UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No.0967

September Term, 2015

PRINCE GEORGE'S COUNTY
DEPARTMENT OF CORRECTIONS

v.

TAMMIE OWENS

Nazarian,
Reed,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: April 25, 2017

In 2009, (then-) Correctional Officer Sergeant Tammie Owens, appellee, filed a grievance against the Prince George's County Department of Corrections ("Department"), challenging the grade she received on a promotional exam needed to obtain the rank of Correctional Officer Lieutenant within the Department. Falling just short of the 70% passing grade, appellee filed her grievance with the Department's Joint F.O.P./Command Staff Appeal Board ("Joint Appeal Board"), contending that her answers to four specific questions were incorrectly graded. After considering each question and her proffered explanation as to why her answer was correct, the Joint Appeals Board disagreed, and voted to deny her grievance.

Appellee then filed a grievance against the Department with the Personnel Board for Prince George's County, Maryland ("Personnel Board"), again arguing that those same four questions were incorrectly graded. After a merits hearing was eventually heard in January 2011, the Personnel Board, in the executive session following the hearing, ruled in favor of the Department. Important here, however, is the fact that, for whatever reason, the Personnel Board's written decision and order was not issued until March 2014, some three years after the hearing.

Appellee petitioned for judicial review in the Circuit Court for Prince George's County, arguing that the she was prejudiced by the Personnel Board's delay in issuing its opinion, and challenged the decision on jurisdictional and procedural grounds. The Department responded, arguing, *inter alia*, that appellee failed to utilize the exclusive administrative procedures afforded to her under the County's Collective Bargaining Agreement, and thus, the Personnel Board did not have subject matter jurisdiction to hear

the case in the first place. The circuit court ruled in appellee's favor on several issues, and thus, reversed the Personnel Board's decision. The Department noted timely appeal, and presents three questions for our consideration, which we have rephrased slightly:[1]

> 1. Did the circuit court err in finding that the Personnel Board's three-year delay in issuing a decision prejudiced a substantial right of Tammie Owens?
>
> 2. Did the circuit court err by substituting its judgment for that of the Personnel Board and deciding that Tammie Owens' answers to the challenged promotional exam questions were actually correct?
>
> 3. Did the circuit court err by directing the Personnel Board to consider the amount of reasonable attorney's fees and costs to be awarded to Tammie Owens?

For the reasons stated below, we answer the second and third questions in the affirmative and accordingly, reverse the judgment of the circuit court.

[1] The Department's original questions were written exactly as follows:

> 1. Did the lower court err when it concluded that the decision of the Personnel Board did prejudice a substantial right of Tammie Owens when the Board issued a Decision and Order on March 12, 2014, more than three (3) years after the hearing?
>
> 2. Did the lower court err when it substituted its judgment by determining that Tammie Owens' answers to exam questions were in fact correct, when there was substantial evidence in the record to justify the Personnel Board's ruling that Tammie Owens should not have been promoted to lieutenant?
>
> 3. Did the lower court err when it usurped the Personnel Board's power to make a determination regarding attorney fees pursuant to the Prince George's County Personnel Code, Section 16-205 and prematurely directed the Board to consider the amount of reasonable attorney fees and costs to be awarded to Tammie Owens?

FACTUAL AND PROCEDURAL HISTORY

Appellee has been employed by Prince George's County ("County") as a correctional officer with the Department since January 4, 1988. By 2009, she reached the rank of Correctional Officer Sergeant, through both non-competitive and competitive promotions, and, during her tenure, received satisfactory or above performance evaluations and incentive awards from the Department.

On April 18, 2009, appellee took the promotional examination ("Exam") given by the Department as a prerequisite for obtaining the rank of Correctional Officer Lieutenant. The Exam was prepared by Pittman McLenagan Group, L.C., a business consulting firm that specialized in personnel selection tools, that was contracted by the County to perform all of the tasks associated with developing and implementing the promotional processes within the Department. As part of that process, the firm, in conjunction with experts from inside and outside the Department, designed the Exam in a way that was "straightforward," yet still "relevant and appropriate for the rank tested." According to the Department, the firm also used a "series of uniform guidelines" in preparing the Exam, including EEOC guidelines.

In preparation for the Exam, all candidates (including appellee) were given orientation materials which gave an overview of the Exam, its content, suggestions for studying, a suggested reading list, and instructions "that increased the test[-]takers[']chances of choosing the correct answers and other relevant information to increase the likelihood of success." In addition, "the orientation materials instructed the candidates to choose the best answer."

Appellee received a score of 68%—just short of the passing grade of 70%, the minimum score needed to be considered for the rank of Correctional Officer Lieutenant. Four candidates, appellee included, appealed their results, challenging a total of 29 questions from the Exam (none of which were ultimately granted). Appellee specifically appealed Questions 14, 27, 83, and 92 by memorandum dated April 23, 2009, addressed to the Director of the Office of Human Resources Management ("OHRM") for the Department.[2]

Sylvester McArthur, a personnel analyst for the Department, was responsible for management of the Exam, as well as appellee's appeal to the Joint Appeals Board. As part of the process, each aggrieved candidate was given a number by Mr. McArthur, and only that number and the challenged questions were given to the Joint Appeals Board to ensure a fair appeal process. The Joint Appeals Board[3] was given the answer key, test booklet, source material, and the candidate's justification for their given answer—all of which was considered individually, before discussing as a panel, in order to decide if the question should be granted or denied. Mr. McArthur was present during the appeal as a representative of OHRM and on behalf of each candidate to monitor the process.

After considering all of the materials, the Joint Appeals Board unanimously agreed that the correct answer was stated on the answer key for Questions 14, 27, and 83; and two members of the Joint Appeals Board agreed that the correct answer was stated on the

[2] Appellee challenges only questions 14 and 92 on appeal.

[3] The Joint Appeals Board consisted of Lieutenant Colonel Kathleen Costello, Major Richard Crump, and Major Martha Brown, all from the Department.

answer key for Question 92.[4] Accordingly, on May 8, 2009, OHRM notified appellee that her appeal was denied, and that she was ineligible for the promotion to Correctional Officer Lieutenant.

By letter dated May 17, 2009, appellee filed an appeal with the Personnel Board based on the Joint Appeals Board's denial of her grievance.[5] After a pre-hearing conference in early January 2011, a merits hearing was held in front of the Personnel Board on January 26, 2011.

At the merits hearing, the Personnel Board heard testimony from three witnesses. The first witness was Dr. Shane Pittman, President of the Pittman McLenagan Group, the company that designed the promotional exam, who testified regarding the process by which the group designed the Exam in conjunction with numerous subject matter experts of the Department and regarding the guidelines that were used to ensure the fairness and appropriateness of the Exam. The second witness was appellee herself, who mostly testified regarding her rationale behind her challenge. The final witness was Mr. McArthur, who outlined the promotional process to the Personnel Board and explained the manner in which challenges were handled by the Joint Appeals Board.

The Personnel Board—for reasons which, to this day, remain unexplained—issued its written Decision and Order for appellee's appeal on March 12, 2014, over three full

[4] Mr. McArthur testified that a unanimous decision was not required, as long as there was a majority in favor of the decision.

[5] Initially, her appeal was dismissed by the Personnel Board because she failed to appear at a pre-hearing conference on March 10, 2010, but after appellee filed a Motion to Reconsider, her appeal was reinstated.

years after the merits hearing. In the Order, the Personnel Board (the membership of which, by that point, had almost completely changed) acknowledged the delay in the following way:

> The hearing on this appeal was heard by the Personnel Board on January 26, 2011. The prior Personnel Board made its decision at the executive session of the Board following the hearing on January 26, 2011, but the legal counsel to the Board at that time did not write the decision and order. The decision and order that follows reflects the decision and order of the members of the prior Personnel Board.

Ultimately, the Personnel Board concluded that appellee "failed to prove by a preponderance of the evidence that the Department of Corrections and OHRM acted in an arbitrary, capricious or illegal manner." The Personnel Board's reasoning essentially came down to the vast amount of deference it gave the Joint Appeals Board:

> The [Personnel] Board considered all the testimony and the evidence presented. While the Board gave considerable latitude to [Appellee] in allowing her to address her specific concerns regarding the four test questions, the Board is cognizant that it is not equipped to be the arbiter of test questions and chooses to leave this to the experts. The experts fully considered her challenges to the four questions and determined to deny the challenges. The Board cannot say that the [Joint] Appeals Board did not have a reasonable basis for denying her challenges based on the evidence presented.

Accordingly, the Personnel Board denied and dismissed appellee's grievance.

On April 17, 2014, appellee filed a Petition for Judicial Review in the Circuit Court for Prince George's County. The matter came before the circuit court for oral arguments on November 6, and December 16, 2014. Appellee argued three main points: (1) the Personnel Board failed to follow procedural rules because four out of the five current

members were not part of the hearing, thereby violating the "*Accardi* doctrine";[6] (2) the decision prejudiced a substantial right of hers due to its failure to follow the time requirements of Section 16-203 of the County Code; and (3) the decision should be modified because it was not supported by substantial evidence or, in the alternative, was arbitrary and capricious. The Department, in addition to denying each of appellee's points, also argued that the Personnel Board did not have jurisdiction to hear the appeal because appellee failed to utilize the procedures available to her under the County Collective Bargaining Agreement.[7]

On June 9, 2015, the circuit court entered its opinion and order, in favor of appellee. The court, after finding that the Personnel Board did have jurisdiction over the appeal, found that (1) the three-year delay in issuing its decision "clearly prejudiced [appellee] and potentially left [her] without a remedy for her appeal and possibly back pay – for which the [c]ourt will remand the case back to the Personnel Board for a determination"; (2) Questions 14 and 92 had two correct answers, and therefore the Personnel Board's decision regarding the questions was "clearly erroneous"; and (3) the delay was "an abuse of discretion by the Personnel Board, . . . was without substantial justification, and . . . has caused [appellee] undue delay and legal costs and fees," and therefore remanded the case back to the Personnel Board "to consider the amount of reasonable legal fees and costs to

[6] Appellee's basis for citing the *Accardi* doctrine is no longer that "four out of the five current [Personnel Board] members were not part of the hearing."

[7] The Department has abandoned this argument.

be awarded to [appellee] consistent with Prince George's County Personnel Code, Section 16-205."

The Department, through the County Office of Law, noted this timely appeal on July 1, 2015.

STANDARD OF REVIEW

Our standard of review is well-settled:

> In an appeal from a judgment entered on judicial review of a final agency decision, we look "through" the decision of the circuit court to review the agency decision itself. *People's Counsel v. Country Ridge Shopping Center, Inc.*, 144 Md. App. 580, 591, 799 A.2d 425 (2002). Our role "in reviewing [the final] administrative agency adjudicatory decision is narrow." *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67, 729 A.2d 376 (1999) (citing *United Parcel v. People's Counsel*, 336 Md. 569, 576, 650 A.2d 226 (1994)). It is limited to determining whether "'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.'" *Id.* at 67–68, 729 A.2d 376 (quoting *United Parcel*, 336 Md. at 577, 650 A.2d 226).
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> "An agency's fact-finding is based on substantial evidence if 'supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Kim v. Md. State Bd. of Physicians*, 196 Md. App. 362, 370, 9 A.3d 534 (2010) (quoting *People's Counsel v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007)). "The agency's decision must be reviewed in the light most favorable to it; because it is the agency's province to resolve conflicting evidence and draw inferences from that evidence, its decision carries a presumption of correctness and validity." *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 751, 894 A.2d 621 (2006). In contrast, while we may "give weight to an agency's experience in interpretation of a statute that it administers, . . . it is always within our prerogative to determine whether an

> agency's conclusions of law are correct." *Schwartz v. Md. Dep't of Natural Res.*, 385 Md. 534, 554, 870 A.2d 168 (2005).

Ware v. People's Counsel for Baltimore County, 223 Md. App. 669, 680-81 (2015) (alterations in original).

DISCUSSION

I. PERSONNEL BOARD'S DELAY

A. Parties' Contentions

While the Department concedes that the Personnel Board was "delinquent in getting out its decision," the Department argues that the delay was essentially harmless because the applicable timeline rule, Section 16-203(a)(2)(B) of the County Code, "does not confer a substantial right to [appellee] as it is a mere guideline put in place to guide the agency through the procedural process of handing out its decision and order" and provides no sanction for noncompliance. The Department "denies [appellee's] assertion that the delay . . . severely prejudiced [her] employment rights and benefits" because she had retaken and passed the Exam and was promoted to Lieutenant in the interim, and there was no guarantee she would have been promoted before then had she passed the Exam the first time.

Appellee responds that the delay did in fact prejudice her "substantial rights" because she "lost, among other things, rank, seniority, pay and associated benefits." She argues that if the timeline rule is deemed "directory," it should still be viewed in the context of its legislative scheme and that "[t]he prism of such [a] review should be that of reasonableness."

B. Analysis

i. Reasonableness of the Delay

The County's Personnel Code dictates that "[i]t shall be the policy of Prince George's County to insure [*sic*] that all employee appeals, whether as a result of an unresolved grievance or of an adverse action taken against an employee, are expeditiously considered and equitably adjudicated." County Code § 16-199. In furtherance of that policy, Section 16-203(a)(2)(B) of the County Code provides that "[w]ithin forty-five (45) days after the close of the hearing record, the Personnel Board shall issue to the parties a written decision." Here, it is undisputed that the hearing was held before the Personnel Board on January 26, 2011, and the decision and order was issued on March 12, 2014—over three years after the close of the hearing record.

In *Pollock v. Patuxent Institution Board of Review*, 374 Md. 463, 467 (2003), the Court of Appeals explicitly adopted, for the first time, the Supreme Court's holding in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The "*Accardi* doctrine," as it is known, "provides that 'an administrative decision is subject to invalidation when the agency's failure to exercise its own discretion, [is] contrary to existing valid regulations.'" *Fisher v. Eastern Correctional Inst.*, 425 Md. 699, 713 (2012) (quoting *Pollock*, 374 Md. at 467 n.1) (internal quotations omitted). There is a "principal exception to the doctrine, which provides that the doctrine is not applicable to 'an agency's departure from procedural rules adopted for the orderly transaction of agency business.'" *Pollock*, 374 Md. at 482 (quoting *Hopkins v. Maryland Inmate Grievance Commission*, 40 Md. App. 329, 336 (1978)).

Important here, however, is that, even if the procedural rule was "adopted for the orderly transaction of business," our analysis does not end there:

> [E]ven if an agency rule does not have the force and effect of law (that is, even if it is simply interpretive, a statement of policy, or any other, lesser, rule of agency organization, procedure, or practice), a violation of that rule will still invalidate an agency's action *if the complainant can show that he was substantially prejudiced by the violation*.

Id. at 484 (emphasis added) (quoting *Anastasi v. Montgomery County*, 123 Md. App. 472, 491 n.8 (1998)).

We agree with the Department, insofar as the *Accardi* exception's applicability to this case. In our view, the 45-day provision provides no sanction for noncompliance and, as a "mere guideline," it appears to be designed for the "orderly transaction of agency business." It is unclear, however, whether appellee was "substantially prejudiced by the violation."

In asserting that appellee suffered no prejudice, the Department encourages us to view the 45-day provision's use of the word "shall" through the lens of this Court's decision in *G & M Ross Enterprises, Inc. v. Bd. of License Comm'rs of Howard County, Md.*, 111 Md. App. 540 (1996). In *G & M Ross*, Ross sought judicial review of the License Commissioner's decision to suspend his liquor license for three days for selling alcoholic beverages to a minor because, "[a]ccording to Ross, the Board violated its own rules and regulations in failing to issue a decision within thirty days of the hearing." *Id.* at 542. Ross argued that the governing statute's use of the word "shall" meant that the provision was

mandatory, and thus, because the Board issued its decision roughly 80 days after the hearing, its decision should be reversed. *Id*. at 542-43.

After briefly discussing the *Accardi* doctrine, this Court explained that, while the use of the word "shall" is presumed to be mandatory in Maryland, a generally recognized exception to that rule is when "shall" is "used in an unsanctioned statute directed toward an arbiter's time limitations for opining." *Id*. at 543-44 (quoting *Pope v. Secretary of Personnel*, 46 Md. App. 716, 719 (1980)). This Court held that the 30-day rule's "purpose [wa]s clearly to encourage the Board expeditiously to render its decisions, although a violation of this directive carrie[d] no sanction." *Ross*, 111 Md. App. at 545. Thus, this Court was willing to overlook what it deemed an "inconsequential" and "relatively minor procedural error," because "imposing such a sanction would be adverse to the purpose of creating the Board to protect the public from the consequences of minors indulging in alcoholic beverages." *Id*.

There are distinctions between the present case and *G&M Ross* which prevent us from deeming the Personnel Board's delay here an "inconsequential," "relatively minor procedural error." The administrative agency in *G&M Ross* issued its decision roughly 50 days late; here, the decision was issued easily over 1,000 days late. Furthermore, the Personnel Board serves an entirely different purpose than that of a licensing board. The Personnel Board exists to adjudicate County employee grievances, and there is no public policy-type reason to allow the delay. If there is an analogous class of people to "protect," it would seem that appellee, a County employee, would be in it. Regardless of how the Personnel Board was going to decide, appellee had a right to know the decision—one that

could affect her employment and future at the Department—in a *reasonable* time. The Personnel Board's three-year delay in issuing its decision was certainly unreasonable.

ii. Remedy for the Delay

Despite our finding of unreasonableness, there is no remedy for appellee. We discuss *infra* that there is substantial evidence in the record to support the Personnel Board's finding that appellee provided incorrect answers to the challenged questions. Having done so, we hold that there is no basis for awarding damages when appellee's answers were in fact incorrect.

Also, the Exam is comprised of two sections: a multiple choice knowledge test and a video scenario skills assessment. [8] A candidate must receive a minimum of 70% on the multiple choice knowledge test component in order "to be eligible to compete in the video scenario skills assessment." On her first attempt, appellant did not pass the multiple choice section of the Exam and, therefore, did not advance to the video skills assessment. Mr. McArthur, the personnel analyst, testified that candidates who pass both portions of the Exam are placed on a list. When a position becomes available, the candidate is promoted. If no positions become available by the date of the next Exam, the list is exhausted and

[8] Having failed the exam, Appellee took the Exam the next time it was offered, April 16, 2011. She successfully completed the other components of the process, and was promoted to Lieutenant effective August 14, 2011. Therefore, it took appellee approximately four months (120 days) to become Lieutenant after retaking the Exam. Using this timeline, it follows that appellee could have been promoted at an earlier date if the Personnel Board ruled in her favor. But they did not. The earliest date appellee could have been promoted, assuming the Personnel Board issued a decision in her favor immediately after the hearing, was approximately May 26, 2011. Consequently, there was an 80-day period where appellee could have been Lieutenant and received the benefits of that title.

applicants must start the promotion process from the beginning. Understanding these facts we cannot speculate or know how the Appellee would have performed on the video skills assessment. Thus, it would be a factual impossibility for the Appellee candidate to have been promoted off of the list even if she had passed the knowledge assessment.

II. ANSWERS TO THE EXAM QUESTIONS

A. Parties' Assertions

The Department argues that the circuit court "substituted its judgment for that of the agency" when the court found that the Personnel Board was "clearly erroneous" in affirming the Joint Appeals Board's decision regarding the answers to Questions 14 and 92. To the Department, the evidence offered at the Personnel Board hearing was more than sufficient to establish that the Exam was created by "subject[-]matter experts," and that their decision should be paid a proper amount of deference.

Appellee argues that the Personnel Board's denial of her appeal for those questions "was not supported by substantial evidence and was clearly erroneous on its face." After examining the actual substance of the questions and explaining why she feels the decision was in error, appellee asserts that, while the Personnel Board "stated what it considered the 'most correct' answer for Questions 14 and 92," the Exam did not ask for the "most correct" answer. To appellee, this "misrepresentation of the answer sought" for those questions "underscores" why the decision was not supported by substantial evidence.

B. Analysis

As a purely factual challenge, our role in reviewing this question is entirely different than that of the previous question. As the Court of Appeals has "cautioned," it is important to remember:

> [T]hat a reviewing court may not substitute its judgment for the expertise of the agency; that we must review the agency's decision in the light most favorable to it; that the agency's decision is prima facie correct and presumed valid; and that it is the agency's province to resolve conflicting evidence and where inconsistent inferences can be drawn from the same evidence it is for the agency to draw the inferences.

Gore Enterprise Holdings, Inc. v. Comptroller of Treasury, 437 Md. 492, 504 (2014) (alteration in original) (quoting *Ramsay, Scarlett & Co. v. Comptroller of Treasury*, 302 Md. 825, 834-35 (1985)). Put another way,

> The heart of the fact-finding process often is the drawing of inferences made from the evidence. . . . The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.

Critical Area Com'n for Chesapeake and Atlantic Coastal Bays v. Moreland, LLC, 418 Md. 111, 123 (2011) (alteration in original) (quoting *Mayor of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398–99 (1979)).

In arriving at its decision, the Personnel Board first described the testimony of Mr. McArthur and Dr. Pittman, the only witnesses other than appellee to testify, both of whom were deemed "excellent" witnesses. The Personnel Board found that, based on Mr. McArthur's testimony, the appeals process of the Department was "fair and reasonable,"

and, based on Dr. Pittman's testimony, the Exam was created by Department "subject matter experts" who "ensured" that the Exam was "fair and job based." The Personnel Board then concluded:

> The Board considered all the testimony and evidence presented. While the Board gave considerable latitude to [appellee] in allowing her to address her specific concerns regarding the four test questions, *the Board is cognizant that it is not equipped to be the arbiter of test questions and chooses to leave this to the experts.* The experts considered fully her challenges to the four questions and determined to deny the challenges The Board cannot say that the [Joint] Appeals Board did not have a reasonable basis for denying her challenges based on the evidence presented.

(emphasis added). Accordingly, the Personnel Board denied her grievance.

Considerable portions of the circuit court's order and appellee's brief are spent reciting the questions, the two disputed answers, and source material, verbatim. There is no need to do so again here, however, because that is not our role. Based on our review of the record, no one, from the Joint Appeals Board to the circuit court, has ever actually claimed that appellee's proffered answers have no basis in the source materials. Indeed, we too readily confess that both questions *appear* to have two comparably equal answers.

But for us to substitute our judgment for that of the Department and engage in an in-depth examination of both questions would be a fundamental misunderstanding of an appellate court's role in reviewing an administrative agency's decision such as the one presented here. It is not the province of this Court to conduct an independent appraisal of the Exam, nor is it to second-guess the Department's ability to govern its own promotional

process in a way that it deems appropriate. Rather, it is our job to ensure that the *decision itself* was supported by substantial evidence in the record, and we believe that it was.

The record shows that Dr. Pittman's group, in close conjunction with the Department leadership, took great pains to ensure that the development process for the Exam would result in a product that was thorough, fair, and a suitable assessment of a candidate's suitability for the Lieutenant position. After appellee filed her grievance, the Joint Appeals Board—after duly considering her proffered answer and explanation, the source materials, and (presumably) their own expertise, having served at the same rank or above—disagreed with appellee and dismissed her appeal, finding that the answer key's answer was the "most correct" answer. The members of the Personnel Board, not being correctional officers themselves, recognized that they were not in a position to supplant their judgment for that of the members of the Joint Appeals Board, all long-time, career correctional officers. We are equally uncomfortable with such a proposition. Surely, if ever there was a situation in which an agency would be entitled to a great deal of deference, it would be this one.

We hold that the circuit court erred in substituting its judgment for that of the Personnel Board. Accordingly, we reverse the circuit court's decision, and affirm the original finding of the Personnel Board.

III. ATTORNEY'S FEES AND COSTS

In reversing the circuit court's decision, attorney's fees and costs are no longer at issue. The circuit court directed the Department to consider attorney's fees and costs after

ruling in favor of appellee. We now decide that was in error, and consequently reverse the circuit court's decision on this issue as well.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.