

Circuit Court for Anne Arundel County
Case No. C-02-CV-17-001691

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2238

September Term, 2017

CLAUDIA BARBER AND JUDICIAL
CAMPAIGN OF CLAUDIA BARBER

v.

MARYLAND BOARD OF ELECTIONS

Meredith,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 26, 2019

*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.

In 2016, Claudia Barber (“Ms. Barber”), one of the appellants in this case, was a candidate seeking to be elected to serve as a judge on the Circuit Court for Anne Arundel County. Her campaign committee, named “Judicial Campaign of Claudia Barber” (the “Committee”), is also an appellant. During the 2016 election cycle, the Committee filed periodic reports of its income and expenses with the Maryland State Board of Elections (“the Board”), appellee.

By letter dated November 15, 2016, the Board’s Director of the Candidacy and Campaign Finance Division notified the treasurer of Ms. Barber’s Committee that the Board had reviewed the campaign finance reports filed by the Committee and had concluded that certain reported expenditures for the payment of legal fees were not permissible campaign expenses, and therefore, the amounts paid for legal expenses “must be reimbursed by the candidate.” The letter provided a list of payments that totaled \$8,769.46, and stated: “Please be advised that you have thirty (30) days from the date of this notice to provide this office with evidence that the campaign has been reimbursed for the impermissible expenditures. Failure to correct these violations will result in the matter being referred to the Office of the State Prosecutor. If you have questions regarding this matter, please contact the Audit and Enforcement Unit (AEU) at 410-269-[####].”

Within 30 days after receiving the letter, Ms. Barber reported that she had repaid \$8,769.46 to the Committee. But she also exchanged e-mails with employees of the Board, disputing the Board’s conclusion that the payments were not permissible campaign expenses.

On March 20, 2017, Ms. Barber filed a Petition for Declaratory Ruling with the Board, requesting “a declaratory ruling from the Maryland Board of Election members that the legal expenses incurred met the nexus requirement as discussed by the attorney general decision [cited] above[, *i.e.*, 78 Md. Op. Atty. Gen. 155, 1993 WL 467835 (1993)]. And if not when would the nexus requirement be met in this situation.”

At its meeting on May 18, 2017, the Board considered Ms. Barber’s request for a declaratory ruling, and voted to deny the request. By letter dated May 22, 2017, the Board’s Deputy Administrator advised Ms. Barber that the Board had declined to issue a declaratory ruling because it had “long been the practice of the Board” to issue declaratory rulings only when asked “how a rule or regulation would apply to prospective behavior, not to actions that have already taken place . . .”

On June 13, 2017, Ms. Barber and the Committee filed a “Complaint and Petition for Judicial Review of Declaratory Ruling” in the Circuit Court for Anne Arundel County. That pleading was superseded by an “Amended Petition for Judicial Review” filed on July 24, 2017. On August 1, 2017, the Board filed a motion to dismiss. After a hearing, the circuit court granted the Board’s motion to dismiss. This appeal followed.

QUESTIONS PRESENTED

Ms. Barber and the Committee present the following questions for our review, which we quote (but reorder):

1. Whether [the Board] took “administrative action” by substantively deciding and unilaterally deciding to reverse Ms. Barber’s campaign expenditures without due process.

2. Whether there was a denial of constitutional due process for Ms. Barber when she was required to become a criminal defendant in a lawsuit brought by a state prosecutor before due process was given to her.
3. Whether the lower court erred in dismissing Ms. Barber's Petition for Judicial Review of Declaratory Relief addressing Constitutional Due Process Claims.
4. Whether there was reversible error in failing to include appeal rights in [the Board's] decisions sent to Ms. Barber.
5. Whether there was reversible error in the lower court's failure to acknowledge Appellants' Amended Petition spelling out declaratory and injunctive relief as well as Ms. Barber's Supplemental Exhibits reflecting substantive due process claims in light of [the Board's] administrative action taken against Ms. Barber to reverse Ms. Barber's campaign expenditures.

Because we conclude that the circuit court did not err in dismissing the Amended Petition for Judicial Review, we shall affirm the judgment of the Circuit Court for Anne Arundel County.

FACTS AND PROCEDURAL HISTORY

In 2016, Claudia Barber was a candidate seeking to be elected to serve as a judge on the Circuit Court for Anne Arundel County. As a result, Ms. Barber and her Committee were required to file campaign finance reports with the Board at the times and for the periods set forth in Maryland Code (2003, 2016 Supp.), Election Law ("EL"), § 13-301 *et seq.* Pursuant to EL § 13-304(b)(1), Ms. Barber's campaign Committee was obligated to file reports with the Board disclosing "all expenditures made by or on behalf of the campaign finance entity during the designated reporting period." Campaign finance reports are subject to discretionary audit by the Board. EL § 2-102(b)(5).

On November 15, 2016, Jared DeMarinis, Director of the Board's Candidacy and Campaign Finance Division, sent a letter to the Treasurer of Ms. Barber's Committee. The letter provided the following explanation for the Director's conclusion that the Committee had used campaign funds for the payment of impermissible expenses:

According to a recent news article the *Judicial Campaign of Claudia Barber* made numerous expenditures for litigation and legal fees. The State Board of Elections ([the Board]) has reviewed the filed campaign finance reports and confirmed the expenditures were made by the committee for that purpose. Given the reported nature of the litigation, the expenditures made are personal, not campaign- or election-related, and therefore under Maryland law campaign funds may not be used to pay for such expenses.

The legal matter in question concerned Ms. Barber's employment with the District of Columbia (D.C.[.]) Office of Administrative Hearings. The litigation expenses paid by the campaign were incurred in defending Ms. Barber against a complaint alleging that she violated her employer's code of ethics by running for Circuit Court Judge in Anne Arundel County, Maryland.

Pursuant to Election Law Article § 13-218(b), a campaign finance entity may disburse campaign funds only in accordance with the purpose of the political committee.^[1] The purpose of an authorized candidate campaign committee is to promote the candidate's candidacy. Additionally, any expenditure must "promote or assist in the promotion of the success or defeat of a candidate, political party, or question at an election." See Election Law Article § 1-101.^[2] Therefore, a permissible expenditure by an

¹ EL § 13-218(b) provides:

- (b)(1) Assets of a campaign finance entity may be disbursed only:
 - (i) if they have passed through the hands of the treasurer; and
 - (ii) in accordance with the purposes of the entity.
- (2) Subject to § 13-220(b)(2) and (c) of this subtitle and except as provided in subsection (d) of this section, the treasurer shall make all disbursements for the campaign finance entity.

² EL § 1-101(aa) provides the following statutory definition of "expenditure":

continued...

authorized candidate campaign committee must aid in the promotion of its authorized candidate in an election.

Pursuant to the Code of Maryland Administrative Regulations (COMAR) 33.13.10.03(B)(6), a political committee is prohibited from paying a candidate's legal defense costs or expenses, except those relating to investigations or legal actions resulting from the conduct of the campaign or election.^[3] The [Board's] Summary Guide explains that “[i]t is prohibited for any candidate or political committee to use campaign funds for legal or other expenses related to investigations or court proceedings that do not have a direct connection with the candidacy. For example, investigations or charges involving misconduct in an individual's employment or public office are not campaign-related, even if the charges first come to light as a result of the individual's decision to run for elected office.” *See* Summary Guide, revised August 2010.

“Expenditure” means a gift, transfer, disbursement, or promise of money or a thing of value by or on behalf of a campaign finance entity to:

- (1) promote or assist in the promotion of the success or defeat of a candidate, political party, question, or prospective question at an election; or
- (2) pay for the publication expense of a legislative newsletter under Title 13, Subtitle 4 of this article.

³ COMAR 33.13.10.03(B) provides in part:

B. Prohibited Expenditures. Except as provided in § C of this regulation, a political committee may not make an expenditure of campaign funds, directly or indirectly, in any amount for:

- (1) The personal use or the personal benefit of a candidate, the candidate's family, or any other individual;

* * *

(5) Expenses not relating to the electoral purposes of the political committee, except if permissible under Election Law Article, § 13-247, Annotated Code of Maryland;

(6) Legal defense costs or expenses, except those relating to investigations or legal actions resulting from the conduct of the campaign or election;

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As noted above, legal fees and litigation expenses incurred to avoid disciplinary or personnel action in one's employment are personal in nature; an ethics complaint concerning employment restrictions imposed by an employer is not an allegation of a campaign violation. Therefore, the litigation cannot be considered campaign related and campaign funds may not be used to pay for such expenses. The Assistant Attorney General who serves as counsel to the State Board agrees that the State Board's determination is consistent with past advice from the Office of the Attorney General on campaign expenditures.

After reviewing the campaign finance reports of *Judicial Campaign of Claudia Barber*, the following expenditures and outstanding obligations are not permissible [and] must be reimbursed by the candidate, Ms. Barber.

Expenditures:

Date	Payee	Amount	Remarks
2016 Pre-General 1 Report Presidential Due 8/30/2016			
6/28/2016	Osborn, Maledon PA	\$1,949.00	Legal Fees - Campaign Election Relates / Expert Witness-Mark Harrison
8/12/2016	David Branch and Associates	1,000.00	Legal Fees – Campaign Election Relates/ Legal fees regarding candidacy
2016 Pre-General 2 Report Presidential Due 10/28/2016			
9/6/2016	Barber, Claudia Adeline	2,000.00	Legal Fees-General / Legal fees reimbursed
9/6/2016	Free State Reporting	300.00	Legal Fees-General / Stenographer Services
9/12/2016	Free State Reporting	498.71	Legal Fees-General / Court reporting services
9/13/2016	Barber, Claudia Adeline	1,000.00	Legal Fees-General / Reimbursement for legal expenses
9/26/2016	Barber, Claudia Adeline	1,400.00	Legal Fees-General / Legal expenses
9/27/2016	DC Court of	13.25	Legal Fees-General /

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	Appeals		Copies made, plus ATM fee of \$3.25
9/27/2016	DC Superior Court	8.50	Legal Fees-General / Copies at courthouse
10/12/2016	Barber, Claudia Adeline	600.00	Legal Fees-General / Legal expenses
Total Expenditures for Reimbursement to the committee, <i>Judicial Campaign of Claudia Barber</i>		\$8,769.46	

Outstanding Bills Due:

Date	Creditor	Amount	Remarks
2016 Pre-Primary[]2 Presidential Due 4/15/2016			
3/23/2016	Barber, Claudia, Adeline	\$2,936.00	Legal fees contesting complaint made by Ronald Jarashow regarding participation in partisan election.
2016 Pre-General 1 Report Presidential Due 8/30/2016			
5/19/2016	Barber, Claudia Adeline	1,000.00	Expert witness
6/6/2016	Barber, Claudia Adeline	4,940.00	Legal fees
8/12/2016	Barber, Claudia Adeline	750.00	Litigation
Total Outstanding Bills Not Due to the committee, <i>Judicial Campaign of Claudia Barber</i>		\$9,626.00	

Please be advised that you have thirty (30) days from the date of this notice to provide this office with evidence that the campaign has been reimbursed for the impermissible expenditures. Failure to correct these violations will result in the matter being referred to the Office of the State Prosecutor. If you have questions regarding this matter, please contact the Audit and Enforcement Unit (AEU) at 410-269-[####].

On November 17, 2016, Ms. Barber sent an e-mail to Donna Duncan, the Board's Assistant Deputy for Election Policy, stating:

I've had enough of Jared DeMarinis and his engaging in the unauthorized practice of law. The following complaint is being filed with the Attorney Grievance Commission:

* * *

Dear Commission:

I am filing a formal complaint against Jared DeMarinis, who appears to be engaging in the unauthorized practice of law. Based on my review of the Maryland's Lawyer Manual [sic], Mr. DeMarinis is not licensed to practice law in the state of Maryland.

* * *

On November 17, 2016, I received the attached letter dated November 15, 2016, coming exclusively from Mr. DeMarinis. In this letter, he unilaterally reaches many legal conclusions that the use of my campaign funds do NOT have a direct connection with my candidacy, and that I need to reimburse the expenditures immediately (within the next 30 days) or otherwise face prosecution from the Office of the State Prosecutor. This threatening prosecution letter is coming from a non-lawyer. This falls squarely within the bounds of engaging in the unauthorized practice of law.

On November 19, 2016, Ms. Barber sent another e-mail to Donna Duncan, requesting "reconsideration of Jared DeMarinis' November 15, 2016 unlawful legal opinion letter." In her November 19 e-mail, Ms. Barber stated, *inter alia*:

. . . I was never given an opportunity to be heard, nor was I afforded any appeal rights.

* * *

The most troubling nature of the unlawful legal opinion letter is where did the author get the facts leading to his legal conclusion of not permitted legal expenditures if there was no testimony or opportunity to be heard[?] Is the "reported nature of the litigation" based on news stories? Do you seriously have a state employee making threats of prosecution against a citizen because he saw it in the newspaper and it must be true because it is there?

* * *

Maryland's Election Law Article identifies many categories of permitted expenditures. This includes campaign funds being used to pay for legal costs associated with an investigation that has a direct connection with the individual's candidacy. Where are the facts that were established that prove these expenses have no direct connection with my candidacy[?] . . .

. . . I seek immediate rescinding of the letter of November 15. The citizens of Maryland deserve due process and an opportunity to be heard.

By letter dated November 22, 2016, Ms. Barber notified the Board that she had reimbursed the Committee for the full amount of \$8,769.46 that had been listed as improper payments in the letter dated November 15, 2016. At that point, the Board considered the matter closed. But Ms. Barber did not.

On December 5, 2016, Ms. Barber sent an e-mail to Linda Lamone, the State Administrator for the Board, and stated:

I sent Donna Duncan several emails seeking an answer to questions. She ignored me. More specifically, I raised concerns about the discriminatory, callous manner in which I was targeted to reverse my campaign finance report without any due process. . . .

The e-mail set forth grievances against Mr. DeMarinis and stated: "Now it's my turn to turn these improprieties over to the Office of the State [P]rosecutor."

On March 20, 2017, Ms. Barber submitted to the Board a "Petition for Declaratory Ruling."⁴ The petition set forth the following:

⁴ Maryland Code (1984, 2014 Repl. Vol.), State Government Article, provides in § 10-304(a) that, with respect to units of the State other than those exempted by § 10-302: "An interested person may submit to a unit a petition for a declaratory ruling with respect to the manner in which the unit would apply a regulation or order of the unit or a statute that the unit enforces to a person or property on the facts set forth in the petition." The continued...

FACTS IN SUPPORT OF PETITION

On or about February 5, 2016, Ronald Jarashow, an Annapolis attorney working on behalf of the four sitting judges, filed a politically motivated ethics complaint with the DC Office of Administrative Hearings (OAH) challenging my candidacy as being violative of the OAH Ethics Code, and sought my termination. An investigation ensued, and legal expenses were incurred. The ethics question was entirely related to my candidacy and whether or not I participated in a partisan primary. A Maryland case, *Suessman[n] v. Lamone*, 852 A.2d 1, 383 Md. 697 (2004), determined that judicial elections in Maryland are partisan affairs.

Jarashow later admitted in subsequent e-mails to my employer that the main purpose in making this ethics complaint was to get me disqualified as a candidate for judge on the Circuit Court for Anne Arundel County. He provided my employer with the Maryland Judicial Campaign Committee handbook and explained how this would lead to getting me disqualified and removed from the ballot.

RELEVANT MARYLAND ELECTION ARTICLE

Maryland's Election Law Article under Title 13, identifies many categories of permitted expenditures. This includes campaign funds being used to pay for legal costs associated with an investigation that has a direct connection with the individual's candidacy. An Attorney General Opinion was precisely written addressing the nexus requirement. See generally 78 Opinions of the Attorney General 155 (1993). The Attorney General made it clear in this opinion that "a candidate or elected official may use campaign funds to pay debts incurred in the defense of a criminal prosecution only if there is a direct connection between the candidacy and the prosecution. This 'nexus' requirement was met with regard to Delegate Fulton's use of campaign funds for this purpose."

RELIEF SOUGHT

pertinent regulation applicable to how the State Board of Elections will respond to such petitions is COMAR 33.01.02.03B, which states:

Within 60 days after the petition is submitted, the State Board shall:

- (1) Consider the petition; and
- (2) Either: (a) Issue a written declaratory ruling as requested; or (b) Notify the petitioner in writing of the reasons for not issuing a declaratory ruling.

I seek a declaratory ruling from the Maryland Board of Election members that the legal expenses incurred met the nexus requirement as discussed by the attorney general decision [cited] above[, *i.e.*, 78 Md. Op. Atty. Gen. 155, 1993 WL 467835 (1993)]. And if not when would the nexus requirement be met in this situation.

At its meeting on May 18, 2017, the Board considered Ms. Barber's request for a declaratory ruling, and voted to deny the request. The minutes of the meeting reflect:

Ms. Charlson [Deputy Administrator for the Board] explained that Ms. Barber asked the State Board to issue a declaratory ruling on whether she can use campaign funds to pay legal expenses she incurred in the course of an ethics investigation related to her former employment. Ms. Charlson recommended that the State Board deny issuing a declaratory ruling in this case because the purpose of a declaratory ruling is to explain how the State Board would apply a regulation, order or statute. Since the Candidacy and Campaign Finance Division has already determined that Ms. Barber cannot use campaign funds for this purpose, her request is not related to a prospective event but is retroactive and is a request to reverse a determination already made by the Division. In response to a question, Ms. Charlson explained that Regulation 33.01.02.01 of the Code of Maryland Regulations uses the verb "would" to show that this process is used to seek a prospective determination.⁵

By letter dated May 22, 2017, Ms. Charlson notified Ms. Barber that the Board had declined to issue a declaratory ruling, and she attached a copy of the memorandum that staff had presented to the Board recommending that no declaratory ruling be issued.

⁵ COMAR 33.01.02.01 provides:

An interested person may petition the State Board for a declaratory ruling on the manner in which the Board would apply any of the following to a person or property on the facts set forth in the petition:

- A. A Board regulation;
- B. A Board order; or
- C. A statute that the Board enforces.

On June 13, 2017, Ms. Barber and the Committee filed their original complaint and petition for judicial review in the Circuit Court for Anne Arundel County, naming as respondents the Board and Jared DeMarinis. The complaint stated that Ms. Barber and the Committee were seeking:

(1) A hearing on a contested case by a judge not on or previously served on [sic] the Circuit Court for Anne Arundel County, and (2) judicial review of a declaratory ruling pursuant to Code of Maryland Regulations No. 33.01.02.05, and Title 10, Subtitle 2 of the Annotated Code of Maryland's State Government Article.⁶

The pleading contained four counts, and claims for relief were set forth in a final section at the end of the pleading that stated:

WHEREFORE, Petitioners pray that:

- (A) [T]he DeMarinis letter of November 15, 2016, be rendered unconstitutional as a matter of law resulting from an unlawful procedure to deny Petitioners due process in violation of both the Maryland and US Constitutions.
- (B) The DeMarinis letter be rendered illegal because it is unsupported by competent, material and substantial evidence admitted into evidence in a formal proceeding.
- (C) The Petition for Declaratory Relief be reversed and vacated for lack of due process.
- (D) That Petitioners be awarded their expenses, counsel fees, and costs associated with or incurred based on the actions caused by the DeMarinis letter.

⁶ COMAR 33.01.02.05 provides: "A declaratory ruling issued under this chapter is subject to judicial review in the same manner that State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland, provides for review of a contested case."

- (E) That Petitioners be allowed to have a hearing on the merits by the presiding judge, or by an independent and unbiased panel of decision makers.
- (F) Judgment be entered in Petitioners' favor and against Respondents in an amount to be determined at trial, but not less than TEN MILLION DOLLARS for casting Plaintiff in a false light and damaging her stellar career, plus court costs and attorneys' fees.

On July 24, 2017, Ms. Barber and the Committee filed an amended petition for judicial review which expressly withdrew all claims against Jared DeMarinis personally. In the introductory paragraph of the Amended Petition for Judicial Review, the petitioners state: "The Petitioners amend their complaint/petition to remove Jared De[M]arinis as a party to the proceedings, and to drop any individual claims against Jared DeMarinis. Petitioners proceed with only an Amended Petition for Judicial Review against the Maryland Board of Elections . . ." The prayers for relief remained the same as those set forth in the June 13 pleading.

On August 1, 2017, the Board filed a motion to dismiss based on the following grounds: (1) the November 15 letter was not an administrative action subject to judicial review; (2) even if the letter could be deemed an administrative action, the petition for judicial review was filed beyond the time limit provided by Maryland Rule 7-203; and (3) although COMAR 33.01.02.05 authorizes judicial review of "[a] declaratory ruling issued" by the Board, that regulation does not authorize judicial review of the Board's denial of a request for a declaratory ruling.

Ms. Barber and the Committee filed an opposition to the motion to dismiss. The case was assigned to a senior judge from another county, and on September 27, 2017, the

court held a hearing on the Board's motion to dismiss. At the conclusion of the hearing, the court took the matter "under advisement."

On January 12, 2018, the court granted the Board's motion to dismiss. With respect to the requests for the letter dated November 15, 2016, to be somehow rescinded or rendered unconstitutional, the court concluded:

Letters[,] particularly those already transmitted and received[,] cannot be unconstitutional or otherwise declared null and void simply because they describe a policy or protocol which when applied to Petitioner(s) might be objectionable. In any case, a plain reading of the letter simply does not even arguably support Petitioners' claim.

. . . [T]he subject letter does not even purport to impose any penalty against Petitioners or take any other action other than a referral to another authority against Petitioner Barber or her campaign. Nor does the letter threaten to take any administrative action against Ms. Barber or her campaign[,] which [the Board] has no authority to do in any case.^[7] Rather[,] the letter explains what the options are for Ms. Barber in light of [the Board's] audit and what action the Board can take which will be based on what action Ms. Barber employs.

* * *

. . . [T]he letter does not take or even threaten to take administrative action against Petitioners[,] nor does it purport to constitute any sort of administrative action taken against the Petitioners.

* * *

⁷ Counsel for the Board had argued that EL § 13-604.1(b) does not authorize the Board itself to issue citations for this particular category of alleged election law violations (even though it may issue citations for other violations enumerated in EL § 13-604.1(b)), and the Board would therefore need to refer the allegation of an impermissible expenditure prohibited by EL § 13-218(b)(1)(ii) to the State Prosecutor for further consideration pursuant to EL § 13-602 or §13-604.

The letter of November 15, 2016 simply is not an administrative agency action for which Petitioners have a right to judicial review regardless of its alleged collateral consequences including any effect on Petitioner Claudia Barber's personal and professional career as a result of media coverage of the letter, collateral disciplinary proceeding incident to her job caused by her candidacy for judicial office or other alleged tortious activities by third parties not sued in this action nor related to the judicial review requested.

Similarly, the circuit court ruled that the Board's denial of Ms. Barber's petition for a declaratory ruling was not subject to judicial review. The court explained that, although there would have been a right to judicial review pursuant to COMAR 33.01.02.05 if the Board had exercised its discretion to *issue* a declaratory ruling, here, the Board issued no declaratory ruling that qualified for judicial review pursuant to COMAR 33.01.02.05. The court stated: "The Board's minutes . . . demonstrate that the Board did not issue a written declaratory ruling at all as requested." The court emphasized that COMAR 33.01.02.05 "clearly does not authorize judicial review of a Board's denial of a request to issue a declaratory ruling." The court ruled that there was no basis for judicial review of the Board's decision not to issue a declaratory ruling. The court granted the Board's motion to dismiss.

On January 23, 2018, Ms. Barber noted this appeal.

STANDARD OF REVIEW

We explained our standard of review of a court's grant of a motion to dismiss in *A.C. v. Maryland Comm'n on Civil Rights*, 232 Md. App. 558, 568–69 (2017), as follows:

Our review of the circuit court's grant of [a] motion to dismiss is *de novo*. *Gasper v. Ruffin Hotel Corp. of Maryland*, 183 Md. App. 211, 226, 960 A.2d 1228, (2008), *aff'd*, 418 Md. 594, 17 A.3d 676 (2011). As we

stated in *Gasper*, “[i]n reviewing the underlying grant of a motion to dismiss, we must assume the truth of the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations.” *Id.* (quoting *Adamson v. Corr. Med. Servs.*, 359 Md. 238, 246, 753 A.2d 501 (2000)). Furthermore, issues of statutory interpretation are legal issues for which we review for legal correctness. *Falls Road Community Ass’n v. Baltimore Cnty.*, 437 Md. 115, 134, 85 A.3d 185 (2014).

The circuit court may grant a motion to dismiss if “the allegations do not state a cause of action for which relief may be granted. . . . Upon appellate review, the trial court’s decision to grant such a motion is analyzed to determine whether the court was legally correct.” *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 496-97 (2014) (quoting *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 643-44 (2010)).

DISCUSSION

The amended petition seeks judicial review of two events that Ms. Barber and the Committee allege were administrative actions of the Board that are subject to judicial review: (1) the Board’s issuance of the letter dated November 15, 2016; and (2) the Board’s decision not to issue a declaratory ruling pursuant to COMAR 33.01.02.03 in response to Ms. Barber’s petition for a declaratory ruling. Because we agree with the circuit court that neither of these events was an administrative agency’s action subject to judicial review, we shall affirm the circuit court’s decision to grant the Board’s motion to dismiss.

“[I]n order for an administrative agency’s action properly to be before this Court (or any court) for judicial review, there generally must be a legislative grant of the right

to seek judicial review.” *Harvey v. Marshall*, 389 Md. 243, 273 (2005). For many of Maryland’s administrative agencies, there is a legislative grant of a right to have judicial review of the agency’s final decision in a contested case pursuant to Maryland Code (1984, 2014 Repl. Vol.), State Government Article (“SG”), § 10-222, which reads as follows:

(a)(1) Except as provided in subsection (b) of this section, a party who is aggrieved by the **final decision in a contested case** is entitled to judicial review of the decision as provided in this section.

(Emphasis added.)

But SG § 10-222 does not authorize judicial review of either of the events that are the subject of Ms. Barber’s petition because neither event meets the definition of being a “decision in a contested case,” let alone a “final” decision of the agency in a contested case. *See* SG § 10-202(d).⁸

⁸ The term “contested case” is defined in SG § 10-202(d), which states:

- (d)(1) “Contested case” means a proceeding before an agency to determine:
- (i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or
 - (ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.
- (2) “Contested case” does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.

In *Maryland Com'n on Human Relations v. Baltimore Gas & Elec. Co.*, 296 Md. 46, 55 (1983), the Court of Appeals quoted Supreme Court precedent to explain what constitutes a “final decision of an agency,” stating:

While Maryland courts have seldom described the attributes of a final administrative action, the United States Supreme Court has frequently articulated the primary characteristics to be considered in determining whether an agency’s action is final for purposes of judicial review. As long ago as 1927, in *United States v. Los Angeles & Salt Lake Railroad Co.*, 273 U.S. 299, 309–10, 47 S.Ct. 413, 414, 71 L.Ed. 651 (1927), Justice Brandeis, writing for the majority, said:

“The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier’s existing or future status or condition; which does not determine any right or obligation.”

Subsequently, in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 112–13, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948), that Court said:

“[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.”

* * *

. . . [I]n *Federal Trade Commission v. Standard Oil Company of California*, 449 U.S. 232, 243, 101 S.Ct. 488, 495, 66 L.Ed.2d 416 (1980), [the Supreme] Court said:

“In sum, the Commission’s issuance of a complaint averring reason to believe that [the regulated company] was violating the Act is not a definitive ruling or regulation. It had no legal force or practical effect upon [the regulated company]’s daily

business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations counsel against the conclusion that the issuance of the complaint was ‘final agency action.’”

296 Md. at 54-56.

Applying that guidance, the Court of Appeals concluded in *Maryland Com'n on Human Relations* that the finding of the Human Relations Commission’s Appeal Board in that case was not subject to judicial review because the challenged order “did not determine or conclude [the petitioner’s] rights and obligations.” *Id.* at 58.

We agree with the circuit court’s conclusion in this case that neither the November 15 letter nor the Board’s denial of the request for a declaratory ruling was a final action in a contested case that was subject to judicial review.

1. Letter of November 15, 2016

Despite Ms. Barber’s contention to the contrary, the November 15 letter fails to satisfy the above definitions of a final agency action. In the November 15 letter, the Director of the Board’s Candidacy and Campaign Finance Division stated that an audit had revealed a violation of EL § 13-218(b)(1)(ii).⁹ Although the Board is authorized by

⁹ EL § 13-218(b)(1) provides:

(b)(1) Assets of a campaign finance entity may be disbursed only:
(i) if they have passed through the hands of the treasurer; and
(ii) in accordance with the purposes of the entity.

The letter of November 15 asserted that the payment of personal legal fees would not be disbursements made “in accordance with the purposes of the entity.”

EL § 13-604.1(g) to issue its own civil citations “to any person the State Board believes is committing or has committed a violation **specified** in subsection (b) of this section” (emphasis added), the violation asserted in this instance — a disbursement in violation of EL § 13-218(b)(1)(ii) — is *not* one of the eight violations specified in EL § 13-604.1(b). Consequently, the Board itself could not issue its own civil citation or directly prosecute the alleged violation, but could only refer the allegation of a violation to either the State Prosecutor or the State’s Attorney. *See* EL §§ 13-603 and 13-604. By sending the letter to the Committee *before* referring the alleged violation to the State Prosecutor, the Board was providing the Committee a notice that, in this case, served the purpose of avoiding a referral of the audit issue to the State Prosecutor. But the letter did not finalize any legal relationship or impose any enforceable obligation on Ms. Barber or the Committee, and, therefore, was not a final decision of an agency subject to judicial review.

2. Possibility of Criminal Charges

Ms. Barber and the Committee contend that the Board’s issuance of the November 15 letter denied them due process because they would have been “required to become a criminal defendant in a lawsuit brought by a state prosecutor” in order to contest the statements made in the audit letter.

As noted above, if Ms. Barber had not repaid the monies within 30 days as she did, the Board’s only option to press for repayment of the funds to the Committee would have been to refer the matter to the State Prosecutor for consideration of issuing a civil citation pursuant to EL § 13-604. (Although the Board theoretically could have also

referred the matter to either the State Prosecutor or State's Attorney for consideration of criminal charges pursuant to EL § 13-603, and also could have asked the Secretary of State to seek an injunction pursuant to EL § 13-605, there is nothing in the record to suggest that the State Prosecutor would have pursued criminal charges rather than issue a civil citation pursuant to EL § 13-604 and -604.1.) If a civil citation had been issued by the State Prosecutor, Ms. Barber and the Committee would have been entitled to a trial in the District Court pursuant to EL § 13-604(d).

But it is clear that the Board never referred Ms. Barber to the State Prosecutor or State's Attorney. The Board did not ask the Secretary of State to seek an injunction. Ms. Barber was never subjected to criminal prosecution. As of the issuance of the letter dated November 15, 2016, there was no legal relationship fixed, there was no final finding of criminal or civil liability, and, therefore, there was no final decision of an agency subject to judicial review. *See Maryland Com'n on Human Relations, supra*, 296 Md. at 54–57.

3. The Board's Non-Issuance of Declaratory Ruling

Ms. Barber asserts that the Board violated her right to due process by not issuing a declaratory ruling on whether the legal expenditures she had already repaid were proper campaign expenditures.

Ms. Barber requested a declaratory ruling from the Board under COMAR 33.01.02.01, which explains that “[a]n interested person may petition the State Board for a declaratory ruling on the manner in which the Board **would** apply” a Board regulation, order, or statute that the Board enforces. (Emphasis added.) When Ms. Barber requested

a declaratory ruling, the Board was authorized by COMAR 33.01.02.03B(2) to decide whether to issue or decline to issue a declaratory ruling. That controlling regulation expressly states that the Board shall *either* issue a declaratory ruling *or* tell the petitioner why it is not issuing a declaratory ruling. 33.01.02.03B(2). Here, for reasons set forth in Ms. Charlson's memorandum, the Board exercised its plenary discretion not to issue a declaratory ruling. Consequently, there was no declaratory ruling for the circuit court to review pursuant to COMAR 33.01.02.05.

4. Notice of Appeal Rights

Ms. Barber and the Committee argue that they were denied due process because the Board's letter dated November 15, 2016, did not advise them of appeal rights. The Board responds that it made no ruling which was subject to appeal, and therefore, there were no appeal rights that could be described. The Board further asserts that there is no statute or regulation that imposes upon it a duty to include an explanation of appeal rights in correspondence sent to candidates and campaign committees.

We agree with the Board that, at the points in time when the Board sent the letter dated November 15, 2016, and provided notice that it was not issuing a declaratory ruling, no right to "appeal" or seek judicial review had arisen, and the Board was under no legal duty to give notice of any rights.

Ms. Barber urges this Court, as she urged the circuit court, to adopt the notice requirement imposed by the District of Columbia Court of Appeals in *Zollicoffer v. DC Public Schools*, 735 A.2d 944 (D.C. 1999). In that case, a parent's agency-level appeal

of an order dismissing a student from school was rejected by the agency as having been filed too late. The parent then petitioned for judicial review, arguing that the appeal of the school superintendent's ruling should not have been dismissed by the school board as untimely. The District of Columbia Court of Appeals observed that, under its precedents, “[i]n administrative matters, an agency is charged with ‘giving notice which was reasonably calculated to apprise [a party] of the decision . . . and an opportunity to contest that decision . . .’ *Gosch [v. District of Columbia Dep’t of Employment Servs.]*, 484 A.2d 956, 957 (D.C.1984)).” In her brief, Ms. Barber quotes the following passage from *Zollicoffer* in support of her request that we require the Board to provide explanations of appeal rights:

“The time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters.” *District of Columbia Pub. Employee Relations Bd. v. District of Columbia Metro. Police Dep’t*, 593 A.2d 641, 643 (D.C.1991). A failure to file a notice of appeal within the required time period divests the agency of jurisdiction to consider the appeal. *Thomas v. District of Columbia Dep’t of Employment Servs.*, 490 A.2d 1162, 1164 (D.C.1985). “We have recognized, however, that a prerequisite to invoking this jurisdictional bar is the agency’s ‘obligation of giving notice which was reasonably calculated to apprise petitioner of the decision of the [hearing officer] and an opportunity to contest that decision through an administrative appeal.’” *Id.* (quoting *Gosch v. District of Columbia Dep’t of Employment Servs.*, 484 A.2d 956, 957 (D.C.1984)).

735 A.2d at 945-46.

Pointing to *Zollicoffer*, Ms. Barber asks us “to adopt” a requirement that the Board “must give notice apprising a petitioner of the decision and an opportunity to contest that decision through an administrative appeal,” and that we further hold that “a failure to do

so renders the decision ‘inadequate as a matter of law.’” She cited no Maryland authority that imposed this notice requirement on all Maryland agencies.

The Board asserts that no Maryland statute or regulation requires it to include an explanation of appeal rights in letters it sends communicating the findings of its audits. The Board distinguishes *Hughes v. Moyer*, 452 Md. 77 (2017), wherein the Court of Appeals examined the obligation of an appointing authority to provide a State employee written notice of the employee’s appeal rights at the same time the employee is notified of a disciplinary action. The Board notes that a specific statute — namely, Maryland Code (1994, 2015 Repl. Vol.), State Personnel and Pensions Article, § 11-106(a)(5) — expressly mandates that an explanation of the employee’s appeal rights be provided under those circumstances. No statute or regulation imposes an analogous duty upon the Board.

Regardless, the circuit court did not dismiss the petition for judicial review as untimely, and therefore, it is not necessary for us to decide in this case the question of whether the Board erred by not providing an explanation of appeal rights.

5. Circuit Court’s Order

The appellants’ final contention is that the circuit court failed “to acknowledge Appellants’ Amended Petition spelling out declaratory and injunctive relief as well as Ms. Barber’s Supplemental Exhibits reflecting substantive due process claims. . . .” In their brief, appellants provide this argument in support of this issue:

As noted above, the lower court dismissed Appellants’ case after making the erroneous assumption the requested relief was only monetary damages mentioned in the prayer for relief. That was clear error when paragraphs 29, 30 and 32 sought other relief. E.12-14. (Appx. Vol. 1, pp.

33-36.). If neither monetary nor equitable relief is allowed in a Petition for Judicial Review, then the question begs what relief does the lower court want to see in a Petition for Judicial Relief [sic]? The failure to answer this question is clear error.

It is not clear to us why appellants assert that the circuit court made an erroneous assumption regarding the requested relief. It appears to us that the circuit court considered the relief requested in Paragraphs 29, 30, and 32 of the Amended Petition for Judicial Review, and concluded that a court could not grant those requests if the case was not properly before the court for judicial review. The referenced paragraphs were as follows:

29. Petitioners ask this tribunal to vacate the decision of DeMarinis and subsequent denial of Petitioners' declaratory ruling, which resulted from an unlawful procedure to circulate a letter to the public without due process to Petitioners.

30. Petitioners ask that the letter be rescinded because it was unsupported by competent, material and substantial evidence and done without notice and opportunity to be heard from Petitioners in violation of the due process clause of the 14th Amendment as applicable to states.

32. Petitioners seek reversal of the denial of Petitioners' Petition for Declaratory Ruling issued by the Board of Elections because it was rendered without procedural and substantive due process, and done without regard to Petitioners' specific questions pertaining to the "nexus" requirement based on supplemental documents submitted.

It appears to us that those requests for relief are fully subsumed within the prayers for relief that were set forth in Paragraphs (A) through (F) at the end of the Amended Petition for Judicial Review. It further appears to us that the circuit court considered these claims for relief and concluded that they were not available pursuant to a petition for judicial review of the two Board actions that were the basis of this litigation.

With respect to the supplemental exhibits, the record reflects that, on January 11, 2018, Ms. Barber's filed "supplemental exhibits" that, she said, should have been part of the record. They were copies of the e-mail from Ms. Barber to Donna Duncan dated November 19, 2016, and the e-mail from Ms. Barber to Linda Lamone dated December 5, 2016 (both of which were mentioned above in this Court's discussion of the background). Because the circuit court's opinion and order were filed on January 12, 2018, Ms. Barber asserts that these documents were likely not considered by the court.

We note that the appellants did not file a post-judgment motion in the circuit court that could have clarified whether the court did or did not have the benefit of reviewing these documents. But, even if it was somehow error for the court to have issued its ruling on the motion before reviewing the supplemental exhibits that were filed (over three months after the court heard oral arguments on the motion to dismiss), appellants have not persuaded us of any prejudice that flowed from that lack of consideration. Accordingly, any error would have been harmless at most. As the Court of Appeals has stated, in civil cases: "It is the policy of this Court not to reverse for harmless error and the burden is on the appellant in all [civil] cases to show prejudice as well as error." *Crane v. Dunn*, 382 Md. 83, 91 (2004); accord *Consolidated v. Standard*, 421 Md. 210, 219 (2011).

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**