 277 Md. 521, 528 n.3 (1976).

If the acting Warden was not the appointing authority, she lacked jurisdiction to review the decision of the board. That authority, in those circumstances, would rest with the Director alone. *Lee-Bloem v. State*, 183 Md. App. 376, 382 (2008). If such was the case, the Warden's acts of issuing the charges, meeting with Seay after the hearing, and terminating Seay would be *ultra-vires*.[7] *Walk v. Twigg*, 396 Md. 527, 548 (2007) ("Government action that is not properly authorized is *ultra vires* and therefore invalid.").

Patuxent contends that Seay waived her right to challenge the Warden's authority to terminate her by failing to raise the issue at any time before she was fired. Patuxent further contends that the instant case is analogous to *Halici v. City of Gaithersburg*, in which this Court held that an appellant's challenging the qualifications of a Historic District Commission (HDC) member for the first time in the circuit court was improper. *Halici*, 180 Md. App. 238, 255 (2008). For the following reasons discussed below, we disagree and hold that the issue was not waived.

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[7] *Ultra-vires* — Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law. BLACKS LAW DICTIONARY, 8th Ed., p. 1559.

When a court reviews administrative agency decisions it may not, typically, consider issues presented for the first time on judicial review. *Id*. at 249 (quoting *Schwartz v. Md. Dept. of Natural Resources*, 385 Md. 534, 556 (2005)). There are, however, a narrow set of exceptions to this rule, two of them are especially pertinent in this case: the constitutional exception and the jurisdictional exception.

Courts have held that constitutional violations can, and must, be argued before the agency in order to be preserved for judicial review. *See Board of Physician Quality Assur. v. Levitsky*, 353 Md. 188, 207-08 (1999) ("We have held, consistently, that questions, including Constitutional issues, that could have been but were not presented to the administrative agency may not ordinarily be raised for the first time in an action for judicial review.").

In *Levitsky*, the Court of Appeals held that the failure of several members of the board to complete certain items of paperwork "in no way compromised [appellant's] opportunity for a full and fair hearing before the [Board] . . . and in no way divested the Board of jurisdiction to proceed. Every statutory prerequisite to the Board's proceeding was satisfied." *Id.* at 208.

In *Lee-Bloem*, this Court held that an alleged lack of regulations and procedures for the Maryland Board of Physicians' peer review mechanism did not compromise the accused's opportunity for a full and fair administrative hearing. In *Lee-Bloem*, 183 Md. at 384, we noted:

> [E]ven assuming, *arguendo*, that appellant's due process rights were violated, we are not convinced that appellant could not fairly argue those alleged constitutional violations within the administrative scheme set forth

> in the Medical Practice Act. Indeed, if appellant were unsatisfied with the outcome of that administrative process, she was entitled to further judicial review. *Id.* at 385.

In *Halici*, this Court held that "[a] challenge to the authority of the agency to act, based on a member's alleged failure to meet the statutory qualifications required to serve as an agency member, is not a challenge to the agency's fundamental 'subject matter jurisdiction[.]'" *Halici*, 180 Md. App. at 252. In *Halici*, we said:

> [W]hen an administrative agency has primary jurisdiction over a controversy, as is the case here, the parties ordinarily must await a final administrative decision before resorting to the courts. This is so because, in general, statutes should be interpreted in the first instance in contested cases by the administrative agency, especially in those instances in which the agency possesses specialized knowledge or expertise regarding the underlying subject matter. Such a process not only provides the court with a complete record and hopefully a rationalized interpretation, but also aids in judicial economy . . . . The only exception is when the agency is palpably without jurisdiction, such as a probate court . . . attempting to try someone for a criminal offense. Therefore a party wishing to circumvent the administrative process must demonstrate that an agency is operating indisputably beyond its authority and distinctly outside its fundamental jurisdiction.

Id. at 253-54 (internal citations and quotations omitted).

The Warden in this case, if she was not the appointing authority, would be without jurisdiction to review the finding of the COBR hearing board.[8] The Warden would be

[8] If the Director is the appointing authority of Patuxent, then the Warden firing Seay deprived her of her due process rights under COBR. CSA §10-910(b). *See* SGA §8-3A-01(d) ("An appointing authority may not delegate the authority to make the final decision on the termination of an employee."). As per the SGA, the only power which may not be delegated is the termination decision, and that decision was not made by the Warden until after the January 20, 2017 meeting. Assuming, *arguendo*, that the Director is the appointing authority and there had been delegation, in writing, of some responsibilities of the appointing authority under the COBR, the issuance of the final

"palpably without jurisdiction, such as a probate court . . . attempting to try someone for a criminal offense." *Id.* at 253 (quoting *State Comm'n on Human Relations v. Freedom Express/Domegold, Inc.*, 375 Md. 2, 19-20 (2003)).

This case is distinguishable from *Levitsky* in that the issue is not whether some preliminary paperwork had been filled out properly, but rather whether the person who terminated Seay had the statutory authority to do so. *See Levitski*y, 353 Md. at 208. Further, if the Warden was not the appointing authority, then all of the statutory requirements were not met in the instant case. *See id.* at 208. These circumstance are distinct from those in *Lee-Bloem* because there is no lack of regulations here: the COBR explicitly states what steps must occur and who must carry them out. *See* CSA § 10-901--10-913.

The issue of who is the appointing authority for correctional officers at Patuxent was not waived by virtue of not being raised before the administrative agency. If the acting Warden was not the appointing authority, then she was "palpably without jurisdiction" to increase Seay's punishment from suspension to termination.

C.

Now that we have determined that the issue of who the appointing authority was not waived, we now consider our next step. In that regard, we are not insensitive to the view that "[a] reviewing court usurps the agency's function when it sets aside the

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order is the first occurrence of a non-delegable act in the proceedings before the administrative agency.

administrative determination upon a ground not theretofore presented and deprives the [administrative agency] of an opportunity to consider the matter, make its ruling, and state the reason for its action." *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 518-19 (1978) (quoting *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)).

However, it is within an appellate court's discretion to remand a case back to a lower court if we conclude that the substantial merits of the case will not be determined by an affirmation, reversal, or modification of the judgment. *Bulluck*, 283 Md. at 518-19 (quoting Md. Rule 871(a)).[9] *See also Bernstein v. Real Estate Comm'n of Md.*, 221 Md. 221, 230 (1959) ("Generally . . . it is the function of the court to affirm the order of the agency *or remand the case for further proceedings if that be necessary*.") (emphasis added); *Sturdivant v. Md. Dep't of Health of Mental Hygiene*, 207 Md. App. 33 (2012), *aff'd*, 436 Md. 584 (2012) (remanding a case to the administrative agency for the purpose of gathering additional evidence and instructing the agency to take certain steps should it conclude that the statutory provisions in that case were violated).

There is not substantial evidence in the record as to whether the Warden is the appointing authority for Seay and, while the issue was not waived, the administrative

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[9] Md. Rule 8-604(d) replaced Md. Rule 871(a) in 2006. Md. Rule 8-604(d) states: "Generally. If the Court concludes that the substantial merits of a case will not be determined by affirming, reversing, or modifying the judgment, or that justice will be served by permitting further proceedings, the Court may remand the case to a lower court. The order of remand and the opinion upon which the order is based are conclusive as to the points decided. Upon remand, the lower court shall conduct any further proceedings necessary to determine the action in accordance with the opinion and order of the appellate court."

agency did not have an opportunity hear the issue. Although Seay cited SPP § 7-209(a)[10] in her brief, there is nothing in the record below as to who makes the appointments of correctional officers at Patuxent, much less who appointed Seay. Evidence as to how the hiring process is conducted in accordance with a position selection plan and SPP 7-201, *et seq*., would be an important aspect in deciding who is the appointing authority for correctional officers at Patuxent. *See generally Sturdivant*, 207 Md. App. at 50, *et seq*., (detailing position selection plan and SPP 7-201 procedures and functions).

For the reasons above, we reverse the decision of the circuit court and remand to the circuit court for that court to remand the case to the administrative agency pursuant to SGA § 10-222(h) to take additional evidence.[11] Specifically, it would be desirable for the parties to present additional testimony, records, or other documentary evidence that may be obtainable on the issue of who is the appointing authority for correctional officers

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[10] Seay cites SPP § **7-209. Appointments.** (a) "*In general.*— Except as otherwise provided by law, an appointing authority shall make an appointment from among the candidates in a rating category on a list of eligible candidates . . . ."

[11] SGA § **10-222. Judicial review.** (h) *Decision*. – "In a proceeding under this section, the court may: (1) remand the case for further proceedings[.]"

assigned to Patuxent.[12]

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

[12] A decision that the appointing authority is in fact the Director may put the entire case against Seay in jeopardy because it is undisputed that the disciplinary charges were signed by the acting warden. CSA § **10-908. Charges; procedure.**

> (a) *Contents.* — If the *appointing authority* brings charges recommending discipline against a correctional officer, the charges shall contain:
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> (1) a statement of facts and offenses alleged; and
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> (2) notice of a correctional officer's appeal rights.
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> (b) *Service of charges and notice*. — The *appointing authority* shall provide the charges and notice required under subsection (a)(2) of this section to the correctional officer and to the correctional officer's legal counsel or the agent of the employee organization selected by the correctional officer under § 10-907 of this subtitle.

(Emphasis added).