Circuit Court for Baltimore City
Case No. 24-C-16-000312

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01698

September Term, 2016

FIRE & POLICE EMPLOYEES
RETIREMENT SYSTEM OF BALTIMORE
CITY
v.

MATTHEW PETTY

Woodward,*
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: February 14, 2019

*Patrick L. Woodward, C.J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

On October 23, 2014, Matthew Petty (hereinafter "Appellee") filed an application with the Fire and Police Employees' Retirement System of the City of Baltimore (hereinafter "Appellant"). Appellee filed an application because he was seeking line-of-duty disability retirement based on an incident that occurred on August 12, 2013. A hearing was held on October 27, 2015, and on December 17, 2015. The hearing examiner denied Appellee's application finding that Appellee was not permanently disabled.

Appellee sought judicial review of the hearing examiner's decision in the Circuit Court for Baltimore City. On September 20, 2016, the circuit court ordered that the case be remanded on the grounds that Appellee's procedural due process rights had been violated. It is from this decision that Appellant files this timely appeal. In doing so, Appellant brings one question for our review, which we have rephrased for clarity:[1]

> I. Were Appellee's due process rights violated under Article 24 of the Maryland Declaration of Rights?

For the foregoing reasons, we answer in the affirmative and affirm the decision of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellee had been employed by the Baltimore City Fire Department ("BCFD") for nineteen years. On August 12, 2013, Appellee was extinguishing a fire. After containing

[1] Appellant presents the following question:

> 1. Were Appellee's due process rights violated, under Article 24 of the Maryland Declaration of Rights, by the admission of previously undisclosed evidence during the administrative hearing when appellee had the subsequent opportunity to provide additional evidence?

the fire, Appellee went into the building to open the walls. He fell several times and eventually fell through the floor. Due to the fall, he sustained an injury to his right thumb. He received treatment for his injury and was later diagnosed with a fracture and collateral ligament tear at the ulnar nerve. As a result of his injury, Appellee had surgery in December 2013, where an anchor and screw were placed into his right thumb. Appellee was advised by Dr. Nanavati, an orthopedic surgeon, that he was "permanently unable to perform all the essential functions of a firefighter." On September 25, 2014, the BCFD officially entered a disposition in which it stated that "[Appellee] is permanently unable to perform all the essential functions of a fire fighter." This statement was based on a report authored by James Levy, M.D., who is the official physician for the BCFD.

After months of being unable to work, on October 23, 2014, Appellee applied for Line-of-Duty Disability Retirement Benefits with the Fire and Police Employees' Retirement System of Baltimore ("Appellant"). At the request of Appellant, Appellee was examined by Louis Halikman, M.D. on February 12, 2015. Dr. Halikman agreed with all the other physicians stating "I agree that [Appellee] is disabled from his job as a fire fighter at this time due to this injury." Appellee was officially terminated from BCFD due to his injury, and was entitled to a line-of-duty disability pension.

A hearing for Appellee's line-of-duty disability pension was held on October 27, 2015 before Hearing Examiner Smylie. At the commencement of the hearing, the parties entered exhibits into the record. Those documents included, *inter alia*, medical reports from physical therapists, treatment notes, a functional capacity exam, and an independent medical examination ("IME"). These records indicated that while Appellee would have

soreness, sensitivity, and difficulty maintaining a grip, his injury "should not stop him from living his life and being active with his hand." Neither the Appellee nor Appellant entered any other exhibits into the record.

During the hearing, Appellee testified that he lifts heavy weights for recreational activity, continues to engage in home remodeling projects, and continues to do "everything that [he] normally [does]." Appellee also testified that he favors his left hand over his right due to his injury. Following Appellee's testimony, Appellant presented its case. It called a private investigator, Craig Poorbaugh to testify regarding a video he had recorded of Appellee. The video showed Appellee at a salvage yard unloading scrap metal from the back of his vehicle. Appellee requested that the video be admitted into evidence because the video also showed Appellee favoring his left hand (the injury was to his right hand).

Following the admission of the video into the official record, Appellant sought to enter a second IME that had been generated after one of the examining physicians, Dr. Halikman, was shown the video. In the second IME, Dr. Halikman stated that "[Appellee] is not disabled and…is capable of working at his regular job as a firefighter." This supplemental IME was not shared with Appellee's counsel prior to the hearing. Appellee objected to Appellant's use of this supplemental report. The hearing examiner expressed her disapproval of Appellant's methods, however, allowed Appellant to use the report.

At the close of the hearing, Hearing Examiner Smylie rendered a written decision stating, "[Appellee] has failed to demonstrate, pursuant to Article 22, Section 34 (e-1) that he is totally and permanently incapacitated from further performance of the duties of his

job classification in the employ of Baltimore City. Thus his action for Line-of-Duty Disability Retirement Benefits is denied."

Following the decision, Appellee filed a Rule 7-207 Memorandum in the Circuit Court of Baltimore City seeking judicial review of the administrative examiner's decision. At the circuit court hearing, the judge reversed the decision of the hearing examiner and remanded the case to the hearing examiner to hold "additional proceedings to afford [Appellee] to [sic] offer testimony and other evidence in response to 1) private investigator Craig Poorbaugh's testimony and video and; 2) Dr. Halikman's September 2, 2015 supplemental report based upon the video…" It is from this order that Appellant has filed this timely appeal.

STANDARD OF REVIEW

The role of appellate courts in reviewing the decisions of administrative agencies is limited.

> "'On appellate review of the decision of an administrative agency, this Court reviews the agency decision, not the circuit court's decision.'… 'Our primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious.' In other words, '[w]e apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists.'"

Long Green Valley Ass'n v. Prigel Family Creamery, 206 Md. App. 264, 273-74 (2012).

An appellate court's review of an "agency's factual findings entails only an appraisal and evaluation of the agency's fact finding and not an independent decision on the evidence. This examination seeks to find the substantiality of the evidence." *Catonsville*

Nursing Home, Inc. v. Loveman, 349 Md. 560, 568-69 (1998) (citations omitted). Moreover, as 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. *Maryland State Police v. Ziegler*, 330 Md. 540, 557 (1993).

DISCUSSION

A. Parties' Contentions

Appellant argues that the circuit court erred when it found that Appellee's procedural due process rights were violated. Specifically, Appellant maintains that "procedural due process in administrative law [proceedings are] recognized to be a matter of greater flexibility than that of strictly judicial proceedings." *Widomski v. Chief of Police of Baltimore Cty.*, 41 Md. App. 361, 378 (1979). Appellant argues that despite this explicit rule the circuit court found that the admission of the video by the private investigator violated Appellee's procedural due process rights. Appellant contends that Appellee "not only acquiesced to the admission of the surveillance video --- Appellee actually affirmatively requested that the video be admitted into evidence at the administrative hearing." Appellant further argues that "the process afforded to Appellee during the hearing satisfied the flexible requirements that were appropriate under the circumstances and Appellee failed to request any additional process or relief." Specifically, Appellant asserts that Appellee failed to request any additional opportunities to address either the video or the second report from Dr. Halikman at the administrative hearing. Appellant maintains that the hearing examiner gave Appellee multiple opportunities to leave the room and

consult with counsel and Appellee was given wide latitude in *voir direing* the private investigator who recorded the video.

Moreover, Appellant argues that Appellee had ample opportunity to cross examine the private investigator and the hearing examiner allowed Appellee to call additional witnesses. Appellant contends that Appellee's only objection was to the report made by Dr. Halikman because the report was not made available to Appellee prior to the hearing. Appellant argues that Appellee "had ample opportunity to request a postponement, seek to provide additional testimony or evidence during the hearing, or to request that the record remain open for the submission of additional testimony or evidence." Additionally, Appellant argues "the information contained in Dr. Halikman's second report was cumulative of the information that has been admitted into evidence without objection during the administrative hearing." Specifically, Appellant maintains that the second video by Dr. Halikman was regarding his observations on the video recorded by the private investigator and the impact the video had on his assessment of Appellee's injuries. Appellant further argues that Appellee had ample time to critique Dr. Halikman's second report because Appellee's closing argument contained a rebuttal to Dr. Halikman's second report.

Lastly, Appellant contends "the evidence contained within Dr. Halikman's second report was cumulative to the medical evidence and testimony admitted at the hearing without any objection from Appellee." Specifically, Appellant argues that "this is not the case where the only evidence on which the hearing examiner relied on was the report that is being challenged." Appellant maintains that the hearing examiner also relied on medical

evidence, including objective "C-arm image results."

Appellee responds that the circuit court did not abuse its discretion in concluding that "basic fairness was not afforded [Appellee] [sic] under the particular facts and circumstances presented." Specifically, Appellee maintains that although Appellee did not object to the presentation of the surveillance video, Appellee did object to the introduction of Dr. Halikman's supplemental report. Moreover, Appellee contends that the hearing examiner expressed great concern about "[Appellee] being ambushed at the hearing with the supplemental report of Dr. Halikman, but the hearing examiner nonetheless permitted the report to be admitted into the record for consideration." Appellee asserts that the second report of Dr. Halikman was a sharp contrast from his original report. Appellee contends that in Dr. Halikman's first report he stated that Appellee was disabled and unable to work for BCFD. However, in Dr. Halikman's second report he stated that Appellee was not disabled and could remain working for BCFD. Appellee argues that the circuit court's decision to remand the case was not based on whether there was substantial evidence for the hearing examiner's decision. Appellee maintains that the circuit court remanded the case to the hearing examiner to give Appellee an opportunity to respond to the evidence that was sprung on him at the hearing. In arguendo, Appellee asserts that "even in the event this Honorable Court concludes that the [circuit court] erred in its due process determination and resulting remand to the administrative agency, the case should be remanded to the circuit court for a judicial review of the hearing examiner's decision because no judicial review of the agency decision has occurred."

We affirm the decision of the circuit court.

B. Analysis

Appellant maintains that the circuit court erred when it found that Appellee's procedural due process rights were violated. Appellant asserts that "procedural due process in administrative law [proceedings are] recognized to be a matter of greater flexibility than that of strictly judicial proceedings." *Widomski v. Chief of Police of Baltimore Cty*., 41 Md. App. 361, 378 (1979). Specifically, Appellant contends that Appellee failed to request any additional opportunities to address either the video or the second report from Dr. Halikman at the administrative hearing.

At the hearing that took place on October 27, 2015, Appellee's counsel reacted to the testimony and video of the private investigator by stating the following:

> [Appellee]: Well this is unbelievable. I'm chastised all the time for being three days before, two days before, or this, and I think you recall the hearing we had where you kind of admonished me to try to get it in in time.
> …..
> [Appellee]: Here's a report dated September 2nd that's given to me at the conclusion of the hearing. I would, and I haven't even read it, but I would argue that it should not be admitted.
>
> [Hearing Examiner]: Why it is being given, not even at the beginning when I asked if there are any additional documents that you wish to be made part of the record was this discount offered. Why is it being offered now, only after we're at the point – this point in the hearing?
>
> [Appellant]: I specifically, at that time, said not at this time. [Appellant] has the opportunity to present additional evidence. This is a matter of credibility. If we had presented this document to the claimant prior to his testimony it would have effected his testimony. This case involves an issue of purely subjective complaint. Accordingly, the credibility of his testimony is a crucial factor in this case.
>
> [Hearing Examiner]: I don't like gotcha games. I think everybody should be able to put their case, and they should be able put forth the best case. But I don't like you sitting here and saying you had a document you've had since

> September 2nd, 2015, and you won't even give it at the beginning of the hearing I have a problem with that.
>
> [Appellant]: there's no discovery rules.
>
> [Hearing Examiner]: I have a problem with that.
>
> [Appellant]: It's perfectly permissible within the discretion of the Fire and Police Employees' Retirement
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> [Hearing Examiner]: and if [Appellee] was sitting here doing that right now you'd be standing on your head telling me that I absolutely cannot take a document that he held out and that he kept it away from the other side.
>
> [Appellant]: Again this is within the standard practice of what Appellant does in cases where we're investigating an issue of credibility. This is not exceptional. We've done this in prior cases you know. This is not anywhere against any of the regulations or rules, and it's completely permissible… And it's our prerogative to present our case in the way we believe to be the most effective. And in this case it is an objective versus subjective issue. The crucial factor in this case is the credibility of [Appellee]… Had we disclosed the video, which you know we have no—absolutely no obligation legally to disclose, and had we disclosed this report again, which we have no obligation legally to disclose prior to this, it would [sic] completely tainted the claimant's testimony.
>
> [Appellant]: For the record, I'm going to renew my objection.

On September 12, 2016, the Honorable Jeffery M. Geller for the Circuit Court of Baltimore City delivered an oral ruling from the bench. Judge Geller reversed the hearing examiner's decision and said the following about the hearing examiner considering the private investigator's video and Dr. Halikman's second report:

> I have a problem with it too. I can't imagine in what version of practice this is considered fair. The issue of credibility, that's for the hearing examiner to determine.
>
> If the hearing examiner said I've reviewed that, I've considered the petitioner's response to it, and I don't find his response and I don't find his

response to the video to be credible, that's their call to make, not my call to make.

And while it may not be -- there may not be discovery rules in the Code. And it may be informal procedurally and informal with respect to the Rules of Evidence.

We do have the Maryland Declaration of Rights. And pursuant to Article 24, Administrative Agencies Performing Judiciary or Quasi-Judicial Functions, observe basic principles of fairness as to the parties appearing before them.

And citing Shultz versus Pritts, 297 Md. 7; Oppenheimer versus Employment--- Employees' Security Administration, 275 Md. 514; Rogers versus Radio Shack, 271 Md. 126.

I'll also note that there are cases, and particularly Shultz versus Pritts where if there is evidence received by an administrative agency after the close of the hearing in which the agency relies on the appellate courts the Court of Appeals has held that due process requires an opportunity for cross-examination and/or rebuttal to be provided.

In this case, this evidence was sprung on petitioner, and I -- it sounds like this is a practice that goes on. But Mr. Petty has -- in this Court's opinion, has been denied due process through this procedure.

And I'm going to reverse the decision and remand it for the--- for further proceedings.

I'm not reaching the issue of whether there's substantial evidence. I'm simply reversing this for Mr. Petty to have a fair opportunity to respond to this.

It is --- as I said, I cannot fathom how this could be considered fair. And I'm reversing the matter.

Article 24 of the Maryland Declaration of Rights states the following:

> Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution guarantee that a person will not be deprived of life, liberty, or property without due process of law. The question of whether a party is deprived of the right to due process involves an issue of law and not of fact. As such, the standard of review applied

> by an appellate court is *de novo.* Consequently, we may substitute our judgment for that of the agency…A party has a valid property interest in an administrative appeal. Moreover, procedural due process requires a fair trial in a fair tribunal. Such principles apply to any tribunal, be it a judge, jury, or an administrative body.

Regan v. Board of Chiropractic Examiners, 120 Md. App. 494, 509-10 (1998).

In *Shultz v. Pritts*, 291 Md. 1, (1981), Robert and Ann Pritts ("the appellees") were contract purchasers of a 2.74 acre tract of land located in Carroll County. The appellees filed an application with the Carroll County Board of Zoning Appeals ("the board") requesting "a special exception use to develop a funeral establishment and a variance for reduction of the minimum front yard requirements." *Id*. at 3. The board held a hearing and the appellees' application was ultimately denied. The board denied the request and held that the request for the variance was moot. The appellees appealed the board's decision to the Circuit Court for Carroll County "which determined that there had been a denial of due process because the board had considered evidence submitted after the close of the hearing." *Id*. The circuit court reversed and remanded the case to the board for a new hearing.

The board refused to hear the merits of the case and the protestants, who opposed the variance, appealed to this Court. The appellees cross-appealed "on the ground that the Circuit Court should have granted the special exception use." *Id*. at 4. This Court "on its own motion that the Circuit Court's order remanding the case to the [b]oard was not a final judgment and dismissed the appeal." *Id*. Subsequently, the protestants filed a petition for a writ of certiorari, and the appellees filed a cross petition. The Court of Appeals held that

the appellees were denied their procedural due process rights because the board considered evidence after the close of the hearing. The Court of Appeals stated the following:

> In general, while administrative agencies are not bound by the technical common law rules of evidence, they must observe the basic rules of fairness as to parties appearing before them. *Ottenheimer Publishers, Inc. v. Employment Sec. Admin.*, 275 Md. 514, (1975); *Hyson v. Montgomery County Council*, 242 Md. 55, 69, (1966); *Dal Maso v. Board of County Comm'rs of Prince George's County*, 238 Md. 333, 337, (1965). When an administrative agency relies upon evidence submitted after the close of a hearing, due process may be violated if no opportunity is provided to challenge the evidence by cross-examination or rebuttal. *Rogers v. Radio Shack*, 271 Md. 126, 129; *Temmink v. Board of Zoning Appeals for Baltimore County*, 205 Md. 489, 496-97,(1954). However, when an administrative agency relies upon evidence submitted after the close of a hearing, there may be no due process violation when the parties are aware that the evidence will be considered but make no objection, particularly if the evidence is duplicative in nature. Under such circumstances, the requisite procedural fairness has been accorded because there was the opportunity to challenge the original evidence by cross-examination or rebuttal or to request the opportunity to challenge the newly acquired evidence before the agency reached its decision. *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel County*, 273 Md. 245, 254, (1974); *Montgomery County, Md. v. National Capital Realty Corp.*, 267 Md. 364, 375-76, (1972); *Birckhead v. Board of County Comm'rs for Prince George's County*, 260 Md. 594, 600, (1971); Dal Maso, 238 Md. at 337, 209.

Shultz v. Pritts, 291 Md. 1, 8-9 (1981).

Here, the circuit court found that the hearing examiner allowing the video and the second report that was made by Dr. Halikman to be considered as evidence was not fair to Appellee. Specifically we find that the circuit court did not abuse its discretion in concluding that basic fairness was not afforded to Appellee. Although the record shows that Appellee did not object to the presentation of the private investigator's video, Appellee did object to the introduction of Dr. Halikman's second report. Dr. Halikman's second

report was completely different from his first report because he found that Appellee was not disabled. Moreover, Appellee stated in his brief that the reason why he did not object to the video was because the video showed him using his left hand, which is the hand that he did not injure.

The record also shows that the hearing examiner expressed great concern about Appellant's presentation of the supplemental report of Dr. Halikman. However, the hearing examiner allowed the report to be admitted into the record for consideration. As we noted above, the second report of Dr. Halikman was a sharp contrast from his original report. Dr. Halikman's first report stated that Appellee was disabled and unable to work for BCFD. However, in Dr. Halikman's second report he stated that Appellee was not disabled and could continue working for BCFD. Appellee should have been given time to prepare and put his best case forward to rebut Dr. Halikman's second report. As the Court of Appeals stated in *Shultz v. Pritts*, "when an administrative agency relies upon evidence submitted after the close of a hearing, there may be no due process violation when the parties are aware that the evidence will be considered but make no objection, particularly if the evidence is duplicative in nature." *Pritts*, 291 Md. at 8. In this case, Appellee was not aware of the evidence and Appellant knew of Dr. Halikman's second report and the video for at least a month prior to the hearing.

The circuit court's decision to remand the case was not based on whether there was substantial evidence to deny Appellee of his disability benefits. The circuit court remanded the case to the hearing examiner to give Appellee an opportunity to respond to the evidence that Appellant presented at the hearing.

The judgment of the Circuit Court for Baltimore City is affirmed.

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