Circuit Court for Baltimore County
Case No. 03-C-16-001374
OAH No. SPMS-DGS-10-15-30873

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1334

September Term, 2016

PEGGY STRONG

v.

DEPARTMENT OF GENERAL SERVICES

Leahy,
Friedman,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: January 11, 2018

Appellant, Peggy Strong, seeks review of an adjudicatory administrative decision terminating her employment with the Department of General Services (DGS). Appellant's Notice of Termination cited as its bases Maryland Code (1993, 2015 Repl. Vol.), § 11-105(1)(iii) of the State Personnel and Pensions Article (SPP), and Code of Maryland Regulations (COMAR) §§ 17.04.05.04(B)(1), (2), (3), (4), (10), (12), and (15).

SPP § 11-105(1)(iii) lists as a cause for *automatic* termination of employment "intentional conduct, without justification, that … seriously threatens the safety of the workplace."

The COMAR subsections cited in appellant's Notice of Termination provide that a skilled or professional services State employee *may* be disciplined for:

> "(1) Being negligent in the performance of duties;
>
> "(2) Engaging in intentional misconduct, without justification, which injures another person, causes damage to property, or threatens the safety of the work place;
>
> "(3) Being guilty of conduct that has brought or, if publicized, would bring the State into disrepute;
>
> "(4) Being unjustifiably offensive in the employee's conduct toward fellow employees, wards of the State, or the public;
>
> ….
>
> (10) Willfully making a false official statement or report;
>
> ….
>
> "(12) Violating a lawful order or failing to obey a lawful order given by a superior, or engaging in conduct, violating a lawful order, or failing to obey a lawful order which amounts to insubordination;
>
> ….

> "(15) Committing another act, not previously specified, when there is a connection between the employee's activities and an identifiable detriment to the State."

COMAR § 17.04.05.04(B).

The Circuit Court for Baltimore County upheld the decision of the Administrative Law Judge (ALJ), and appellant noted this timely appeal. Appellant presents one issue for our review:

> "Whether the ALJ erred in failing to recognize that the Agency had failed to provide substantial, credible evidence such as to justify the instant termination, and whether the termination was effected by error of law such as to require reversal?"

Factual Background & Procedural History

We present the first-level facts as found by the ALJ.

Appellant was employed as an Administrator II[1] in the Inventory and Fuel Management Division of the DGS. On July 8, 2015, appellant's supervisor, Ms. Rosemary Thomas, met with the Director of Human Resources, Ms. Janet Cora, to conclude appellant's mid-cycle performance evaluation. Given that appellant's overall rating was unsatisfactory, a Performance Improvement Plan (PIP) was prepared as a matter of administration policy. Ms. Cora then instructed Ms. Thomas to schedule a meeting with appellant for July 9, 2015, at 2:30 p.m.

At 12:56 p.m. on July 8, Ms. Thomas sent appellant a Google Calendar "invitation," reading: "At 2:30, after our regular weekly Fleet meeting, I'll give you your mid-cycle [performance evaluation]. Janet Cora will also attend. This is a required meeting. Thank

[1]This position constitutes "skilled services" employment.

you." Appellant declined the "invitation," thereby generating an automated e-mail notification sent to Ms. Thomas, at 1:21 p.m., and went to lunch. Ms. Thomas forwarded that e-mail to Ms. Cora. Upon appellant's return from lunch, Ms. Thomas and Ms. Cora confronted appellant in her office about her decision to decline the invitation. Appellant refused to attend the meeting without her attorney. Ms. Thomas signed the evaluation and handed it to appellant.

Appellant grew agitated, referred to a co-worker and Ms. Thomas as "liars," and used the word "bitch." Without signing the form, appellant declared that she needed to go to the restroom. When Ms. Cora asked if appellant could wait until after they had reviewed her PIP, appellant yelled at Ms. Cora and Ms. Thomas to get out of her office. They did not do so.[2]

When Ms. Cora and Ms. Thomas did not leave, appellant stood up from her desk and rushed between Ms. Cora and Ms. Thomas to exit the room.[3] In so doing, appellant made contact with Ms. Cora's arm, and Ms. Thomas's hands and forearms touched appellant's midsection. Once past Ms. Cora and Ms. Thomas, appellant screamed, *inter alia*: "Did you see that, she pushed me! Now she's getting violent!" Appellant paced the office corridor, continuing to scream accusations of assault as she did so.

[2]At that time, appellant had been seated at her desk, with both women standing across from her—Ms. Cora stood to appellant's left and Ms. Thomas stood to appellant's right with her back against a legal size file cabinet that was against the wall.

[3]According to Ms. Cora's testimony, the dimensions of appellant's office were "probably maybe 12 or 13 feet long and maybe 6 or 7 feet [w]ide."

Ms. Cora contacted the Maryland Capital Police, requesting that they escort appellant from the building. However, appellant exited the building before the police arrived.

When appellant reported to work at approximately 8:00 a.m. the following day, July 9, she was met by Ms. Cora, who directed her to attend a mitigating circumstances meeting at 9:00 a.m. that morning to determine whether she should suffer disciplinary action. In attendance at that meeting were Ms. Cora, appellant's union representative, DGS Deputy Secretary Nelson Reichart, and appellant. Mr. Reichart directed appellant to go home and advised her that she was being placed on administrative leave through Tuesday of the following week (*i.e.*, July 14).[4]

On July 15, 2015, appellant received a notice of termination, effective that date. Appellant appealed her termination to the Secretary of the Department of General Services. After the Secretary upheld appellant's termination, she appealed to the Secretary of Budget and Management, who delegated adjudication to the Maryland Office of Administrative Hearings (the OAH). An ALJ conducted an evidentiary hearing on December 3, 2015. In a written decision filed January 14, 2016, the ALJ made the first level factual findings described above and concluded therefrom that appellant had violated SPP § 11-105(1)(iii), which carries automatic termination, as well as COMAR §§ 17.04.05.04B(2), (3), (4), &

[4]On July 9, Ms. Cora and Ms. Thomas each filed in the District Court of Maryland Applications for Statements of Charges against appellant, who, on July 13, filed an Application for Statement of Charges against Ms. Thomas. None of the charges resulted in a conviction.

(12).[5] The ALJ upheld termination as the discipline. On judicial review, the circuit court affirmed the ALJ's decision.

Additional facts will be stated, as required, for the discussion of particular issues.

Standard of Review

When reviewing an administrative adjudicatory decision, "'[we] limit our review to the agency's decision.'" *Cosby v. Department of Human Res.*, 425 Md. 629, 637 (2012) (quoting *Anderson v. General Casualty*, 402 Md. 236, 244 (2007)). The standard of review for such decisions is as follows:

> "'A court's role in reviewing an administrative agency adjudicatory decision … 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. Department of Pub. Safety & Corr. Servs., 403 Md. 115, 127-28 (2008) (quoting *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)).

We review an administrative agency's factual findings under the "substantial evidence test." *Colburn*, 403 Md. at 128 (citing *Banks*, 354 Md. at 67). We will defer, therefore, to an administrative agency's factual findings where (i) the record contains substantial evidence in support of the administrative agency's decision, and (ii) "'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*

[5]The ALJ found that the DGS failed to prove "by a preponderance of the evidence that appellant's termination should be sustained on the bas[e]s of … alleged violation[s] of COMAR" §§ 17.04.05.04B(1), (10), and (15).

Wood Apts., 283 Md. 505, 512 (1978)). We will, moreover, defer to an agency's resolution of conflicting evidence, *Noland*, 386 Md. at 571 (quoting *CBS v. Comptroller*, 319 Md. 687, 698 (1990)), and its assessment of witness credibility. *Schwartz v. Maryland Dep't of Natural Res.*, 385 Md. 534, 554 (2005).

We review an agency's legal conclusions *de novo*. *Colburn*, 403 Md. at 128 (quoting *Schwartz*, 385 Md. at 554). We frequently afford weight to that agency's interpretation and application of the statute at issue, *id*., as well as the caselaw it cites. *Noland*, 386 Md. at 572. "[I]t is," however, "'always within our prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong.'" *Colburn*, 403 Md. at 128 (quoting *Schwartz*, 385 Md. at 554).

Discussion

I. The "Push"

Appellant primarily contends that the ALJ's factual findings do not support the ALJ's legal conclusion that appellant "knew or should have known that by … pushing her way between two fellow [S]tate employees, she was … seriously jeopardizing the safety of the workplace." She submits that the ALJ found only that she "rushed between Ms. Cora and Ms. Thomas to exit the room" and that this "[c]learly … [was] not conduct which 'seriously threaten[ed] the safety of the workplace.'"

Where, as here, an ALJ's factual findings—which, if supported by substantial evidence, are binding on this Court—expressly contravene the conclusions of law on which that ALJ's decision is based, that decision cannot stand. *See Grant v. State*, 449 Md. 1,

32 (2016) ("Maryland appellate courts generally reverse a lower court's judgment where the factual findings and legal conclusions are inconsistent.").

The ALJ found as a fact that appellant "rushed between Ms. Cora and Ms. Thomas to exit the room." Appellant's intended conduct, then, was to hurry from her office. The ALJ further found that, in the course of appellant's doing so, she "made contact with Ms. Cora's arm and Ms. Thomas's hand and forearms touched the [appellant's] midsection." Based on these factual findings, this contact was *incidental to* appellant's hurried egress from the office.

When stating her conclusions of law, however, the ALJ attributed to appellant a different course of conduct, writing that appellant "push[ed] her way between two fellow [S]tate employees." We distinguish between the *volitional* push of another and accidental contact with another *incidental to* speedy movement.

The threats to workplace safety occasioned by "rush[ing] between" and "push[ing] … between" coworkers differ in degree. We note that to engage in conduct that *seriously threatens* the safety of the workplace is, *ipso facto*, to engage in conduct that *threatens serious injury or damage* to the personnel or property therein. One does not speak of a serious threat of trivial harm.

That the threat to which SPP § 11-105(1)(iii) refers is of serious harm is supported by principles of statutory construction. The doctrine of *noscitur a sociis*—"a word is known by the company it keeps"—operates to "'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth

to the Acts of [the Legislature].'" *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

In its entirety, SPP § 11-105(1) provides:

> "The following actions are causes for automatic termination of employment:
>
> (1) intentional conduct, without justification, that:
> (i) *seriously injures* another person;
> (ii) causes *substantial damage* to property; or
> (iii) seriously threatens the safety of the workplace[.]"

(Emphasis added).

The harms to persons and property to which SPP § 11-105(1)(i) and (ii) refer amount to "grave" harms incurred by workplace personnel and equipment. *See The Oxford English Dictionary*, (3d ed. 2013) (defining "serious," in the context of the adjective's describing "an injury, condition, etc.," as "significant or worrying; giving cause for anxiety or concern; grave, threatening, or dangerous."). SPP § 11-105(1)(i) is applicable only where an injury is *serious*; SPP § 11-105(1)(ii) applies only where property is *substantially* damaged. It follows that, consistent with its preceding provisions, SPP § 11-105(1)(iii)'s "threat[]" must be of serious injury, substantial damage, or some other grave harm to the workplace.

Our reading of SPP § 11-105(1)(iii) conforms with the language of this Court in *Department of Safety & Corr. Servs. v. Neal*, 160 Md. App. 496 (2004), *cert denied*, 386 Md. 181 (2005). There the warden of the Maryland Correctional Institution for Women issued a Notice of Termination to Neal, a dietary officer. *Id*. at 503. While Neal was working with four inmates in a small area, one of them, Ramsburg, repeatedly bumped into Neal, giggling each time. *Id*. at 499-500. "After several such bumping incidents, Neal put

her hands around Ramsburg's neck, in a choking gesture, and said words to the effect of, 'If I choked you, would you think it was funny or an accident?'" *Id*. at 500. Another inmate reported the incident. *Id*. Neal admitted the conduct and the statement. *Id*. 500-01. Ramsburg said that Neal had been "playing around" and intended no harm. *Id*. at 500. Neal denied applying any pressure to Ramsburg, who was not harmed. *Id*. at 501. The Department Secretary delegated the final agency decision on the termination recommendation to the OAH whose ALJ modified the discipline to a thirty-day suspension without pay.[6] *Id*. at 499. The circuit court and this Court affirmed. *Id*.

Neal's notice of termination had based that sanction on the automatic termination provisions of SPP § 11-105(1)(iii) and (8), the latter proscribing, *inter alia*, excessive force against a prisoner. *Id*. at 503. This Court held that the ALJ did not act arbitrarily when she found "that the evidence did *not* support a finding that Neal had engaged in the alleged conduct warranting automatic termination." *Id*. at 514. Relevant to the construction of § 11-105(1)(iii), we explained that the suspension was reasonable because the ALJ "took into account the quality of the offense, that is, that it did not involve serious misconduct." *Id*. at 518. If simulated choking is not serious misconduct, it would seem, *a fortiori*, that contact incidental to a hurried departure from a small office is not conduct subject to automatic termination.

Analogous here is the so-called "Crowded World Doctrine," described by learned commentators on tort law.

[6]Neal also had a record of mandatory counseling and reprimands. *Neal*, 160 Md. App. at 502.

> "[I]n a crowded world, a certain amount of personal contact is inevitable, and must be accepted. *Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention,* a friendly grasp of the arm, or *a casual jostling to make a passage* …."

W. Page Keeton *et al*., *Prosser & Keeton on the Law of Torts* § 9, at 42 (5th ed. 1984) (emphasis added; footnotes omitted). Although the "Crowded World Doctrine" is presented as a defense to civil battery, its underlying rationale applies in the context before us.

The ALJ's sustaining of the charged violation that carries a sanction of automatic termination must be reversed. We likewise reverse the finding that appellant warranted disciplinary action pursuant to COMAR § 17.04.05.04(B)(2), as that regulatory provision is substantially similar to SPP § 11-105(1). The question then arises whether this action should be remanded for reconsideration. The answer depends on whether appellant's challenges to other charged violations, sustained by the ALJ, have merit. We now turn to appellant's other arguments.

II. Profanity

Appellant contends that because the ALJ found statements made by the parties during the days immediately following July 8 more credible than those made at the hearing, and Ms. Thomas's police statement made no mention of appellant's having called either woman a "liar" or a "bitch," the ALJ's findings were unsupported.

Only once did the ALJ deem a witness's pre-hearing statement more credible than that witness's testimony. This occurred in response to Ms. Cora's having testified that

appellant said, "I need to – I need to leave the office." The ALJ noted that in her July 9 "Application For Statement of Charges" Ms. Cora reported that appellant had "announced that she needed to go to the restroom." In resolving this inconsistency, the ALJ found "the July 9 statement … more accurate than her testimony because Ms. Cora wrote the statement one day after the incident."

Appellant infers from this isolated finding a general credibility litmus test equally applicable to all of the parties. In so doing, appellant ignores the fact that Ms. Cora's testimony was the sole credible evidence from which the ALJ concluded that appellant "referred to a co-worker and Ms. Thomas as 'liars' … and used the word 'bitch.'" Given that the ALJ's factual finding was predicated solely on Ms. Cora's testimony, any statement or omission by Ms. Thomas is immaterial to the substantiality issue.

III. Insubordination

Appellant next contends that there is no factual support for the ALJ's conclusion that appellant was insubordinate, as there was no directive to which appellant could have been insubordinate. Specifically, appellant contends that she merely declined Ms. Thomas's "invitation" to attend the July 9 evaluation review. Upon learning that appellant had "declined the invitation," appellant continues, "Ms. Cora and Ms. Thomas … did not send her an email directing that her appearance the following day be mandatory." In so arguing, appellant too heavily emphasizes the means by which the directive was conveyed—via an "Invitation from Google Calendar"—while ignoring the content of that transmission.

The declined Google Calendar "invitation" read in relevant part: "At 2:30, after our regular weekly Fleet meeting, *I'll give you your mid-cycle PEP*. Janet Cora will also attend. *This is a required meeting*. Thank you." (Emphasis added). The plain language of the "invitation" evinces its having been an "invitation" in name alone. The first sentence of the "invitation" was by no means an optional request that appellant attend the review. The imperative nature of the communication is evinced by Ms. Thomas's explicitly identifying the 2:30 p.m. meeting as "required."

The content of the Google Calendar "invitation" alone affords substantial evidence from which the ALJ could conclude that the invitation was, in fact, a directive, and that declining the "invitation" was, therefore, an act of insubordination on the part of appellant.

IV. Disrepute to the State

Lastly, appellant contends that "there is no credible evidence on which to rely in support of a finding that the [appellant] ever [']asked['] [Ms.] Cora or [Ms.] Thomas to 'get out of my office.'" To the contrary, Ms. Cora's testimony, which the ALJ consistently found credible, provided:

> "A. So at that point[,] I laid the performance … improvement plan on the edge of her desk. Peggy started screaming at [Ms. Thomas] and I [sic], get out of the office. By now she was highly agitated and screaming at us, get out of the office, get out of the office.
>
> ….
>
> "A. The door was open, yes.
>
> ….
>
> "A. We just stood there. [Ms. Thomas] and I just kind of stood there. I mean, I was taken aback at her screaming like that and then quickly

Peggy rushed around the edge of the desk and brushed through the middle of us, between -- between [Ms. Thomas] and I [sic].

….

"When she rushed by, she sort of brushed my arm. I'm not sure the extent of any contact with Ms. Thomas, if there was any. I think she sort of brushed her, too.

"But as soon as she got past us and was still inside the office but closer now to the door, Peggy stopped and started screaming very loudly [']did you see that? Now she's getting violent. She shoved me, she assaulted me.['] She started screaming these sort of things.

….

"Q. Was she in the doorway?

"A. She was close to the doorway, much closer than she had been when she was sitting at her desk. She was probably -- two steps would have put her outside the door, but she didn't stay there long because then she did go outside the door and was kind of pacing up and down outside.

….

"[S]he was walking back and forth and kept screaming these things.

"[']She's getting violent, how dare you push me? How dare you push me? You're assaulting me.[']

….

"A. I think all the office -- except where the conference call was going on, I think all the office doors were open."

Ms. Cora's testimony furnished substantial evidence from which the ALJ could conclude that "most members of the public would be appalled" by appellant's conduct in her capacity as a State employee.

V. Mandate

We have held that the charged violation of SPP § 11-105(1)(iii) is not supported by substantial evidence. We have rejected appellant's challenges to the remaining violations found by the ALJ. Under these circumstances, we must reverse and remand for reconsideration of the appropriate discipline by an exercise of discretion and absent reliance on the automatic sanction provisions of SPP § 11-105(1)(iii). *See Warner v. Town of Ocean City*, 81 Md. App. 176, 199 (1989).

We shall issue the following mandate.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED WITH INSTRUCTIONS TO REMAND THIS CASE TO THE OFFICE OF ADMINISTRATIVE HEARINGS FOR RECONSIDERATION OF THE DISCIPLINE APPROPRIATE TO THE SUSTAINING OF ALL CHARGES OTHER THAN VIOLATION OF MARYLAND CODE (1993, 2015 REPL. VOL.), § 11-105(1)(iii) OF THE STATE PERSONNEL AND PENSIONS ARTICLE AND CODE OF MARYLAND REGULATIONS § 17.04.05.04(B)(2).

COSTS TO BE PAID 30% BY THE APPELLANT AND 70% BY THE APPELLEE.