Circuit Court for Baltimore City
Case No. 24-C-19-001072

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1758

September Term, 2019

DEPARTMENT OF GENERAL SERVICES

v.

ERNEST PETERKIN

Nazarian,
Reed,
Woodward, Patrick. L
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: August 5, 2021

Appellant Department of General Services ("the Department") issued a notice of termination against Ernest Peterkin ("Appellee") on May 22, 2018. Appellee was terminated, without prejudice, from his position as Administrator III based on the Department's finding that Appellee failed to enroll in a drug rehabilitation program after testing positive for illegal use of drugs in the workplace. Appellee filed a written appeal of his termination which progressed to the Office of Administrative Hearings. After a hearing on December 13, 2018 before an Administrative Law Judge, Appellee's termination was upheld. Appellee then sought judicial review before the Circuit Court for Baltimore City. On October 1, 2019 Judge Lawrence Fletcher-Hill issued a Memorandum Opinion with a separate Order reversing the administrative decision and reinstating Appellee's employment with back pay. This appeal by the Department followed.

In bringing its appeal, the Department presents two questions for appellate review, which we have condensed and rephased into one[1]:

I. Was the Administrative Law Judge's determination that Appellee's termination was lawful because he had knowledge the Renaissance

[1] Appellant presents the following questions:

1. Does the substantial evidence in the record, including the fact that Mr. Peterkin was told in advance of the deadline that the Renaissance Center was not an approved drug treatment program and he was given additional time to locate an approved program, support the administrative judge's determination that Mr. Peterkin's termination was lawful because he failed to enroll in an approved drug rehabilitation program of at least six months duration?
2. Does the substantial evidence in the record show that Mr. Peterkin knew a condition of returning to work required that he submit documentation of his enrollment in a drug treatment program by May 22, 2018, but that he failed to do so?

> Center was not a State-approved drug rehabilitation program and he failed to produce documentation of enrollment in an approved program supported by substantial evidence in the record?

For the following reasons, we answer in the negative and affirm the judgement of the circuit court.

FACTUAL & PROCEDURAL BACKGROUND

We present the facts as found by the Administrative Law Judge ("ALJ"):

FINDINGS OF FACT

> I find the following facts by a preponderance of the evidence:
>
> 1. At all times relevant to this proceeding, the Employee [Ernest Peterkin] was employed as an Administrator III with DGS. The Employee maintained this position for approximately seventeen years. The Employee managed 300 to 400 leases and three to four million square feet of commercial space. Overall, the Employee has approximately 35 years of state service.
>
> 2. On March 26, 2018, the Employee displayed signs of impairment while at work and Ms. [Wendy] Scott-Napier authorized the Employee to report for drug testing. The Employee reported for testing to a location in Arbutus, Maryland and tested positive for illegal use of drugs. As a result of the positive test, the Employee was suspended for fifteen days.
>
> 3. On April 5, 2018, via letter from James Fox, State EAP Coordinator, the Employee was required to participate in a State-approved drug rehabilitation program that was no less than six months in duration. In addition, the Employee was expected to enroll in the drug rehabilitation program while on the fifteen-day suspension to remain compliant with the EAP. The letter also contained additional documents, namely, the confidential release form and the list of State-approved drug rehabilitation programs.
>
> 4. Mr. Fox maintained a follow-up call log of telephone contact with the Employee regarding his progress. Mr. Fox communicated with the Employee by telephone on several occasions including: April 6, 2018, April 18, 2018, April 27, 2018, May 3, 2018, and May 14, 2018.
>
> 5. The Employee completed an initial screening with Johns Hopkins Hospital in April 2018. In May 2018, the Employee was unable to complete intake at

Recovery Network due to an insurance issue.

6. On May 14, 2018, Mr. Fox notified Ms. [Tonya] Sturdivant the Employee was not in compliance as he had not enrolled in a State-approved drug rehabilitation program.

7. On May 15, 2018, DGS and the Employee met for a mitigation conference to discuss why the Employee had not enrolled in a State-approved drug rehabilitation program. The initial established deadline to enroll in a State-approved program was May 14, 2018. The Employee was given an additional week to enroll in a drug rehabilitation program.

8. On May 22, 2018, the Employee met via telephone with the DGS HR Director to discuss the drug rehabilitation program. The Employee was on sick leave and phone participation was permitted. The Employee had a letter faxed from The Renaissance Center Christian Counseling (Renaissance) indicating the Employee attended his initial counseling session for substance abuse counseling on May 21, 2018. The next session was scheduled for June 2, 2018.

9. DGS contacted James Fox, who indicated the organization was not listed as a Maryland State Certified substance abuse treatment program by the Maryland Department of Health (MDH). Further, Mr. Fox noted the program did not appear to be a substance abuse treatment program as required.

10. Renaissance is [sic] community-based pastoral counseling ministry program located in Woodlawn, MD. Renaissance provides counseling services to a specified target group, namely, all mental health populations in Baltimore County, Baltimore City, and Howard County areas. Renaissance is not a State-approved drug rehabilitation program. Renaissance accepts various forms of insurance including the Johns Hopkins Family Plan.

11. On May 22, 2018, the Employee was terminated for failing to enroll in an approved drug rehabilitation program. The termination was signed by Wendy Scott-Napier, the Appointing Authority and Ellington Churchill, Jr., DGS Secretary.

Mr. Fox's letter to Appellee instructed him to contact his health insurance provider "for assistance in selecting a drug abuse rehabilitation program" and if he did not have insurance, to reference the enclosed list of approved programs. On cross examination, Mr.

Fox testified he never inquired if Appellee had insurance or not. Mr. Fox also testified that during his conversation with Appellee about two programs Appellee attempted to enroll in – Recovery Network and Klomac Clinic – Mr. Fox did not address if either of those programs were on the list of approved programs. On May 14, 2018, Mr. Fox closed his case on Appellee and did not have any communication with the Department or Appellee regarding enrollment in Renaissance.

That same day, Appellee emailed Mr. Fox, Mr. Robert Suit, and Ms. Wendy Scott-Napier, DGS Appointing Authority, to notify them he located a program, the Renaissance Center, that would accept his insurance and the program would begin May 21, 2018. Appellee testified that no one responded to his email or inquired further into his selection of Renaissance. Appellee testified further that his insurance referred him to Renaissance and that a representative for the program informed him Renaissance was licensed by the State of Maryland as well as EAP approved. Appellee emailed Ms. Tonya Sturdivant, Human Resources Director, on May 21, 2018 to inform her he enrolled in "drug treatment counseling" at Renaissance, and confirmed he had his initial session on May 20, 2018 with his "drug treatment counselor," Darryl Webster, LCPC. In response, Ms. Sturdivant emailed Appellee on May 22, 2018 at 9:03am reminding him to submit documentation of enrollment. Ms. Sturdivant did not provide any response to Appellee's description of the program as "counseling." Appellee had documentation of his enrollment faxed to Ms. Sturdivant that same day and she had it sent to Mr. Fox. Ms. Sturdivant testified she did not know if Renaissance was an approved program until Mr. Fox emailed her at 1:59pm on May 22, 2018. When the Department did reach out to Mr. Fox via email to determine if

Renaissance was an approved program, they did not include Appellee in the email.

The ALJ found that Ms. Sturdivant, "communicated with [Appellee] in person, via email, and via telephone" to emphasize he must be enrolled in a State-approved drug rehabilitation program by May 22, 2018. The ALJ also found that during the May 15, 2018 mitigation conference between Appellee, Ms. Sturdivant, Ms. Scott-Napier, and Ari Ross, Appellee "mentioned Renaissance and was advised counseling was not appropriate." Based on these findings, the ALJ concluded Appellee was "on notice regarding the approved program requirement and the possibility of termination for his failure to comply."

Appellee filed a petition for judicial review in the Circuit Court for Baltimore City. The circuit court found the ALJ's conclusion was unsupported by the record due to a contradiction in the testimony presented:

> This critical fact – that [Appellee] was told on May 15, 2018 that the Renaissance Center was not an acceptable treatment program – is not supported by the record in the way stated by the ALJ. The ALJ failed to resolve important direct contradictions between the testimony of Ms. Scott-Napier and the testimony of Ms. Sturdivant.

The ALJ relied on testimony by Ms. Scott-Napier that Ms. Sturdivant told Appellee Renaissance was not an acceptable program. But the circuit court found Ms. Scott-Napier's testimony was contradicted by Ms. Sturdivant "because [Ms. Sturdivant] did not know that the Renaissance Center was not an approved program until May 22, 2018, when Mr. Fox provided that information." Mr. Fox's testimony supported Ms. Sturdivant's testimony as he confirmed "he did not provide any information about the Renaissance Center on May 14 or 15, 2018 and that he had no further communications concerning [Appellee] until May 22, 2018." The ALJ did not establish its finding was made solely on the testimony of Ms.

Scott-Napier, which would discredit the testimony of Mr. Fox and Mrs. Sturdivant. The circuit court concluded that despite any reference to "counseling versus treatment" during the mitigation conference, Appellee was not clearly notified that Renaissance was an inappropriate program. Accordingly, on October 1, 2019 Judge Lawrence Fletcher-Hill issued a Memorandum Opinion with a separate Order reversing the administrative decision and reinstating Appellee's employment with back pay.

STANDARD OF REVIEW

When reviewing a final administrative decision, our review is limited to the decision of the ALJ, not the circuit court. *Cosby v. Dep't of Human Res*., 435 Md. 629, 637 (2012). "Even though our mandates in administrative law cases remand, affirm, reverse, or modify the circuit court's judgement, we are reviewing the agency's decision not that of the circuit court." *Bond v. Dep't. of Pub. Safety & Corr. Servs*., 161 Md. App. 112, 122 (2005) (citing *Mehrling v. Nationwide Ins. Co*., 371 Md. 40, 57 (2002)). Thus, this Court's standard of review for such decisions "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Colburn v. Dep't of Pub. Safety & Corr. Servs*., 403 Md. 115, 127-28 (2008) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)). "In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Maryland Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (quoting *Bulluck v. Pelham Wood Apts*., 283 Md. 505, 512 (1978)) (internal quotations omitted). When applying these standards, we review the record

in the light most favorable to the agency and "defer to [its] fact-finding and drawing of inferences" if supported by the record. *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67 (1999). Moreover, we defer to an agency's resolution of conflicting evidence. *Noland*, 386 Md. at 571. We review an agency's legal conclusions *de novo*. *Colburn*, 403 Md. at 128.

DISCUSSION

A. Parties' Contentions

The Department contends the record contained substantial evidence to show Appellee had notice of the mandate to enroll in a State-approved drug rehabilitation program and provide documentation of enrollment but failed to comply. The Department argues that Appellee's failure to comply resulted in a lawful termination of employment. The Department asserts the ALJ properly assessed the credibility of witnesses for the Department, specifically Mr. Fox, who testified Renaissance was not licensed and thus not a State-approved program despite Appellee's testimony that an unidentified representative told him the exact opposite. Because Renaissance was never a State-approved program and Appellee was told during the mitigation conference that counseling was not appropriate, the Department contends there was substantial factual support to terminate Appellee's employment.

Appellee contends the ALJ's decision is unsupported by substantial evidence in the record, thus requiring reversal of the administrative decision. Appellee asserts that Mr. Fox's letter instructed him to enroll in a drug rehabilitation program through his insurance but if he did not have insurance to refer to the list of approved programs. Appellee argues

the letter failed to specify the programs listed were the only ones acceptable and, if that were the case, the letter should have been clearer. Appellee contends further that he notified the Department via email on May 14, 2018 that his insurance referred him to Renaissance and a week went by before he received any indication that the program was not State-approved. Appellee argues that the Department consistently misstates the record, pointing to the contradiction in testimony between Ms. Sturdivant and Ms. Scott-Napier that the circuit court based its reversal on.

B. Analysis

The record does not support that Appellee was notified Renaissance is not a State-approved program in advance of his termination. We begin our analysis with the instructions in the letter Appellee received from Mr. Fox, which states in relevant part:

> Contact your health insurance company for assistance in selecting a drug abuse rehabilitation program. If you do not have health insurance, enclosed please find a list of approved drug abuse rehabilitation programs. After selecting a substance abuse treatment program, contact the program to enroll.

The language of the letter clearly directed Appellee to locate a drug abuse rehabilitation program through his insurance company. Additionally, the letter specifies that reference to the list of "approved" rehabilitation programs is required *if* an employee does not have insurance. It fails to clarify that a program selected through an employee's insurance company may not qualify as an "approved" program and thus requires the employee to contact programs on the list. Mr. Fox himself testified that he did not determine if Appellee was insured or not and the record does not support that Appellee should have been aware insurance companies may refer employees to programs that are not State-approved.

Moreover, Appellee enrolled at Renaissance and emailed Mr. Fox and Ms. Sturdivant on May 14, 2018 but did not receive a response or notice that the program was inappropriate until May 22, 2018.

However, the ALJ's determination that Appellee had advance notice that Renaissance was not a State-approved program primarily rests on the statements made during the May 15, 2018 mitigation conference. The circuit court found support of "the assertion that the acceptability of the Renaissance Center was discussed on May 15, 2018…came only in the cross examination of Ms. Scott-Napier." We agree. When questioned on cross examination about Appellee's May 14, 2018 email about Renaissance, Ms. Scott -Napier offered testimony that Renaissance was discussed at the May 15, 2018 mitigation conference:

[Counsel]	Did you respond to [Appellee] or Mr. Fox or Mr. Suit regarding the information that was contained in that email?
[Ms. Scott-Napier]	I did not respond to this email because I – as I understood it, this was communication with DBM on this matter. So, I did not respond to this particular email, no.
[Counsel]	Okay. And you never had any conversation with [Appellee] about the Renaissance Center in particular. Is that correct?
[Ms. Scott-Napier]	The only – I do know that when we met at a mitigating conference, we did talk about the Renaissance Center because he was sharing with us what he had attempted to enroll in.
[Counsel]	Okay
[Ms. Scott-Napier]	So, that, I believe, was part of the discussion on May

15th.

[Counsel] Okay. And was he given any specific information on that date with regard to the Renaissance Center?

[Ms. Scott-Napier] He was not given any information by me because, as I understood it, it was up to DBM to confirm that the program was valid. And so, I was not part of that discussion of confirming that the Renaissance was a valid program.

[Counsel] Okay. So you – you were in the entire meeting on the 15th and there – nobody during that meeting told [Appellee] there were any issues with the Renaissance Center. Isn't that correct?

[Ms. Scott-Napier] I recall on the 15th that he was told that going to see a counselor was not the same as enrolling in a treatment program. That – that is what I recall from the meeting on the 15th and that he had another week to get enrolled in a program.

[Counsel] Okay. My question, ma'am, was did you have discussions with him during that meeting about the Renaissance Center and whether or not that program was acceptable?

[Ms. Scott-Napier] I – I didn't personally have the conversation, but I recall that Tonya Sturdivant informed him that – that the Renaissance Center was not an acceptable program.

Ms. Sturdivant only testified to the content of the May 15, 2018 conference on re-direct examination, but her testimony did not mention counseling:

[Counsel] [W]hat was asked of [Appellee] at that conference?

[Ms. Sturdivant] Any reasons why he had not enrolled in a program as required for his employment

[Counsel] And what were his explanations?

[Ms. Sturdivant] He stated that no one would take him, no one would

accept him in their program.

[Counsel] And was it your understanding that – at that meeting on May 15th, 2018 that [Appellee] had not enrolled in any drug rehabilitation program?

[Ms. Sturdivant] From that point, yes, that he had not enrolled in a program.

[Counsel] And what – what happened as a result of that meeting?

[Ms. Sturdivant] We granted him an extension to allow him additional time to seek out a program.

* * *

[Counsel] And how was that communicated to [Appellee]?

[Ms. Sturdivant] In the meeting with him face to face. We gave him the March 22nd [sic] deadline, which I believe was about seven to [ten] days, to provide some type of documentation confirming his enrollment.

[Counsel] And did he agree with that deadline?

[Ms. Sturdivant] Yes.

[Counsel] And how – how did he indicate his agreement May 22nd 2018 deadline?

[Ms. Sturdivant] He stated he would have something to us by that deadline.

[Counsel] And in that meeting was there a discussion of what drug rehabilitation programs he was considering?

[Ms. Sturdivant] No. But I reminded him that it needed to be one that was acceptable at Department of Budget and Management and told – I always tell employees, when you seek out a program just even ask the program coordinator to be sure that its an appropriate program, acceptable.

[Counsel] Did– at that meeting did [Appellee] discuss any of his

communications with Mr. Fox regarding drug rehabilitation programs?

[Ms. Sturdivant] Not in that meeting, no.

The record fails to support the contention that Appellee was informed during the May 15, 2018 mitigation conference that Renaissance was not a State-approved program. Moreover, even if the record supported Ms. Scott-Napier's testimony that seeing a counselor is not equivalent to enrolling in a treatment program, such a statement does not support the conclusion that Renaissance was not licensed and not State-approved.

CONCLUSION

The Department's failure to communicate with Appellee about the acceptability of Renaissance created a lack of notice to Appellee that he had not enrolled in a State-approved program. Instead of resolving the conflicting testimony presented by the Department's witnesses, the ALJ unreasonably relied on the contradicting statements in conflict with the record. Taken as a whole, the record does not substantially support the ALJ's conclusion that Appellee deliberately pursued a drug rehabilitation program that was not State-approved. Ms. Sturdivant testified that Appellee did submit documentation of his enrollment at Renaissance. However, it was not until after Appellee was enrolled, documentation was submitted on the deadline, and Mr. Fox determined the day of the

deadline that the program was not licensed, that Appellee was notified Renaissance was not State-approved. Accordingly, we affirm the decision of the circuit court.

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