UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1130

September Term, 2015

UNIVERSITY OF MARYLAND,
COLLEGE PARK

v.

ALLEN TIFFANY

Krauser, C.J.,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 10, 2016

*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 case turns on whether appellant Allen Tiffany is right that the University of Maryland, College Park's (the "University") collective bargaining agreement with the American Federation of State, County, and Municipal Employees (the "Union") abrogated the University's existing policy regarding non-cause termination of regular exempt employees. The University terminated Mr. Tiffany without cause; as a regular exempt employee with eight years of service, the policy required the University to provide him with nine months' written notice and paid him in full during the notice period, both of which it did. Mr. Tiffany challenged his discharge, claiming that the collective bargaining agreement allows termination only for cause and only through the agreement's disciplinary process. He filed a grievance and lost, then appealed to the Office of Administrative Hearings ("OAH"), which affirmed. He then sought judicial review in the Circuit Court for Baltimore City, which reversed the OAH's decision and ordered the University to reinstate Mr. Tiffany to his previous position. We reverse.

I. BACKGROUND

Mr. Tiffany served for eight years as an Assistant Manager in the University's Intercollegiate Athletics Operations department, where he was responsible for maintaining athletic equipment for the University's sports teams. In this position, he was classified as a regular exempt employee and was subject to the University Board of Regents' Policy, VII-1.22: Policy on Separation for Regular Exempt Employees (the "Policy").[1] The

[1] The Policy was approved by the Board of Regents on December 3, 1999 and amended June 27, 2014.

Policy, VII-1.22, § II, states that "[e]mployment for regular USM employees in exempt positions is on an at-will basis. This means that, subject to applicable laws and policies, the employment relationship may be terminated at any time by either the employee or the University, consistent with Section III of this policy."

The Policy establishes two distinct termination procedures for regular exempt employees. The *first*, entitled "Termination by Period of Notice," is set forth in Section III of the Policy and allows the University to "involuntarily separate[]" a regular, exempt employee without cause[2] after giving that employee a defined period of notice that varies based on years of service.[3] The *second*, entitled "Termination for Cause," is contained in Section IV of the Policy and permits termination without notice if the employee is terminated for one of the listed reasons.[4]

---

[2] The volitional language exists in Section II, but not in Section III.

[3] The period of notice due an employee is driven by the number of years the employee worked for the institution, and is displayed in a chart within the Policy.

[4] Section IV of the Policy states:

> With the approval of the President or designee, the period of notice defined in III.B above is not required if the employee is to be terminated for any of the following reasons: moral turpitude, incompetency, willful neglect of duty, illegal actions, gross misconduct, severe safety violations, failure to accept reassignment, or medical condition causing inability to perform essential job duties with reasonable accommodations required by law.

Upon becoming a regular exempt employee on July 1, 2007,[5] Mr. Tiffany also became a member of the Union (the exempt employee bargaining unit) and was covered by the Memorandum of Understanding for Exempt Employees (the "MOU").[6] The MOU memorializes agreements between the University and the Union on a range of issues, including "wages, hours, and other terms and conditions of employment." By its terms, the MOU is meant to operate in parallel with existing University policies, and modifies only the policies it addresses:

> Except as specifically provided for in this Memorandum of Understanding, all University System of Maryland and University of Maryland, College Park policies, procedures, rules, practices, and conditions of employment governing bargaining unit employees ("Policy") are and shall remain in full force and effect. Where a portion of any existing Policy is modified by this MOU, the remainder of that Policy not in conflict with the MOU remains in full force and effect.

MOU, Article 1, Section 4(A).

The MOU contains no analog to the University's policy regarding "Termination by Period of Notice." It does, however, contain provisions relating to employee discipline and sanctions, including termination. Article 15 of the MOU, entitled "Disciplinary Actions," states in Section 1 that "[n]o employee shall be disciplined without cause."

---

[5] Mr. Tiffany began working in the same capacity for the University on August 11, 2005, but only later attained regular exempt status.

[6] The MOU is regularly updated: Mr. Tiffany was first subject to a MOU covering 2004-2007, then a MOU covering 2007-2010, followed by the 2010-2013 MOU. We look to the MOU covering July 1, 2014-June 30, 2017, which was in force at the time of Mr. Tiffany's termination.

Section 2 contains a list of available disciplinary actions, including termination. Section 5 defines the timeframes during which the University must commence any disciplinary action; for example, a termination action must be instituted within fifteen days of the time the University learned of the conduct at issue. And Section 5 again, and specifically, distinguishes disciplinary sanctions from notice termination: "this schedule shall have no applicability to either separation under the Notice Termination provisions of [the Policy] or Rejections on Probation under that Policy or Article 8 of this MOU."[7]

On July 14, 2014, the University sent Mr. Tiffany a Notice of Separation (the "Notice"). The Notice stated that Mr. Tiffany's employment would be terminated on April 13, 2015—nine months from the date of the letter—and that he would receive full compensation during the notice period. The Notice did not state any reason for the termination,[8] nor did the University initiate or pursue any disciplinary proceedings against him.

[7] Both the Policy and the MOU recognize a twelve-month probationary period for newly hired employees (or shorter for transferred employees). During probation, the Policy allows the University to "reject" the employee at its discretion. The MOU does not address any outcome other than satisfactory completion of the probation period. Mr. Tiffany had long since completed his probationary period, so none of these provisions applies.

[8] Mr. Tiffany's annual performance evaluations show a steady decline in all aspects of his work. The emails provided show cooperative implementation of plans designed to help Mr. Tiffany organize his duties and better allocate his time. Although some coaches reported improvements in his work, there were numerous complaints that teams did not have their uniforms or equipment on time, which was Mr. Tiffany's primary duty. Accordingly, it seems as though the University could have more easily terminated Mr. Tiffany with reason, but instead chose the path that involved no reason, but with ample notice and full pay.

On July 16, 2014, the Union filed a Step Two grievance on Mr. Tiffany's behalf. They claimed that the Notice violated Article 15, Section 5 of the MOU because Mr. Tiffany had been denied progressive discipline and mitigation considerations before termination. The Step Two grievance was denied, and Mr. Tiffany filed a Step Three grievance with the Office of Administrative Hearings, this time arguing that Article 15 of the MOU abrogated all at-will termination provisions otherwise applicable to bargaining unit employees. The administrative law judge ("ALJ") heard arguments, and ultimately concluded, on January 20, 2015, that Article 15, Section 5 of the MOU "allows for the non-disciplinary Notice Termination of the Employee in the instant case."

Mr. Tiffany sought judicial review, and the circuit court reversed the ALJ's decision in an order dated June 22, 2015. The circuit court examined whether Mr. Tiffany was an at-will or for-cause employee and whether Section III of the Policy (the at-will provision) could co-exist with Section 15 of the MOU (the progressive discipline provisions). Relying on *Spacesaver Sys., Inc. v. Adam*, 440 Md. 1 (2014), the court agreed with Mr. Tiffany that an employee can never be both an at-will and a for-cause employee, and found that the expectations set forth in the MOU abrogated the Policy. The circuit court ordered Mr. Tiffany's reinstatement, and the University appealed.

II. DISCUSSION

The ultimate question in this case, whether the University could permissibly terminate Mr. Tiffany without cause, depends on whether VII-1.22 of the Policy and Section 15 of the MOU coexist. If they can, Mr. Tiffany was subject both to the Policy's Termination by Period of Notice and the MOU's disciplinary provisions, and the

University could proceed under either.[9] The University contends, and the ALJ agreed, that the Policy's Termination by Period of Notice provisions survive the MOU; the circuit court disagreed.

On this posture, we look through the circuit court's ruling to review the agency's decision, and our review is narrow and deferential. *Spencer v. Md. St. Bd. of Pharmacy*, 380 Md. 515, 523-24 (2004). We review the agency's findings of fact in the light most favorable to it, and consider only whether substantial evidence exists to support the agency's findings and conclusions. *United Parcel v. People's Counsel*, 336 Md. 569, 577 (1994) (citations omitted). Where there is clear legal error, we owe no deference to the agency. *E. Outdoor Advert. Co. v. Mayor and City Council of Baltimore*, 128 Md. App. 494, 514 (1999) (citation omitted). We do not substitute judgment for that of the agency, and we disrupt the agency's decision only "if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision . . . is arbitrary and capricious." Md. Code (1984, 2014 Repl. Vol.), § 10-222(h)(3)(vi) of the State Government Article. So long as the decision falls within the agency's authority, is lawful,

---

[9] The University offered the following Question Presented:

> Given that the University and AFSCME had expressly agreed to two types of termination, did the circuit court erroneously determine that a for-cause termination clause in the employment contract prohibits any other form of termination when that clause explicitly references alternative forms of termination?

and is supported by material and substantial evidence, we uphold that decision. *Md. Transit Auth. v. King*, 369 Md. 274, 291 (2002).

The University argues that the express reference in Article 15, Section 5 of the MOU to the continuing force of Section III of the Policy demonstrates that the two co-exist. Mr. Tiffany counters that the MOU abrogates the Policy because, otherwise, Mr. Tiffany would have been both an at-will and a for-cause employee, and the law forbids that status. *See Spacesaver*, 440 Md. at 16 (an employee cannot be both an at-will and a for-cause employee). We agree with the University that the Policy and the MOU were crafted to co-exist, and therefore that the University was authorized to terminate Mr. Tiffany as it did.

"In Maryland, at-will employment is an employment contract of indefinite duration" that "can be legally terminated at the pleasure of either party at any time." *Suburban Hosp., Inc. v. Dwiggins*, 324 Md. 294, 303 (1991). Over time, an employer's ability to fire an employee "at [its] pleasure," *id.*, has become subject to statutory, common law, and contractual modification. As an example of a common law restriction, an employee may have a cause of action for wrongful discharge if the employer fires him on account of race. *See, e.g.*, *Adler v. Am. Standard*, 291 Md. 31, 42 (1981). Similarly, the Maryland Code precludes employers from firing at-will employees for filing a workers' compensation claim. Md. Code (1991, 2014 Repl. Vol.), § 9-1105 of the Labor and Employment Article.

Parties also can bargain for employment protections. *See Dwiggins*, 324 Md. at 306 ("If an employee is not afforded the job termination procedures outlined in a handbook, the employee may have a breach of contract action against [the] employer." (citing *Land v. Michael Reese Hosp. & Med. Ctr.*, 153 Ill. App. 3d 465, 466 (1987) (employee entitled

to grievance procedures dictated in handbook))); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 588 (1980) (personnel policies and practices established by the employer are in fact obligations owed to the employee). But an employer's agreement to increased procedural protections does not transform an at-will employee into a for-cause employee for all purposes—the agreement binds the employer to those protections with regard to its otherwise-at-will employees. *Dwiggins*, 324 Md. at 307 ("By creating and disseminating its grievance procedures, [the employer] promised merely that they would be followed," but the existence of such procedures did not change the employee's at-will status); *Carnes v. Parker*, 922 F.2d 1506, 1511 (10th Cir. 1991) ("Although procedural protections themselves are not sufficient to create a property interest in continued employment, they can sustain an entitlement to the procedures themselves.").

Here, the University and the Union agreed to a range of procedural protections beyond basic at-will employment, as memorialized in the MOU, for its bargaining unit employees, including Mr. Tiffany. These included, among other things, employee disciplinary procedures. Article 15, Section 1 states that "[n]o employee shall be disciplined without cause," and the Article goes on to delineate progressive discipline measures, time limitations to impose measures, and the right to union representation in disciplinary proceedings.

Mr. Tiffany argues, however, that Article 15 also abrogated VII-1.22 of the Policy, and thus eliminated the Termination by Period of Notice procedure for Union employees. He claims that AFSCME "bargained for-cause protection for regular exempt employees of the University" and that the University and AFSCME "expressly abrogated the at-will

designation of regular exempt employees at the University."[10] But this is not what the MOU says, nor a result compelled independently by case law. An agreement changes what it changes and doesn't change what it doesn't change. *See Spacesaver*, 440 Md. at 25 ("[T]he presumption for at-will employment persists and is only defeated when the parties explicitly negotiate and provide for a definite term of employment or a clear for-cause provision."); *Dwiggins*, 324 Md. at 309-10 ("Specific modifications to the at-will relationship should not be an indication that the employer intends to go beyond the specific modifications and add an implied covenant of fair dealing to the at-will relationship."); *Sullivan v. Snap-on Tools Corp.*, 708 F. Supp. 750, 753 (E.D.Va. 1989) ("An employer's promise to discharge an employee only for just cause should be explicit and unambiguous, and such an intent should be clearly expressed."). And this MOU expressly recognized the continuing force of the Policy where the two documents don't conflict.

We agree with the ALJ that there is no conflict between the Policy and the MOU's discipline provisions. The MOU's statement that "[n]o employee shall be disciplined without cause," means exactly what it says: the University cannot institute *disciplinary* action without cause. But not all terminations flow from *disciplinary* actions—employers can terminate employees without disciplining them, and the Policy provides a mechanism that affords an employee far greater notice and protection than a pure at-will termination

[10] Mr. Tiffany included in the Record Extract an arbitrator's denial of a motion to dismiss in another case, and he filed a motion asking us to take judicial notice of the arbitrator's final decision. These are not, however, materials appropriate for judicial notice, *see Abrishamian v. Wash. Med. Grp.*, 216 Md. App. 386, 412-17 (2014), and the motion is denied.

would. In light of the MOU's express preservation of non-conflicting University employment policies, we decline to stretch one sentence at the end of a paragraph lodged in a section entitled "Disciplinary actions" to abrogate a parallel termination process, particularly since the Union and the University *could have* negotiated this point as well. In the absence of MOU language eliminating the Termination by Period of Notice for covered employees, the Policy remained in force, and the University had the authority to terminate Mr. Tiffany as it did.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. COSTS TO BE PAID BY APPELLEE.