UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1516

September Term, 2015

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION MERIT SYSTEM BOARD

v.

JOANNE HILL

Graeff,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 18, 2017

*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.

Appellant, Maryland-National Capital Park and Planning Commission Merit System Board ("the Board"), appeals from the reversal, by the Circuit Court for Prince George's County, of the Board's dismissal of an administrative appeal filed by appellee, Joanne Hill ("Hill").

The Board presents for our review a single question, which for clarity we rephrase:[1]

Was the Board's dismissal of the appeal arbitrary, capricious, or illegal?

For the following reasons, we shall reverse the judgment of the circuit court.

FACTS and PROCEEDINGS

In October 2014, Hill, an employee of the Maryland-National Capital Park and Planning Commission ("the Commission"), received a "Letter of Intent" to dismiss her from employment.[2] In November 2014, Hill's counsel responded, in writing, to the Letter of Intent. Hill and her counsel subsequently met with Casey Anderson, Chair of the Commission's Montgomery County Planning Board ("MCPB"), the MCPB's Special Assistant, and the MCPB's Associate General Counsel. On December 23, 2014, Anderson sent to Hill, in care of her counsel, a letter in which Anderson advised Hill that her "employment with the ... Commission ... will be terminated effective" as of that date.

On December 30, 2014, Hill sent to Colleen Schaefgen, the Board's Operations Manager, an email "notify[ing] the ... Board of [Hill's] intent to appeal the decision to

[1]The Board's question presented *verbatim* is: "Did the Board act within its wide discretion in dismissing Ms. Hill's appeal?"

[2] In this appeal we are concerned only with the procedural aspects of the Board's actions, not the underlying reasons for Hill's dismissal.

terminate [her] employment." Hill stated: "The decision was delivered to me, through my attorney, on December 23, 2014." Hill included in the email her counsel's mailing address, phone number, and FAX number, and forwarded a copy of the email to counsel. Later that day, Schaefgen responded to Hill by email stating: "I received your intent to appeal. Since you indicated that you are represented by counsel, I will send all correspondence regarding your appeal to [counsel]."

Also on that same day, Schaefgen sent to Hill's counsel a letter stating: "Your client's Letter of Appeal must be submitted to the Board by 4:00 PM on Wednesday, January 14, 2015." (Emphasis in original.) Schaefgen enclosed with the letter "a description of the appeals process," which stated, in pertinent part:

> This document summarizes the process of filing an appeal by non-represented career Merit System employees, but it does NOT replace or supersede the Merit System Rules and Regulations.
>
> * * *
>
> Once the Intent to Appeal is accepted by the Merit System Board (after being reviewed for timeliness and eligibility of the appeal), a letter will be sent to the Employee's home address outlining the timeframe and required submission items for the Letter of Appeal. Employees have 14 calendar days from the date of the letter from the Merit System Board to submit a Letter of Appeal; the response deadline is specified in the letter.

(Emphasis in original.)

Schaefgen also enclosed with the letter a copy of Chapter 2100 of the Merit System Rules and Regulations (hereinafter "MSRR"), which provide, in pertinent part:[3]

> 2122 Notice of Appeal
>
> A Notice of Appeal is a simple, written statement to the Merit System Board that an employee is submitting a notification of an intent to appeal. Upon receipt of an intent to appeal, the Merit System Board shall respond to the employee requesting a Letter of Appeal.
>
> 2123 Letter of Appeal
>
> Within fourteen (14) calendar days of filing a Notice of Appeal, an employee shall submit a Letter of Appeal containing the following information:
>
> 2123.1 Name of employee, position title and department.
>
> 2123.2 Employee specified mailing address, telephone number, and an electronic address (if one is available). All official correspondence from the Merit System Board is sent to the mailing address.
>
> 2123.3 A description of the action/decision being appealed or explanation of charges being made.
>
> 2123.4 Reasons for disagreement with the action/decision or basis for the alleged charges.
>
> 2123.5 Relief or corrective action that is being requested to resolve the problem.
>
> 2124 Dismissal of Appeal
>
> If an appeal is not submitted within the specified time limits, the Merit System Board may dismiss the appeal. The Merit System Board may also dismiss an appeal for failure to comply with the established appeal procedures.

[3] We recognize that creation and adoption of agency rules are the prerogative of the agency and, in this opinion, we make no suggestion as to the efficacy of rules governing this proceeding.

On January 20, 2015, Schaefgen sent to Hill, at her home address, a letter notifying her that: "As of the above date, the Merit Board has not received any further correspondence from you or your attorney. As a result of your failure to respond and participate in the appeal process, the Merit Board has no choice but to dismiss your appeal." On January 22, 2015, Hill's counsel communicated to Schaefgen, by email:

> I received today your letter of January 20 dismissing my client's appeal. There has obviously been a misunderstanding. I'm certain that my client does not want her appeal dismissed and I would request a few more days (until Tuesday the 27th of January) within which to meet with my client and make a submission in support of her appeal. No one will be prejudiced by this short delay, which will give me an opportunity to confer with my client on an appropriate submission.

On January 26, 2015, Schaefgen sent to counsel an email in which Schaefgen stated:

> The Merit System Board has considered your request to allow you to submit a Letter of Appeal on behalf of your client, Ms. Hill, that was due on January 14, 2015. The Merit Board's deadlines are firm, and only in rare exceptions based on individual circumstances (e.g. hospitalization of the responding party, a weather emergency that has closed the building where the Merit Board office is housed) will the Merit Board accept a submission from any party in the appeal process past the deadline.
>
> Miscommunication between the Appellant and her Legal Counsel about the submission do [sic] not merit an exception. Therefore the Merit System Board will not accept a late submission from you or your client in this appeal.

Later that day, Hill's counsel responded to Schaefgen, again by email:

> Ms. Hill filed her Notice of Appeal *pro se*. The acknowledgment of receipt of her Notice should not have been sent to me but to her, as was done in the past with a prior action pursued by Ms. Hill. I was not engaged to represent her in any appeal, and it was improper of the Merit Board to send anything but a copy of the acknowledgment to me. I do not recall seeing the letter of December 30, 2014, which is not in my file. Nor is Chapter 2100 of the Merit System Rules, which I never received.

> Ms. Hill deserves the opportunity to decide whether to pursue an appeal *pro se* or with the assistance of counsel. The Merit Board's error in sending the acknowledgment to me instead of to her can be corrected by affording her the right to pursue an appeal of the decision terminating her employment.

The following day, Hill's counsel sent to the Board an email containing a Letter of Appeal. On February 3, 2015, the Board responded to counsel, stating:

> Your submission of January 27, 2015 is untimely and will not be considered by the Merit System Board.
>
> Appeal Case 15-4 has been dismissed for failure to timely file a Letter of Appeal pursuant to Chapter 2123 and Chapter 2124 of the Merit System Rules and Regulations.

Hill subsequently filed in the circuit court a petition for judicial review. In her supporting memorandum, Hill contended that the Board "erred in failing to respond to [her] Notice of Appeal with a request for a Letter of Appeal" and "in refusing to hear [the] appeal and decide [the] case on the merits." (Boldface omitted.) Following a hearing, the court agreed, stating:

> THE COURT: [T]he question properly framed should be whether the agency's dismissal, due to her failure to timely file her appeal[,] was arbitrary and capricious under the applicable law.
>
> * * *
>
> Ms. Hill's e-mail regarding her Intent to Appeal clearly says this is to notify the Merit Board of my Intent to Appeal. And it ... clearly says, "If you have further questions, you may contact me at my home address which appears below. I am also including contact information for my attorney."
>
> But at no time does she say that she does not wish to be informed of what is going on or that all information is to be given to him, because she's clearly saying you may contact her at her home address. And then the Ms. – "Schaefgen"?
>
> [BOARD'S COUNSEL]: Schaefgen.

> THE COURT: I'm sorry. Thank you. She then says she received it and "Since you indicated you're represented by counsel, I will send all correspondence regarding your appeal to [counsel.]" And so what the Board now is saying that we are to assume since she didn't respond that that was okay. But there is no further e-mail or indication that she gave up or wanted to not be informed of what was going on, what the process would be.
>
> Under those circumstances, I do believe that it was arbitrary. I believe that a person is entitled to see the rules or understand and that the Park and Planning puts out a notice on [its] website, a person is entitled to rely on that, and that they will receive a letter to their home address outlining the time frame. And that's not unreasonable.
>
> Based on that, I'm going to remand it back for further proceedings.

DISCUSSION

The Board contends that its "decision was owed deference, and the Circuit Court erred in not affirming." The standard of review in an "appeal from an order of a circuit court regarding a petition for the judicial review of a decision of an administrative agency" is "well-established." In *Sugarloaf Citizens Ass'n v. Board of App.*, 227 Md. App. 536, 545-46 (2016), we enunciated that standard in some detail.

> When we review the decision of an administrative agency or tribunal, we assume the same posture as the circuit court ... and limit our review to the agency's decision. The circuit court's decision acts as a lens for review of the agency's decision, or in other words, we look not at the circuit court decision but through it.
>
> We review the agency's decision in the light most favorable to the agency because it is prima facie correct and entitled to a presumption of validity.
>
> The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made in accordance with the law or whether it is arbitrary, illegal, and capricious. With regard to the agency's factual findings, we do not disturb the agency's decision if those findings are supported by substantial evidence. Substantial evidence is

> defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Id. at 546 (internal citations, quotations, brackets, and emphasis omitted).

When put on notice that Hill was being represented by counsel, the Board was obliged to communicate with counsel. *See* Md. Rule 19-304.2(a). Hill's response to the October 2014 Letter of Intent was submitted by counsel. When Hill subsequently met with representatives of the MCPB, she was represented by counsel. In her December 30, 2014 email to Schaefgen, Hill referred to counsel as "my attorney," and stated that Anderson's December 23, 2014 letter was delivered to her through counsel. Finally, Hill included in the email her counsel's mailing address, phone number, and FAX number, and forwarded a copy of the email to counsel. A reasonable mind could accept this evidence as sufficient to support a conclusion that, Hill was, in fact, represented by counsel. Hence, the Board was under obligation to communicate with Hill's counsel.[4]

Hill contends that the termination of communication was arbitrary and capricious for two reasons. First, she claims that, by "provid[ing] its employees with the 'Code' version of the Rules and the 'Appeals Procedure' version," the Board "issued inconsistent and contradictory procedures for appealing a termination decision." (Extract references omitted.) We are not persuaded. The Board's "description of the appeals process"

[4] In the strict sense, the Board is not "counsel" as contemplated in the Rule. It is a reasonable assumption, however, that at that stage of the proceedings the Board would have been acting on the advice of counsel.

expressly states that it does not replace or supersede the MSRR. Hence, the Board did not issue inconsistent or contradictory appeal procedures.

Second, Hill claims that the Board "unilaterally decid[ed] to exclude [her] from the appeals process" by "directly contradict[ing the] instructions in her Intent to Appeal." But, the Comment to Md. Rule 19-304.2 states that "[t]he Rule applies even [if a] represented person initiates or consents to the communication." Here, even though Hill initiated the appeal process and may have consented to further communication, the Board was required to, and did, communicate with her counsel. The Board did not improperly exclude Hill from the appeal process.

Finally, Hill contends that "the decision of the Board was not only arbitrary and capricious, but illegal," because "there is no evidence ... that Ms. Hill wanted any correspondence sent to [counsel] instead of herself." That assertion flies in the face of the record. In her December 30, 2014 email to Schaefgen, Hill referred to counsel as "my attorney," and listed complete contact information for her counsel. Also, when Schaefgen, in her December 30, 2014 email, stated that she would "send all correspondence regarding [the] appeal to" counsel, Hill did not respond or advise that she was no longer represented by counsel, nor did she request that Schaefgen send future correspondence only to her.[5]

[5]In her brief, Hill claims, for the first time, that she "did not receive" Schaefgen's December 30, 2014 email. (Footnote omitted.) But, a "reviewing court is prohibited from considering new evidence not presented to the administrative agency." *Mesbahi v. Board of Physicians*, 201 Md. App. 315, 340 n. 21 (2011) (citation omitted). Hill also claims that she "was not represented by counsel" at the time of the email. But, in his January 22, 2015

We conclude that a reasonable mind might accept this evidence as sufficient to support a conclusion that Hill wanted the Board to send correspondence regarding the appeal to counsel. Hence, the Board's decision to dismiss Hill's appeal was supported by substantial evidence, and was not arbitrary, capricious, or illegal.[6]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.

email, counsel repeatedly referred to Hill as "my client," and indicated that he would "make a submission in support of her appeal."

[6]Hill's overarching theme in this appeal is that, in the processing of her appeal, there was a "miscommunication." Indeed, there was an apparent miscommunication between Hill and her counsel, but there existed no miscommunication that would bind the Board to her point of view.