Circuit Court for Baltimore City
Case No. 24-C-19-002981

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2105

September Term, 2019

MICHAEL ARIOSA

v.

MARYLAND DEPARTMENT OF ENVIRONMENT

Nazarian,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: June 17, 2021

This case stems from an Administrative Complaint, Order, and Penalty issued by the Maryland Department of the Environment (the "Department") to Michael Ariosa, appellant, in which the Department assessed an administrative fine of $35,000.00 based on Mr. Ariosa's purported failure to comply with the Reduction of Lead Risk in Housing Act. Mr. Ariosa contested the amount of the fine in the Office of Administrative Hearings ("OAH"), and a hearing was held before an Administrative Law Judge ("ALJ"). The ALJ ultimately affirmed the amount of the Department's administrative penalty against Mr. Ariosa. Mr. Ariosa later sought judicial review of the ALJ's decision in the Circuit Court for Baltimore City, which also affirmed. In this appeal, Mr. Ariosa presents five questions, which we have rephrased and consolidated into a single question[1]:

[1] Mr. Ariosa phrased the questions as:

1. "Does Md. Code Ann., Envir. § 7-266 require that fines assessed by the Md. Dept. of the Environment be assessed with consideration given to each factor listed under § 7-266(b)(2)(ii)?"

2. "Does the record reflect that consideration (in accordance with the meaning that word was intended to have by the legislature) was given to each factor listed under § 7-266(b)(2)(ii)?"

3. "Under the circumstances of this matter, is a $35,000 fine consistent with the Appellee's statutory mandate to reduce the incidence of childhood lead poisoning while maintaining the stock of affordable housing?"

4. "Is a $35,000 fine under the circumstances in this matter arbitrary and/or capricious?"

5. "Is a $35,000 fine under the circumstances in this matter excessive under the Eighth Amendment?"

Did the ALJ err in finding that the amount of the Department's administrative penalty against Mr. Ariosa was reasonable?

For reasons to follow, we hold that the ALJ did not err, and therefore affirm the judgment of the circuit court.

BACKGROUND

Mr. Ariosa is the sole owner of a rental property located at 3632 Keswick Road, Baltimore, Maryland (the "Property"), which was built prior to 1950 and thus subject to certain requirements pursuant to the Reduction of Lead Risk in Housing Act (the "Act"). Under the Act, an owner of a property that was constructed before 1950 and that contains at least one rental dwelling unit ("Affected Property") must, among other things, register the property with the Department and provide the Department with certain information. *See* Md. Code, Envir. § 6-801, *et. seq.* The Act states that, upon a change in occupancy at an Affected Property, the owner must have the property inspected and certified compliant with the lead-risk-reduction standards of the Act. *See* Md. Code, Envir. § 6-815. The Act also states that, when a child under the age of six or a pregnant woman resides or regularly spends at least 24 hours at an Affected Property ("Person at Risk"), the owner must comply with certain additional lead-reduction standards. *See* Md. Code, Envir. §§ 6-817 and 6-819. In the event of a violation of those provisions of the Act, the Department may assess an administrative penalty of up to $500.00 per day that the Affected Property is out of compliance, but the penalty cannot exceed $100,000.00 in total. *See* Md. Code, Envir. § 7-266. Before assessing a penalty, the Department must consider the following factors: the willfulness of the violation; any actual harm to the environment or human health; the

cost of cleanup; the nature and degree of injury to or interference with health and property; the extent to which the location of the violation poses a danger to the environment or human health or safety; the available technology and economic reasonableness of eliminating the violation; the degree of hazard posed; and the extent to which the current violation is part of a recurrent pattern of violations. *Id.*

On September 13, 2004, Mr. Ariosa registered the Property with the Department. Mr. Ariosa informed the Department that a tenant had begun occupying the Property on August 10, 2004. He did not, however, provide information as to whether a "lead inspection certificate" had been obtained for the Property. On January 14, 2008, Mr. Ariosa renewed the registration for the Property, but he failed again to indicate whether a lead inspection certificate had been obtained.

On September 21, 2012, the Department sent a letter to Mr. Ariosa informing him that he had failed to renew the Property's registration. The Department informed Mr. Ariosa of the inspection and certification requirements of the Act, and also indicated that Mr. Ariosa's failure to register the Property could result in administrative penalties.

On June 26, 2013, the Department sent a letter to Mr. Ariosa informing him that he had failed to renew the Property's registration for the years 2006, 2007, 2009, 2010, 2011, 2012, and 2013. That letter again informed Mr. Ariosa of the requirements of the Act and the potential for administrative penalties.

On July 9, 2013, Mr. Ariosa submitted the registration fees for the Property, which totaled $135.00, for the years 2006 through 2013. In 2014 and 2015, he renewed the

Property's registration with the Department. He did not renew the registration for the year 2016.

On December 15, 2017, Mr. Ariosa renewed the Property's registration. In so doing, Mr. Ariosa reported that the current tenant had moved into the Property on May 10, 2006, and that the most recent lead certification for the Property was April 11, 2008.

On June 19, 2018, the Department issued to Mr. Ariosa an Administrative Complaint, Order and Penalty. In that complaint, the Department alleged that, during the period from December 31, 2006 through April 7, 2017, Mr. Ariosa had violated the Act by failing to bring the Property into compliance with the Act's full risk-reduction standard and by failing to obtain a full risk-reduction certificate for the Property. The Department also alleged that a Person at Risk had been residing at the Property and that Mr. Ariosa had failed to satisfy the risk-reduction standards of the Act for Persons at Risk. Based on those alleged violations, the Department assessed an administrative penalty of $35,000.00 against Mr. Ariosa.

On September 27, 2018, Mr. Ariosa obtained a "full risk-reduction certificate" for the Property. On December 11, 2018, the Department issued an Amended Administrative Complaint, Order and Penalty, in which the Department acknowledged that Mr. Ariosa had obtained the full risk-reduction certificate but reiterated that Mr. Ariosa had failed to obtain such a certificate prior to September 27, 2018. The Department reasserted the allegations contained in its previous complaint and again assessed an administrative penalty of $35,000.00 against Mr. Ariosa.

Motion for Summary Decision

Shortly after filing its Amended Complaint, the Department filed a Motion for Summary Decision asking the OAH to make findings as to Mr. Ariosa's liability and the reasonableness of the penalty. Although Mr. Ariosa opposed the Department's motion, he did not dispute the Department's allegations that he had failed to comply with the applicable law. He disputed, rather, the reasonableness of the Department's penalty.

The presiding ALJ ultimately granted the Department's motion as to Mr. Ariosa's liability, finding that there was no dispute that Mr. Ariosa had violated the Act. The ALJ found that Mr. Ariosa "readily admits he failed to comply with the applicable law." But, because there was a dispute as to the amount of the proposed fine, the ALJ determined that a contested hearing on the merits of the administrative penalty was appropriate.

Contested Hearing

At that hearing, Maximillian Jeremenko, an Environmental Compliance Specialist with the Department, testified that an investigation of Mr. Ariosa was initiated after the Department received a "tenant outreach" survey stating that the Property was occupied and that the tenant had been living there for approximately 11 years. Mr. Jeremenko stated that he then checked the Department's "lead certificate database" and discovered that there were no certificates on file for the Property. A letter of non-compliance was sent to Mr. Ariosa.

Mr. Jeremenko testified that, on April 26, 2018, he went to the Property and interviewed the tenant. During the interview, the tenant informed Mr. Jeremenko that he

had moved to the Property 12 years ago and that a two-year-old child was living at the Property. Contemporaneously with that interview, Mr. Jeremenko completed a "Compliance Interview" form, on which he indicated that a two-year-old child was "residing or spending significant amounts of time at the Property." Mr. Jeremenko testified that, after confirming that there was no lead certificate for the Property, he "proceeded to push the case forward for a possible enforcement action."

Christopher DenBleyker, an Environmental Compliance Specialist Supervisor with the Department, testified that he was responsible for making the penalty recommendation in Mr. Ariosa's case. Mr. DenBleyker testified that, in making that recommendation, he reviewed the "eight penalty factors" and determined that "there were four that were applicable for this case." He explained that he then compared those penalty factors with information from the inspector and the rental registry database "to determine if the property is in compliance or out of compliance for the registration." Mr. DenBleyker noted the following factors as being of particular importance in his recommendation of a $35,000.00 penalty: that there was an "at-risk child" at the Property; that Mr. Ariosa had not obtained a lead certificate for the Property despite the tenant having lived there for 12 years; and that Mr. Ariosa had been sent "numerous letters" regarding his non-compliance.

Mr. DenBleyker testified that there were several factors that were not applicable in Mr. Ariosa's case. He explained that he determined two of the factors – the actual harm to the environment or human health and the nature and degree of injury to or interference with general welfare, health, and property – to be inapplicable because there had not been any

injury to person or property. He explained that a third factor – the degree of hazard posed – did not impact his recommendation because he had not received the laboratory results indicating whether lead was present in the Property. Mr. DenBleyker did recognize that Mr. Ariosa had submitted a full risk-reduction certificate; however, he noted that such a certificate did not establish that there was never any deteriorated paint at the Property, nor did it establish that there was no lead paint at the Property. He also testified that a lead inspection, which he had performed on a number of occasions, cost approximately $200.00.

Dr. Ezatollah Keyvan-Larijani, an expert in epidemiology, public health, and lead poisoning, testified to the dangers of lead poisoning. He noted that almost all houses built before 1950 contained lead paint. He explained that, over time, lead paint gradually dries up and, through friction, becomes dust, which can then be ingested or inhaled. He testified that even small amounts of lead in the body can lead to lead poisoning, and that lead poisoning can cause a host of very serious health problems in adults and children.

Jesse Salter, the Division Chief for the Certification, Registration, and Compliance Division with the Department, testified that he was responsible for reviewing enforcement investigations and administrative penalties for Affected Properties that are not in compliance with the Act. He stated that an owner of an Affected Property can register with the Department by submitting an application online or through the mail. He testified there were "thousands" of accredited inspectors who inspect Affected Properties and that "other owners obtain thousands of certificates by those accredited inspectors per year."

Regarding Mr. Ariosa's case, Mr. Salter testified that he reviewed Mr. Jeremenko's investigation and other records relative to the case. He noted that, in the years leading up to the filing of its complaint against Mr. Ariosa, the Department sent yearly renewal packets to Mr. Ariosa that asked him to provide, among other things, the date of the most recent change in occupancy and the date of the most recent lead certificate. Mr. Salter also noted that, in 2012 and 2013, the Department sent letters to Mr. Ariosa regarding his obligations to register the Property and obtain a lead inspection certificate.

Mr. Salter testified that he also reviewed the penalty recommendation in Mr. Ariosa's case. Mr. Salter explained that the Department was required to consider eight statutory factors in determining the penalty. When asked which factors the Department determined were applicable in Mr. Ariosa's case, Mr. Salter responded that "we do consider all the factors, but some may be more or less applicable to a particular case." He considered as being "applicable" in Mr. Ariosa's case the following factors: that the violation was willful; that Mr. Ariosa was sent multiple notices regarding registering the Property; that the presence of a tenant and small child created the potential for harm; and that the process for bringing a property into compliance is relatively easy and economically reasonable. Mr. Salter added that he did not consider the value of the Property or the impact such a penalty would have on the supply of affordable housing in the area.

At the conclusion of the hearing, Mr. Ariosa argued that, although there was no dispute that he had failed to file the appropriate paperwork, the $35,000.00 fine was unreasonable because, had the Department initiated the action sooner, he would have

brought the Property into compliance at a much earlier time. He argued further that the Department did not properly consider all of the requisite factors and did not provide any evidence of how it reached the sum of $35,000.00. He argued that the Department did not seem to appreciate the economic impact of the penalties on property owners, which was contrary to the purpose of the Act.

The ALJ ultimately issued a written order affirming the penalty of $35,000.00 and finding as follows:

> The evidence demonstrated that the Department considered three[2] out of the eight factors required by section 7-266(b)(2)(ii) of the Environment Article. [Mr. Ariosa's] arguments that the Department failed to consider all eight factors and any mitigation factors is unpersuasive. As to the factors considered by the Department, [Mr. Ariosa] failed to file a lead certificate with the Department for several years, at least from December 31, 2006 through April 26, 2018, for a total of 4,134 days. [Mr. Ariosa's] failure to comply occurred despite several letters and a Notice of Non-Compliance issued to [Mr. Ariosa] during that same time period. These circumstances demonstrate a willfulness to not comply with the applicable law, if not a willingness to turn a blind-eye (willful ignorance) to the law. [Mr. Ariosa's] argument that he would have complied with the law had the Department initiated its enforcement action sooner is without merit. The Act places a direct and primary responsibility on [Mr. Ariosa] to register his affected properties and obtain a lead certificate for those properties, which he failed to do.
>
> The failure to obtain a lead certificate for the Subject Property created a potential harm to the Subject Property's tenants, including a young child

[2] According to the testimony presented at the hearing, the Department "considered" all eight factors and found four to be applicable in Mr. Ariosa's case.

The ALJ referred to the failure to file and comply after letters and a notice of noncompliance. To the extent that the ALJ is claiming that the Department only considered three of the factors, that finding was clearly erroneous, but it did not undermine the analysis. In other words, the ALJ addressed four factors considered by the Department which indicated a willful noncompliance and to the potential harm created and to the reasonableness of the process.

> who was living at the property. [Mr. Ariosa] attempted to discredit the Department's witnesses regarding their knowledge of how much time the child was present at the property, if at all. However, the evidence demonstrated that the adult tenant of the Subject Property told Mr. Jeremenko that the child lived at the property, and I found Mr. Jeremenko credible. There was no reason or motive by the tenant to not accurately explain who was living at the Subject Property and [Mr. Ariosa], the owner and landlord for that tenancy, offered no proof to discredit the tenant's report. Although there was no evidence of actual harm, the law only requires a potential for harm. The failure to comply with the lead certificate requirements creates the risk for unknown and undiscovered lead contaminates to be in the Subject Property's environment and places the health of the tenants at risk.
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> Finally, the Department demonstrated that [Mr. Ariosa] could have avoided violating the Act by hiring one of the thousands of accredited lead certificate inspectors and paying a reasonable fee of approximately $200.00. Interestingly, the inspector's fee of $200.00 is below the $500.00 per day fine to which [Mr. Ariosa] was exposed, highlighting how reasonable it would have been to simply comply with the law.
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> [Mr. Ariosa] urges that I consider reducing the administrative penalty to $1,000.00. I see no legal basis to do so, especially when I conclude that the administrative penalty assessed by the Department was within its statutory authority and constituted a reasonable exercise of its discretion after properly considering the relevant factors described in section 7-266 of the Environment Article.

Judicial Review in the Circuit Court

Following the ALJ's ruling, Mr. Ariosa sought judicial review in the Circuit Court for Baltimore City. After holding a hearing on Mr. Ariosa's petition, the court affirmed the ALJ's decision. This timely appeal followed.

STANDARD OF REVIEW

In *Okoro v. Maryland Department of the Environment*, 223 Md. App. 198 (2015), we set forth the following standard of review regarding a circuit court's decision to affirm an ALJ's decision regarding an administrative penalty:

> In reviewing an administrative decision, "[t]his Court looks through the circuit court's decision and evaluates the decision of the agency." *Wilson v. Md. Dep't of the Env't*, 217 Md. App. 271, 283 (2014) (citation and internal quotation marks omitted). Such review is limited to deciding "if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and … if the administrative decision is premised upon an erroneous conclusion of law." *John A. v. Bd. of Educ. for Howard Cnty.*, 400 Md. 363, 381 (2007). "The substantial evidence test evaluates whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Motor Vehicle Admin. v. Lipella*, 427 Md. 455, 467 (2012) (citations and internal quotation marks omitted). The Court of Appeals has stated that "[e]ven with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 572 (2005) (citations and internal quotation marks omitted).
>
> Furthermore, an agency "has broad latitude in fashioning sanctions within legislatively designated limits." *Neutron Products, Inc. v. Dep't Of The Env't*, 166 Md. App. 549, 584 (2006). Therefore, "[a] reviewing court is not authorized to overturn a lawful and authorized sanction unless the disproportionality [of the sanction] or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary and capricious." *Noland*, 386 Md. at 581 (brackets in original) (citations and internal quotation marks omitted).

Id. at 205-06 (alterations in original).

DISCUSSION

Mr. Ariosa contends that the ALJ erred in affirming the Department's administrative penalty of $35,000.00. He raises several arguments in support of that contention. First, he argues that the Department failed to properly consider the requisite statutory factors in

setting the amount of the penalty. Second, he argues that the amount of the penalty was inconsistent with the Department's statutory mandate. Third, he argues that the Department's method of setting the amount of the penalty was arbitrary. Finally, he argues that the amount of the penalty was unconstitutional. As we discuss in greater detail below, we disagree with Mr. Ariosa's contentions and hold that the ALJ did not err in finding that the Department's administrative penalty was reasonable and properly applied.

A. The Department properly considered the requisite statutory factors in setting the amount of the penalty.

As noted, Mr. Ariosa was found to have violated the Act by failing to bring the Property into compliance with the Act's full risk-reduction standard and by failing to obtain a full risk-reduction certificate for the Property.[3] When such violations occur, the Department may assess a penalty of up to $500.00 for each violation, with each day that a violation occurs being a separate violation, provided that the total amount of the penalty does not exceed $100,000.00. *See* Md. Code, Envir. §§ 6-850(a) and 7-266(b). Before imposing a penalty, however, the Department must consider the following eight factors:

> 1. The willfulness of the violation, the extent to which the existence of the violation was known to but uncorrected by the violator, and the extent to which the violator exercised reasonable care;
>
> 2. Any actual harm to the environment or to human health, including injury to or impairment of the use of the waters of this State or the natural resources of this State;
>
> 3. The cost of cleanup and the cost of restoration of natural resources;

[3] Mr. Ariosa does not challenge the ALJ's findings as to his liability.

> 4. The nature and degree of injury to or interference with general welfare, health, and property;
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> 5. The extent to which the location of the violation, including location near waters of this State or areas of human population, creates the potential for harm to the environment or to human health or safety;
>
> 6. The available technology and economic reasonableness of controlling, reducing, or eliminating the violation;
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> 7. The degree of hazard posed by the particular waste material or materials involved; and
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> 8. The extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator.

Md. Code, Envir. § 7-266(b)(2)(ii).

Here, the Department established, by way of testimony and other evidence admitted at the contested hearing, that all eight statutory factors were considered and that four were found to be applicable in Mr. Ariosa's case: the willfulness of the violations, the potential for harm to human health or safety, the available technology and economic reasonableness of eliminating the violations, and the degree of hazard posed by lead paint. The Department established that Mr. Ariosa had been in violation of the Act for over 4000 days between 2006 and 2018 (with each day being a separate violation). The Department also established that, during that 12-year period, Mr. Ariosa was sent yearly renewal packets and multiple notices regarding his obligations under the Act, including the requirement that a lead inspection certificate be obtained upon a change in occupancy. Despite those myriad communications, and despite the fact that a tenant had moved into the Property in May of 2006, Mr. Ariosa did not obtain a lead inspection certificate until September of 2018. The

Department further established that a two-year-old child was living at the Property for some time prior to Mr. Ariosa obtaining the lead inspection certificate. Finally, the Department established that Mr. Ariosa could have easily obtained a lead inspection certificate and brought the Property into compliance without causing him any unreasonable financial burden.

From that, it is clear that the Department properly considered all the requisite statutory factors in setting the penalty amount of $35,000.00. It is equally clear that that amount was reasonable under the circumstances and was well below the statutory caps of $500.00 per violation and $100,000.00 in total. Thus, we see no reason to disturb the ALJ's decision on those grounds.

Mr. Ariosa argues that the Department's statutory duty to "consider" each factor requires more than what the Department did in his case, which was to "look at and dismiss" the inapplicable factors and then set the penalty amount based only on those factors that were applicable. He asserts that the Department's statutory duty to impose a penalty upon consideration of the eight factors "cannot possibly be interpreted to mean that the absence of four of the eight factors can have no bearing whatsoever on the amount of the find imposed by the Department."

We disagree. The statute states that the penalty imposed shall be "assessed with consideration given to" the eight factors. Md. Code, Envir. § 7-266(2)(ii). The word "consideration" means "a matter weighed or taken into account when formulating an opinion or plan." http://merriam-webster.com/dictionary/consideration (last visited May

11, 2021). Thus, the plain meaning of the statute requires the Department to "weigh" or "take into account" all eight statutory factors before assessing a penalty. *See Handy v. State*, 175 Md. App. 538, 576-77 (2007) (noting that, in interpreting a statute, an appellate court first looks to the text and gives the words of the statute their ordinary and usual meaning). That is what the Department did in this case. The Department considered all eight factors, ultimately determining that four were inapplicable and thus did not impact the penalty calculus. The Department then weighed the remaining factors and assessed a penalty that was well below the statutorily-authorized maximum. That was all the law requires.

Mr. Ariosa appears to argue that, for a statutory factor to be properly "considered," the absence of an inapplicable factor in a given case must be given some weight in assessing a penalty. Mr. Ariosa is mistaken. The plain language of the statute does not require the Department to consider the absence of a factor in assessing a penalty. *See 75-80 Props., LLC v. Rale, Inc.*, 470 Md. 598, 624 (2020) (noting that appellate courts "neither add no delete words to a clear and unambiguous statute to give it a meaning not reflected in the words the Legislature used or engage in a forced or subtle interpretation in an attempt to extend or limit the statute's meaning") (citations and quotations omitted). The statute merely requires the Department to give consideration to all eight factors, which the Department did. In other words, the Department is not required to reduce a penalty when certain factors are not applicable or when there are other mitigating circumstances. *See Neutron Prods., supra*, 166 Md. App. at 594-95.

Mr. Ariosa also challenges the Department's assessment of the factors it found applicable. He argues that the violations were not "willful" because there was no evidence to show that he intentionally failed to register the Property or that he was aware that he was out of compliance with the law. He argues that there was no danger to human health because there was no lead above the statutory limit found at the Property. He argues further that there was no danger to any Person at Risk because there was no evidence that any such person was ever living at the Property. Lastly, Mr. Ariosa argues that the available technology and economic reasonableness of eliminating the violations was "considered only in the abstract."

We remain unpersuaded. "[I]n the context of an environmental enforcement action, the willfulness of a violation of an order is considered in terms of the extent to which the existence of the violation was known but uncorrected by the violator, and the extent to which the violator exercised reasonable care." *Okoro*, 223 Md. App. at 208 (citations and quotations omitted). Here, the evidence established that Mr. Ariosa first registered the Property with the Department in 2004 and that he subsequently renewed that registration in 2008, 2013, 2014, 2015, 2017, and 2018. Mr. Ariosa was obviously aware of his obligation to register the Property; yet, from 2005 to 2018, he failed to do so eight times. Moreover, during that time, the Department sent yearly renewal packets to Mr. Ariosa that asked him to renew his registration and provide the date of the most recent lead inspection certificate. In 2012 and 2013, the Department also sent letters to Mr. Ariosa informing him of his obligations to register the Property and obtain a lead inspection certificate. Despite

those communications, and despite his clear awareness of his obligation to register the Property, Mr. Ariosa did not obtain a lead inspection certificate until 2018. In light of those facts, the ALJ found that Mr. Ariosa had "demonstrate[d] a willfulness to not comply with the applicable law, if not a willingness to turn a blind-eye (willful ignorance) to the law." Substantial evidence supports that finding.

Regarding Mr. Ariosa's claim that his violations did not pose a danger to human health, the ALJ found that Mr. Ariosa's "failure to obtain a lead certificate for the Subject Property created a potential harm to the Subject Property's tenants, including a young child who was living at the property." In making that finding, the ALJ credited Mr. Jeremenko's testimony that the child was living at the Property in April of 2018. The ALJ also rejected Mr. Ariosa's attempts to discredit that testimony or otherwise cast doubt on the frequency with which the child resided at the Property. Moreover, it is undisputed that an adult tenant was living at the Property for approximately 11 years, and Dr. Keyvan-Larijani testified that lead poisoning can cause a host of very serious health problems in adults as well as children.

To be sure, Mr. Ariosa did present evidence that he obtained a "full risk-reduction certificate" for the Property in September of 2018. Mr. DenBleyker testified, however, that such a certificate did not establish that there was never any deteriorated paint at the Property or that there was no lead paint at the Property. Moreover, Dr. Keyvan-Larijani testified that even small amounts of lead in the body can lead to lead poisoning. That evidence supports the ALJ's finding that Mr. Ariosa's "failure to comply with the lead

certificate requirements create[d] the risk for unknown and undiscovered lead contaminates to be in the Subject Property's environment and place[d] the health of the tenants at risk." The fact that Mr. Ariosa's tenants were lucky enough not to have been injured by his willful violation of the law should not absolve him of liability, nor does it require a reduction of a penalty that is already well below the statutory limit.

Finally, as to the available technology and economic reasonableness of eliminating the violations, the Department presented substantial evidence establishing the ease with which Mr. Ariosa could have brought the Property into compliance. The Department highlighted, among other things, the availability of accredited inspectors, the reasonableness of their fees, and the simple manner in which an Affected Property can be registered. As the ALJ noted, "the Department demonstrated that [Mr. Ariosa] could have avoided violating the Act by hiring one of the thousands of accredited lead certificate inspectors and paying a reasonable fee of approximately $200.00." Thus, Mr. Ariosa's claim that the Department considered this factor only "in the abstract" is without merit.

In sum, the Department properly considered all the statutory factors and assessed a reasonable penalty that was well below the statutory limit. The ALJ did not err in affirming on those grounds.

B. The amount of the fine was consistent with the Department's statutory mandate.

The Reduction of Lead Risk in Housing Act was enacted in 1994 and was intended "to reduce the incidence of childhood lead poisoning, while maintaining the stock of available affordable rental housing." Md. Code, Envir. § 6-802; *see also Jackson v.*

Dackman Co., 181 Md. App. 546, 560 (2008), *rev'd on other grounds* 422 Md. 357. In enacting the Act, the General Assembly recognized that "[o]ne of the most important sources of exposure to lead paint is lead-contaminated dust in older housing with deteriorated paint." *Jackson*, 181 Md. App. at 560. It also recognized that "the practice of ordering full abatement after identification of a lead-poisoned child residing in the property has not been an effective solution," and that "a preventive approach is needed." *Id.* Noting, on the other hand, that "owners of low and moderate income rental housing generally cannot afford to make the expenditures necessary to entirely remove lead hazards from all their properties without substantially increasing rents," and that "tenants cannot absorb significant rent increases," the legislature recognized that "performance of lead hazard reduction treatments that fall short of full abatement would be considerably less costly." *Id.* at 560-61.

To balance those competing concerns, the legislature codified §§ 6-815 and 6-819 of the Environment Article, which, as discussed, required an owner of any property built before 1950 to register the property with the Department and to satisfy certain risk-reduction standards, including having the property inspected, upon any change in occupancy. *See* 1994 Maryland Laws Ch. 114. In addition, it enacted § 6-850 of the Environment Article to enforce violations of the Act through a monetary penalty. *See* 1994 Maryland Laws Ch. 114. At that time, the penalty could "not exceed $250 per day for any violation of this subtitle which is not cured within 20 days after receipt of notice of the violation by the owner." *Id.* The statute also incorporated the provisions of § 7-266 of the

Environment Article, which capped the total penalty at $100,000.00. *Id.*; *see also* Md. Code, Envir. § 7-266 (effective July 1, 1991).

In 2005, the legislature amended § 6-850 to eliminate the 20-day grace period for violations of the Act. 2005 Maryland Laws Ch. 278. The purpose of the change was to "encourage[] noncompliant owners to improve their properties and responsible property owners to buy noncompliant properties and make them lead safe, thereby assuring healthy, affordable housing." *See* Maryland Governor's Message, May 10, 2005.

The following year, a bill was introduced to increase the penalty cap from $250.00 per day to $500.00 per day. H.B. 1450, 2006 Reg. Sess. (Md. 2006). In support of the bill, the Department argued that an increase in the maximum penalty would likely encourage rental property owners to register Affected Properties and perform lead risk reductions. *See* Maryland Department of the Environment, Letter in Support of House Bill 1450, 2006 Reg. Sess., at 28 (Md. 2006). The bill was eventually adopted, and § 6-850 was amended to its current form. *See* 2006 Maryland Laws Ch. 398.

With that legislative backdrop, we are persuaded that the $35,000.00 penalty assessed in the instant case was not inconsistent with the Department's mandate of reducing the incidence of childhood lead poisoning while maintaining the stock of available affordable rental housing. First, it is clear that the stated purpose of the Act, as reflected in § 6-802, had little if anything to do with the penalties assessed by the Department against property owners for non-compliance. Rather, the Act reflected the legislature's recognition that requiring property owners to completely abate the threat of lead poisoning would result

in an increased financial burden, which the owners would likely pass on to prospective tenants in the form of increased rents. To balance the "competing concerns" of victims, tenants, and property owners, the legislature put into place the current standards, which are less onerous and less costly than full abatement, but still reduce the incidence of childhood lead poisoning without negatively impacting the stock of available affordable rental housing. Dan Friedman, *Jackson v. Dackman Co.: The Legislative Modifications of Common Law Tort Remedies Under the Maryland Declaration of Rights*, 77 Md. L. Rev. 949, 970-71 (2018). Nothing in the text of the statute or the history of the Act suggests that the goal of maintaining affordable housing was intended to serve as an informal cap on penalties imposed by the Department under § 6-850.

In fact, the Act's legislative history exhibits the General Assembly's clear willingness to allow the imposition of significant fines against property owners for non-compliance. Since it was enacted in 1994, § 6-850 has twice been amended – once to remove the 20-day grace period for violations of the Act and again to increase the per-day fine from $250.00 to $500.00. Both changes were made to encourage property owners to comply with the Act. Those changes reflect a clear intent to give the Department broad authority to impose significant penalties for non-compliance. Given that the penalty assessed in the instant case was significantly lower than the prior maximum of $250.00 per day, we cannot say that the amount of the penalty was in any way inconsistent with the Department's mandate.

C. The amount of the penalty was not arbitrary.

Mr. Ariosa argues that the penalty amount of $35,000.00 is "arbitrary" because it "does not logically derive from a consideration of the penalty factors" and "is not the result of any reproducible method." He asserts that, if the penalty were not arbitrary, then the Department would have increased the penalty for the additional days that the Property was out of compliance between when the Department filed its initial complaint and when it filed its amended complaint. He also argues that the penalty was arbitrary because the Department could have brought the action much sooner.

We are not persuaded by any of Mr. Ariosa's arguments. As noted, because the assessment of a penalty is left to the discretion of the administrative agency, "the agency has broad latitude in fashioning sanctions within legislatively designated limits." *Neutron Prods., supra*, 166 Md. App. at 584. "As long as an administrative sanction or decision does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion[.]" *Maryland Transp. Auth. v. King*, 369 Md. 274, 291 (2002). That is, "[a] reviewing court is not authorized to overturn a lawful and authorized sanction unless the 'disproportionality [of the sanction] or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary and capricious.'" *Noland*, 386 Md. at 581 (citing *King*, 369 Md. at 291) (brackets in original).

Mr. Ariosa was found to have committed more than 4000 violations between 2006 and 2018. The Department determined, and the ALJ found, that those violations were

willful and could have easily been cured by Mr. Ariosa. The Department also determined, and the ALJ found, that Mr. Ariosa's chronic inability to comply with the Act posed a serious risk to the Property's long-time tenant and to a two-year-old child who was living at the Property. After considering all the statutory factors and determining some of them to be inapplicable, the Department assessed a penalty of $35,000.00, which was, on average, less than $9.00 per infraction. Although the Department did not explain how it reached that particular figure, it did explain, in detail, the significance of the various factors that it found applicable in Mr. Ariosa's case and the process used in determining the penalty.

That the Department employ a reproducible "method" is not required by the statutory scheme or subsequent case law. *See Neutron Prods.*, 166 Md. App. at 593 (holding that the agency "was not required to assign a particular dollar amount for each category of violation or individual violations, so long as it did not impose a fine [that exceeded the statutory cap]"). Nor was the Department required to bring the action sooner or to increase the amount of the penalty upon amending the complaint. The Act places an affirmative obligation on property owners to bring an Affected Property into compliance and authorizes the Department to assess a penalty that does not exceed the statutory maximums against those property owners who fail to comply with the Act. A penalty does not become arbitrary simply because the Department chooses to bring an action at a particular time and then chooses not to increase the amount of the penalty upon subsequent violations. In short, we have no problem holding that the penalty of $35,000.00 was well

within the Department's authority, was lawful, and was supported by competent, material and substantial evidence.

D. The amount of the penalty was constitutional.

Mr. Ariosa's final argument is that the $35,000.00 penalty was "grossly disproportional" and thus was unconstitutional pursuant to *United States v. Bajakajian*, 524 U.S. 321 (1998). To highlight the "disproportionality" of his penalty, Mr. Ariosa cites other cases in which the Department assessed fines similar to or less than the one imposed in this case. He argues that the infractions in those cases were much more egregious than the ones he committed.

We hold that Mr. Ariosa's claim is not preserved for our review. Mr. Ariosa did raise this claim in the circuit court, but, because he did not raise the claim before the ALJ, he is precluded from raising it here. *See Finucan v. Maryland State Board of Physician Quality Assurance*, 151 Md. App. 399, 423 (2003) ("It has consistently been held that 'questions, including Constitutional issues, that could have been but were not presented to the administrative agency may not ordinarily be raised for the first time in any action for judicial review.'") (quoting *Board of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 208 (1999)).

Assuming, *arguendo*, that the claim was preserved, it is without merit. In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court held that a fine is "constitutionally excessive … if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. There, the Government seized approximately $357,144.00 from the

defendant after the defendant had tried to board an international flight without reporting the money to the Government, as was required by federal law. *Id.* at 324. The Supreme Court ultimately held that the forfeiture was unconstitutional. *Id.* 337-340. In comparing the amount of the forfeiture to the gravity of the offense, and in concluding that the two were "grossly disproportional," the Court noted that the crime at issue was solely a reporting offense and was not related to other illegal activities, and that the defendant did not fall within the class of persons for whom the statute was designed. *Id.* at 337-38. The Court also noted that crime only hurt the Government and that, because there was no evidence of fraud or loss of public funds, any injury to the Government was minor. *Id.* at 339. Finally, the Court noted that the crime itself carried a maximum fine of $5,000.00, which was many times lower than the amount the Government seized from the defendant. *Id.* at 338-40.

The circumstances surrounding Mr. Ariosa's penalty are clearly distinguishable. The Department established that properties built before 1950, like the one owned by Mr. Ariosa, were presumed to have lead paint and that exposure to lead paint posed a very serious health risk to occupants, particularly children. The Act, and in particular its penalty provision, was enacted to combat those issues and encourage property owners to bring their Affected Properties into compliance with the risk-reduction standards of the Act. Mr. Ariosa, as the owner of an Affected Property and thus the type of person for whom the Act was designed, was required to bring the Property into compliance upon the change in tenancy in 2006. He did not; instead, he permitted the Property to remain out of compliance

for over 4000 days. In so doing, he potentially exposed his tenant and a two-year-old child to lead paint, which is precisely the sort of harm the Act was designed to prevent. The Department was authorized, by statute, to assess a fine of $500.00 per day. Given the number of days Mr. Ariosa was out of compliance, such a fine would have easily reached the statutory cap of $100,000.00. The Department chose, however, to assess a fine of $35,000.00, or approximately $9.00 per day. The fine was not grossly disproportional to the gravity of the offense.

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