Circuit Court for Montgomery County
Case No. 4445722V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2409

September Term, 2018

BERNADETTE F. LAMSON

v.

MONTGOMERY COUNTY, MARYLAND,
et. al.

Berger,
Beachley,
Wells,

JJ.

Opinion by Wells, J.

Filed: May 5, 2020

Appellant, Bernadette Fowler Lamson, filed an ethics complaint with the Montgomery County Ethics Commission, co-appellee. In her complaint, she alleged that the Office of the County Attorney acted unethically when it engaged in practices that, in her words, "traded the prestige of the office for private gain," created conflicts of interest, and engaged in *ex parte* communications with members of the Ethics Commission. The Ethics Commission dismissed the complaint. Lamson subsequently sought judicial review in the Circuit Court for Montgomery County. The circuit court dismissed the petition, finding that Lamson had no standing.

Lamson appeals and poses two questions for our review, which we reprint verbatim:

1. Whether the circuit court erred in dismissing Appellant's appeal of the Commission's decision for lack of standing?

2. Whether the circuit court erred in failing to disqualify Whiteford from representing the County on grounds of conflict of interest?

We answer both questions in the negative and affirm the circuit court.

FACTUAL AND PROCEDURAL HISTORY

a. The Ethics Complaint

This appeal stems from on-going litigation between Bernadette Lamson and her former employer, the Montgomery County Office of the County Attorney ("the County Attorney"). Starting in September 2015, Lamson filed a series of grievances against the County Attorney with the Merit Systems Protection Board ("MSPB"). Since October 2015, Lamson has filed multiple requests for information from her former employer under the Maryland Public Information Act ("MPIA"). The County hired the law firm of

Whiteford, Taylor, & Preston, L.L.P. ("Whiteford Taylor") to act as counsel in these lawsuits.

The litigation previously made its way to us after the County Attorney denied Lamson's request for access to her supervisor's performance evaluation notes under the MPIA. In an unreported opinion dated August 25, 2017, to be found at 2017 WL 3668171, a panel of this Court affirmed the circuit court's denial of judicial review. Later, the Court of Appeals reversed us in *Bernadette Fowler Lamson v. Montgomery County*, 460 Md. 349 (2018), and vacated the circuit court's order of dismissal and remanded to that court with instructions to evaluate the propriety of the County Attorney's denial of Lamson's access to the requested information. *Id*. at 328-29.

As an outgrowth of this litigation, on February 22, 2018, Lamson filed a complaint with the Montgomery County Ethics Commission ("the Ethics Commission"). The complaint stated that her former employer violated county ethics laws by using public funds to hire Whiteford Taylor to defend it against her accusations.

In the second count of the complaint, Lamson claimed the County Attorney violated its own policy of sequestering attorneys to prevent conflicts of interest. Specifically, Lamson alleged that one Assistant County Attorney ("ACA") engaged in conversations with an Ethics Commission hearing officer who was reviewing Lamson's MSPB grievances and then spoke to his colleagues in the County Attorney's office about what was said. Lamson also claimed another ACA spoke with an Ethics Commission hearing officer about a different ACA's handling of one of the MSPB grievances.

The Ethics Commission found no merit in either of Lamson's allegations and dismissed her complaint. In an order dated March 28, 2018, the Ethics Commission wrote, "the complaint does not allege facts sufficient to state a violation of the Ethics Laws of Montgomery County."

b. The County Moves to Dismiss the Petition for Judicial Review

Twenty days later, on April 17, 2018, Lamson filed a petition for judicial review. The County filed a response and moved to dismiss the petition. The Ethics Commission filed its own response.

In its motion to dismiss, the County asserted that Lamson lacked standing to challenge the Ethics Commission's decision. The County maintained that the only parties to the complaint were the Ethics Commission and the County and its subordinate offices. Further, the County argued that even if Lamson were not a party, she is not aggrieved, and thus had no standing.

Lamson opposed dismissal. She asserted that it would be absurd for the only parties to an ethics complaint to be the County and the Ethics Commission. She claimed she became a party when she filed the complaint. As for aggrievement, Lamson insisted that because the County Attorney used public money from the Self-Insurance Fund to finance its defense, the County Attorney had a substantial financial advantage over her. Lamson also claimed she was aggrieved because with the dismissal of the complaint the alleged *ex parte* communications between the County Attorney and the MSPB would now go unaddressed.

The County countered by reiterating that Lamson is a non-party to the Ethics Commission. The County posited that Lamson was trying to bootstrap her grievance before the MSPB into an ethics complaint and thereby derive aggrieved status. In support of its position, the County cited several out-of-state cases that hold where a statute does not explicitly confer party-status on a complainant, but defines who a party is elsewhere, merely filing an ethics complaint does not confer party-status.

Additionally, the County argued Lamson cannot use judicial review to force the Ethics Commission to act. In the County's opinion, judicial review evaluates the propriety of the Ethics Commission's actions, not to provide Lamson an additional forum to air her grievances. In sum, the County argued that while Lamson may lodge an ethics complaint, only the Ethics Commission may investigate and prosecute unethical behavior.

c. Lamson's Preliminary Motion to Disqualify Whiteford Taylor

Before the circuit court considered the merits of the motion, Lamson moved to disqualify Whiteford Taylor from representing the County at the hearing. Lamson argued that under Maryland Rule of Professional Conduct 1.7, Whiteford Taylor had a non-waivable conflict of interest that prevented it from representing the County. According to Lamson, Whiteford Taylor could not defend the County Attorney before the MSPB and circuit court on an ethics complaint that arose from the MSPB litigation.

In response, the County insisted that there was no conflict of interest. Alternatively, the County claimed that if a conflict existed, it would have to be between Whiteford Taylor, the County, the County Attorney's staff, and, most importantly, Lamson. The County asserted that Whiteford Taylor never had a relationship with Lamson. The County argued

that for a conflict of interest to arise, Lamson would have to be able to enforce the County's ethics laws, which she cannot.

Lamson conceded Whiteford Taylor had never been her attorneys, but maintained that an un-waivable conflict of interest existed nonetheless. Lamson claimed that the conduct of the County Attorney's staff during the pendency of her grievances before MSPB was the basis of the conflict. Lamson argued that the County should have hired a different law firm, specifically one that had not worked on the MSPB and MPIA litigation. As evidence of a conflict, Lamson offered Whiteford Taylor's billing records which purportedly showed they billed the County for representation in both the ethics complaint and the MSPB grievance matters.

d. The Circuit Court's Ruling

After a hearing, the motions court noted "[t]he basis set out in the motion is that it is contended that Whiteford's representation of its client in this case violates Maryland Rule 1.7." Then, the circuit court discussed how disqualification cases should be analyzed by explaining that,

> [t]he Court of Special Appeals gave us a road map, if you will, as to what to do first. Look to see if the moving party has identified a specific violation of a specific rule of professional conduct. Then the Court determines whether there was or was not an actual violation of the rule that's alleged to have been implicated. Court of Special Appeals then says disqualification, nonetheless, is not automatic, and that the court has to bring to bear certain factors to then exercise discretion to determine whether or not to disqualify a law firm and to grant the motion.

The court observed, "that the only party that Whiteford represents is the County as a municipal government. I find Whiteford does not represent and has not entered an

appearance on behalf of any of the named individuals who have been named as defendants in this case by plaintiff." And with regard to the Ethics Commission, the court specifically found that they "retained separate counsel, and no motion has been made to disqualify counsel for the [E]thics [C]ommission."

The motions court then ruled on the alleged conflict of interest stating:

> I am not persuaded that 1.7 is implicated. I do not see any conflict of interest because Whiteford only has, in my case, one client, and the only case before me, respectfully, is this case, [Civil Case No.] 445722. What, if anything, is going on in other venues before other judicial or administrative officers is not before me, and I have no authority to get involved in those cases. If there are matters that should be properly addressed by those administrative or judicial officers, they certainly can be raised, but I am not persuaded that 1.7 is implicated. I do not see, respectfully, any actual conflict. I do not see any apparent conflict.
>
> Respectfully, the motion [to disqualify Whiteford Taylor] is denied.

The motions court then turned to the County's motion to dismiss and directly addressed the issue of standing.

> [The] Court has reviewed the papers filed by both sides, who have both well briefed the issues in this case and there are a number of concepts that are relevant to ultimately the decision here. The Court is persuaded, largely for the reasons set forth by the County in its moving papers, that the, the petitioner lacks standing, as the Court of Special Appeals has interpreted that phrase.

On the issue of whether Lamson could create standing merely by filing an ethics complaint, the court said:

> The Court is also persuaded that there is no private right of action in this context that has been created that would afford a private citizen a right of action against the Ethics Commission.
>
> * * *
>
> The Court is persuaded that the petitioner lacks a judicially cognizable interest. She was not the subject of the Ethics Commission inquiry. She was

> not the subject of a decision. She was not, in my judgment, aggrieved, as that phrase has been judicially defined by the appellate courts in Maryland, for purposes of conferring standing for judicial review.
>
> I realized that some of the analogies to grand juries and state's attorney are imperfect analogies, but essentially, what is being sought here is an effort to force an investigative and prosecutorial body to take an action that they have declined to take. The motion to dismiss is granted, and for those reasons the Court need not reach any other issues or questions that have been raised.

Lamson then filed this appeal.

DISCUSSION

We address both of Lamson's contentions in the order raised in her questions. We begin with a determination of whether the circuit court erred in dismissing the petition for judicial review.

I. Motion to Dismiss

a. Standard of Review

In *A.C. v. Maryland Commission on Civil Rights*, we wrote that "our review of the circuit court's grant" of the respondent's "motion to dismiss is de novo." 232 Md. App. 558, 568 (2017). There, A.C. had been fired from the Maryland Attorney General's Office where they had been employed. *Id*. at 563. Despite A.C.'s claim to the contrary, the Maryland Commission on Civil Rights found "no probable cause" that the Attorney General's office discriminated against A.C. based on race. *Id*. A.C. then filed a petition for judicial review of the final order and the Commission moved to dismiss. *Id*. The circuit court subsequently granted the Commission's motion. *Id*.

We noted that when we review a motion to dismiss we assume the truth of "the well-pleaded factual allegations of the complaint, including the reasonable inferences that may be drawn from those allegations." *Id*. at 569 (*quoting Gasper v. Ruffin Hotel Corp. of Maryland*, 183 Md. App. 211, 226 (2011); *Adamson v. Corr. Med. Servs*., 359 Md. 238, 246 (2000)). "Furthermore, issues of statutory interpretation are legal issues for which we review for legal correctness." *Id*. (*citing Falls Road Community Ass'n v. Baltimore Cnty*., 437 Md. 115, 134 (2014)).

b. Lamson's Contentions

Lamson argues that the circuit court should have found that she had standing to seek judicial review of the Ethics Commission's dismissal of her complaint. Lamson asserts that even without a statutory private right of action found within the Montgomery County Public Ethics Code ("MCPEC"), Lamson nevertheless claims she, as the complainant, may appeal an Ethics Commission determination.

Even though MCPEC does not contain language that expressly establishes a private right of action, Lamson nonetheless encourages us to interpret the code to create one. Lamson argues that a previous version of the ethics code, which provided for a private right of action, should be our guide. To bolster her position, Lamson relies on the holding in *Sugarloaf Citizens Ass'n v. Gudis*, 78 Md. App. 550, 562, *aff'd* 319 Md. 558 (1990) which addressed whether a member of the public could bring a private action under the now-superseded version of the Montgomery County Ethics Code. Lamson readily admits that *Gudis* did not address the situation found here. Rather, she asserts that because there is no

authority found in MCPEC that explicitly forbids her from bringing a private suit to enforce the code's provisions, she can.

Alternatively, while Lamson tacitly concedes she is a non-party, she asserts that she was aggrieved by the dismissal of the complaint, and thus acquired standing. Specifically, Lamson posits that because of the Ethics Commission's dismissal of her complaint, she "is personally and specifically affected in a way different from the public generally." As we understand her argument, she is aggrieved because with the dismissal of her complaint, her allegations go un-addressed. According to Lamson, the public knows nothing of the County's alleged wrongdoing because ethics complaints are confidential, thus, she is the only aggrieved party.

Lamson maintains that her aggrievement is unique to her for several reasons. She claims that the County used public funds to defend itself against her claims before the MSPB and the MPIA litigation. This, Lamson alleges, is a misuse of "the prestige of office" found at MCPEC §19A-14. Specifically, Lamson claims that the County's use of public funds to hire Whiteford Taylor "stack[ed] the deck" against her. In Lamson's opinion, the public, who know nothing of the County's supposed wrongdoing, do not suffer, but she does.

Finally, Lamson claims that the various alleged *ex parte* communications made between members of the County Attorney's Office and hearing officers on the Ethics Commission are specific to her, not the public. Consequently, in Lamson's view, she, not the public is aggrieved by the Ethics Commission's dismissal of her complaint.

c. The County's Contentions[1]

First, the County asserts that Lamson is neither a party to the ethics complaint nor is she aggrieved, as defined by appellate opinions. *Greater Town Council of Cmty. Ass'ns. v. DMS Dev., LLC*, 234 Md. App. 388, 409 (2017); *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 344 Md. 271, 286 (1996) (in the administrative law context, standing derives solely from being a party and being aggrieved.) Further, the County notes that MCPEC § 19A-10(f), explicitly states that "the parties to the hearing are the subject of the complaint and the County." While MCPEC does not explicitly state who may appeal a decision of the Ethics Commission, the County argues that standing derives from the statutory scheme.

Additionally, the County points out that MCPEC § 19A-6(d) states only "a person affected by a final decision of the [Ethics] Commission . . . may ask the Commission for a rehearing or reconsideration." In the County's estimation, it would be illogical for the County Council to have restricted who could seek reconsideration but allow "anyone" to seek judicial review of an adverse Ethics Commission decision.

At oral argument, counsel for the Ethics Commission also addressed this issue. Counsel for the Ethics Commission argued that the intent of the County Council in passing MCPEC § 19A-6 was specifically to disallow non-parties from appealing Ethics Commission decisions. Further, counsel averred that the County Council did not contemplate that a non-party would seek review of an Ethics Commission decision.

[1] The Montgomery County Ethics Commission joins the County's arguments, except the section in County's brief that discusses the sufficiency of Lamson's ethics complaint because the Ethics Commission never adjudicated that issue.

According to counsel, the County Council envisioned that only parties, as defined in MCPEC §19A-10(f), would seek judicial review.

Second, the County argues that even if Lamson were able to establish standing, Lamson failed to establish the necessary predicate: aggrievement. The County notes that Md. Rule 7-202 requires a non-party petitioner to state the basis for standing to bring judicial review of an agency decision. And, critically, according to the County, standing requires the petitioner to have the status of being aggrieved. *See Jordan Towing, Inc. v. Hebbville Auto Repair, Inc*., 369 Md. 439, 443 (2002); *Greater Towson Council of Cmty. Ass'ns*, 234 Md. App. at 406 (internal citations omitted).

The County argues that by law, the Ethics Commission has complete discretion to pursue alleged violations of the MCPEC, not members of the public. According to the County, as an arm of the executive branch, the Ethics Commission's decision to prosecute is plenary by virtue of its authorizing statute. *Spencer v. Md. Bd. Of Pharm.*, 380 Md. 515, 533 (2004). The only exceptions are in the case where the Ethics Commission commits "fraud or egregious behavior." Lamson does not allege the Ethics Commission's decision was the product of "fraud or egregious behavior."

Third, the County assails the merits of Lamson's complaint. The County maintains that Lamson's complaint about the misuse of "the prestige of office" is without merit. Recall that what Lamson means by this allegation is that the County's use of public funds to defend itself against her complaints was improper. According to the County, Lamson's claim is meritless because Lamson cites no authority to support her proposition. The

County also maintains it is fully within the County's authority to use public funds to defend itself against Lamson's complaints.

The County argues that Lamson's allegation that the members of the County Attorney's Office engaged in improper communications with members of the Ethics Commission are meritless. The County asserts that members of the County Attorney's Office who communicated with the Ethics Commission did so as legal advisors. The County also argues that communications between a legal advisor and an administrative law judge ("ALJ") is not necessarily improper, even by the standards that Lamson cites. Further, the County explains that the County Attorneys who communicated with the ALJs did so solely to put the judges on notice that Lamson had made additional claims. The County insists that the County Attorneys and the ALJs did not have substantive discussions about the merits of the grievances.

Fourth, the County asserts that even if Lamson were to prevail, this Court cannot implement the remedies that Lamson requests. Specifically, Lamson demands that we (1) agree with the merits of her complaint, (2) order the Ethics Commission to fashion an appropriate remedy and (3) retain jurisdiction to ensure that the remedy is properly implemented.

Finally, the County urges us to realize that if we agree with Lamson, we would effectively be deputizing her to enforce the County's ethics laws. The County argues that enforcement of its ethics laws should remain wholly within the jurisdiction of the Ethics Commission.

d. Analysis

1. Statutory Framework

Maryland Code, General Provisions ("GP") Article, § 5-807(a) (2014, 2018 Repl. Vol.), provides that "subject to § 5-209 of this title, each county shall enact provisions to govern the public ethics of local officials relating to conflicts of interest."[2] (cleaned up). Montgomery County, in accordance with GP § 5-807(a), adopted the current version of the Montgomery County Public Ethics Law in 1990. Sec. 19A-1 (1990).[3]

[2] GP § 5-209:

(a) The Ethics Commission may exempt from this title or modify the requirements of this title for a board, a member of a board, or a municipal corporation if the Ethics Commission finds that, because of the nature of the board or the size of the municipal corporation, the application of this title to that board, member, or municipal corporation:
   (1) would be an unreasonable invasion of privacy;
   (2) would reduce significantly the availability of qualified individuals for public service; and
   (3) is not necessary to preserve the purposes of this title.
(b) Subject to § 5-502(d) of this title, the Ethics Commission may grant an exemption to a board or member of a board only on written request of the executive unit of which the board is a part.
(c) Notwithstanding any other provision of this title, the records of the Ethics Commission in any matter in which an exemption is granted under this title shall be available for public inspection.

[3] GP § 5-502(d), referenced in GP § 5-209(b), is not relevant to resolution of this case.

Montgomery County makes the Montgomery County Code available at: https://bit.ly/37BKCC1. It is worth noting that the Montgomery County Public Ethics Law is older than the Maryland Public Ethics Law.

The MCPEC defines an "agency or county agency" as "any department, principal office, or office of the executive or legislative branch of County government." MCPEC § 19A-4(a)(1). It is uncontested that this would make the County Attorney subject to any section of the MCPEC that would apply to any "agency or county agency."

We note that the MCPEC provides the Ethics Commission with "Administrative Support," which may include legal assistance from the Office of the County Attorney. *See*, MCPEC §19A-5(f). Specifically, "[t]he Commission may ask the County Attorney to provide an opinion on any legal issue relating to the Commission's duties." MCPEC § 19A-5(f)(2). And,

> The County Attorney must, on request of the Commission, provide the Commission with legal services. The County Attorney must provide an attorney to prosecute a case before the Commission under Section 19A-10 unless the Commission assigns or retains a different attorney or other staff member to perform that function. An individual attorney in the office of the County Attorney who is assigned to provide general legal advice to the Commission must not be an investigator under Section 19A-9 or prosecute a case before the Commission under Section 19A-10 for one year after the attorney's Ethics Commission assignment ends.

MCPEC § 19A-5(f)(3).

With regard to complaints, anyone may file a confidential written complaint with the Commission. MCPEC § 19A-10 (a)(1). Further, "[t]he complaint must allege *facts under oath that would support a reasonable person in concluding that a violation of this § or Sections 2-109, 11B-51 or 11B-52(a) occurred*." *Id*. (emphasis added).

MCPEC § 19A-10(a)(3) states that, "[t]he Commission may refer the complaint to Commission staff or the County Attorney for investigation under Section 19A-9 or may

retain a special counsel or other person to conduct an investigation." And, MCPEC § 19A-10(a)(4) affirms that,

> [i]f the complaint does not allege facts sufficient to state a violation of this section, the Commission may dismiss the complaint. The Commission must inform the complainant of its decision to dismiss the complaint. The Commission may inform the subject of the complaint that the complaint was filed and dismissed but must not disclose the identity of the complainant.

Most importantly, MCPEC § 19A-10(f) specifically defines who is a party to an Ethics Commission proceeding:

> *The parties to the hearing are the subject of the complaint and the County*. The prosecuting attorney may be the investigator who issued a report under Section 19A-9, *an attorney in the County Attorney's office*, or a special counsel. Each party may be represented by counsel. Each party may present evidence and cross-examine witnesses. The subject of the complaint may require the Commission to issue subpoenas for witnesses and documents to the same extent a party in litigation in state court would be entitled to the summons or subpoena.

(emphasis added). Additionally, we observe that Maryland Rule 7-202(c)(1)(C) states that "the petition shall … state whether the petitioner was a party to the proceeding, and if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review."

2. Applicable Appellate Decisions

Recently, in *Greater Towson Council of Community Associations v. DMS Development, LLC*, 234 Md. App. 388 (2017), *cert. denied*, 457 Md. 406 (2018) we discussed how standing may be established to obtain judicial review of an administrative decision. There, a community group, Greater Towson Council of Community Associations ("the community group"), petitioned the circuit court for judicial review of Baltimore

County's approval of a "planned unit development" near Towson University. *Id*. at 398. DMS, the developer, filed a motion to dismiss the petition alleging that Greater Towson Council of Committee Associations lacked standing. *Id.* at 401. The circuit court denied the motion to dismiss and affirmed the county's approval of the development. *Id*. at 402.

After the circuit court approved the development plan, the community group appealed to this Court. The developer, DMS, cross-appealed, arguing that the circuit court erred when it denied the motion to dismiss the community group for lack of standing. *Id.* at 397. In determining whether the community group had standing, we said:

> Whether Greater Towson Council of Community Association's appeal "is properly before us depends upon whether Greater Towson Council of Community Associations has standing." A petitioner's establishment of standing demonstrates "the right of the individual to assert the claim in the judicial forum." The Court of Appeals has held that "the claimant alone is responsible for raising the grounds for which his right to access the judiciary system exists. It is well established in Maryland that, in order to have standing to petition for judicial review, a party must meet "two conditions precedent." First, a petitioner "must have been a party to the proceeding before the board." If he or she participated in the case before the board, the court's next inquiry is whether the party is "aggrieved" by the decision of the board.

Id. at 408-09 (internal citations omitted). Similarly, here, in determining whether Lamson meets the "two conditions precedent," to establish standing, we must first examine whether Lamson was "a party to the proceeding" before the Ethics Commission.

a. Party Status

Our research reveals that where a statute defines who is a party to an administrative proceeding, that limitation will control. For example, in *Sugarloaf Citizens' Association, et al. v. Department of the Environment, et al., supra*., homeowners, organized as the

Sugarloaf Citizens' Association ("the association"), opposed Montgomery County operating a waste-to-energy facility on land adjacent to that of the association's members, requested a hearing before an administrative law judge on the issue of the county's application for a permit necessary to begin construction of the waste facility. 344 Md. at 278-282.[4] The ALJ determined that granting the permit would be appropriate, and, therefore, recommended that the Department of the Environment issue the permit. *Id*. at 281-82.

The association sought judicial review in the circuit court. *Id*. at 282. But the circuit court dismissed the petition finding that the association lacked standing to pursue the claim. *Id*. In the association's subsequent appeal to this Court, we affirmed. *Id*.

The Court of Appeals granted certiorari. *Id*. at 284. In its opinion, the Court observed that "a person may properly be a party at an agency hearing under Maryland's 'relatively lenient standards' for administrative standing but may not have standing in court to challenge an adverse agency decision. *Maryland–Nat'l v. Smith*, 333 Md. 3, 11 (1993)." 344 Md. at 285-86. However, the Court of Appeals also noted that, "***absent*** a statute or a reasonable regulation specifying criteria for administrative standing one may become a party to an administrative proceeding rather easily." *Id*. at 286. (emphasis added).

[4] The Court of Appeals distinguished *Sugarloaf Citizens*' *Association* in *Chesapeake Bay Foundation, Inc., et al. v. DCW Dutchship Island, LLC, et al.*, 439 Md. 588, 596-599 (2014). The distinction was, *first*, on the issue of "piggy-back" standing ("if one party has standing to participate in the proceedings, so do all other parties on the same side of the case"). This issue is not raised here. *Second*, was an examination of this Court's holding that if one party has standing in the circuit court, we need not look to see if other parties have standing as well. Likewise, this issue is not raised here either.

Here, unlike in *Sugarloaf*, we have "a statute or reasonable regulation specifying criteria for administrative standing." MCPEC § 19A-10(f) specifically states that, "[t]he parties are the subject of the complaint and the County." *Accord*, *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 599 (2014) (Standing for the purpose of administrative proceedings is "more lenient than judicial standards and is designed to encourage citizen participation.").

We hold under the plain language of MCPEC § 19A-6(c),[5] as a non-party, Lamson cannot seek judicial review in the circuit court. Contrary to Lamson's argument, this limitation on who may seek judicial review of Ethics Commission decisions does not render Section 19A-6(c) superfluous but simply prohibits who may appeal.

Lamson also asserts she has standing as a non-party via an implied right of action found in Maryland Rule 7-202(c)(1)(C). This Rule is, essentially, a fill-in-the-blanks form to be completed by anyone seeking judicial review of an administrative agency's decision. Rule 7-202(c)(1)(C) asks, as part of its instructions, "if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review." On this basis Lamson asserts that she may still seek judicial review, at least by implication.

[5] "A final decision of the Commission on a complaint, request for waiver, or request for other employment approval may be appealed to the Circuit Court under the applicable Maryland Rules of Procedure governing judicial review of administrative agency decisions. An appeal does not stay the effect of the Commission's decision unless the court hearing the appeal orders a stay. Any party aggrieved by the judgment of the Circuit Court may appeal that judgment to the Court of Special Appeals."

She then turns to *Gudis*, *supra*., for support, asserting an implied right of action found that decision.

The short answer to these assertions is that the authority of MCPEC § 19A-10(f), defining who is a party to Ethics Commission proceedings, controls. Further, there is no implied right of action to be found in MCPEC. Had the Montgomery County Council intended to create such a right of action, they could have explicitly done so, but did not.

Further, Lamson's reliance on *Gudis* is misplaced. In *Sugarloaf Citizens Association, Inc. v. Gudis*, the Montgomery County Council voted to place a mass-burn resource recovery facility in Dickerson, Montgomery County.[6] 319 Md. at 561. The facility was to be placed on land in part owned by Potomac Electric Power Co., otherwise known as PEPCO. *Id*. Michael Gudis, a member of the county council, owned PEPCO stock. *Id.* at 562. The Ethics Commission had granted Gudis a waiver of what was an apparent conflict of interest. *Id*. The Sugarloaf Citizens Association sued in the circuit court to "void the action of the Council in approving" the mass-burn facility. *Id*. at 563. The circuit court ruled in Gudis' favor, and the Citizens Association appealed to this Court. *Id*.

We affirmed, holding that there was no implied right of action under the then-existing version of the MCPEC for the Citizens Association to file suit to void the county

[6] *Gudis* was decided under a now-superseded version of the Montgomery County Public Ethics Law.

council's decision. *Sugarloaf Citizens Ass'n. v. Gudis*, 78 Md. App. 550, 560 (1989). We did not, however, reach the question of the validity of the waiver. *Id*.

The Court of Appeals affirmed this Court but did so holding that the then-existing version of MCPEC was unconstitutional. 319 Md. at 563, 580. The Court explicitly said it would not address our contention that there was no implied right of action.

> The Court of Special Appeals thought "the genesis for Sugarloaf's cause of action was the Montgomery County Ethics Law." The intermediate appellate court held that "no private right of action, implied or otherwise, exists under [then]-section 19A-22(b) [relating to relief the County may seek when conflicted county councilors vote on issues the councilor might have a financial interest] of the Montgomery County Code." Whether [then-]§ 19A-22(b) creates an implied or express private cause of action is not critical to our decision and is a question we do not address.

Id. at 566-567. The Court of Appeals held that the Citizens Association had standing. But, this was because the Citizens Association made a constitutional challenge to the underlying statute. *Id*. Here, critically, Lamson does not make a constitutional challenge to the MCPEC. Consequently, we determine that *Gudis* does not create an implied right of action as Lamson claims.

b. Aggrievement

Both sides agree that to establish aggrievement one must have an "interest such that they are personally and specifically affected in a way different from the public generally." *Patel v. Board of License Commissioners for Somerset County*, 230 Md. App. 195, 209 (2016). They disagree whether Lamson is actually aggrieved.

We examine both of Lamson's specific allegations to determine whether she meets the definition of aggrievement. *First*, Lamson alleged that she was aggrieved because the

county used public money from the Self-Insurance Fund ("SIF") to defend itself in the grievances she filed against the County Attorney. As we see it, the county code provides that SIF Funds may be used, "to compensate for … any other type of civil or tortious action resulting from the negligence or wrongful act of any public … employee within the scope of their official duties." Montgomery County Code § 20-37(c). Here, Lamson brought ethics charges against members of the County Attorney's Office who, at the time, were acting in their official capacities defending their office in the MSPB and MPIA litigation. Lamson does not dispute that the members of the County Attorney's "Management," as she calls them, were at that time, operating in their official capacity as county employees. From this, we cannot conclude that Lamson was personally affected any differently from any other member of the public who sued the county because of the alleged acts of its employees. The effect of suing the county, rather than individual employees, was that the county could use the SIF Funds.

Second, Lamson was also not aggrieved by the so-called "*ex parte* communications." From what we have gleaned from the record, it appears that what Lamson calls "*ex parte* communications" were merely notifications between an ALJ and a County Attorney Division Chief in which the latter informed the former about additional grievances before the MSPB. Lamson has not demonstrated that the communications were substantive.

Further, we agree with the county that the decision to prosecute an allegation of ethical misconduct rests wholly within the authority of the Ethics Commission. The Court

of Appeals has addressed this issue in *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515 (2004). There, the Court of Appeals was asked, in part, to determine whether a pharmacist whose license expired, had the right to challenge an adverse disciplinary decision by the Board of Pharmacy. *Id.* at 523.

Linda Spencer's license to practice pharmacy expired on July 1, 1999. *Id*. at 518. For unknown reasons, despite Spencer's claim that she had submitted a renewal application, her license lapsed. *Id.* at 519. Spencer applied to renew her license, and certified that she had completed the required units of mandatory continuing education. *Id.* In fact, she had done so. *Id*. When the Board of Pharmacy learned that Spencer obtained her continuing education credits only after license expired, the Board sued her for practicing without a license. *Id*.

After negotiations failed to resolve the charges, Spencer requested the matter be forwarded to the Office of Administrative Hearings. *Id*. The Board declined the request, stating that it had never previously forwarded a matter to the Office of Administrative Hearings and there was no reason the Board could not impartially hear the issue. *Id.* at 520. The Board found that Spencer had committed statutory violations, reprimanded her, issued her a fine, and placed her on a probationary status. *Id*. Spencer petitioned for judicial review in the circuit court. *Id*. at 521.

The Circuit Court for Baltimore City vacated the Board's order and remanded with instructions to send the case to the Office of Administrative Hearings. *Id*. On direct appeal

to this Court, we also remanded with instructions to send the matter to the Office of Administrative Hearings. *Id*. at 521-22

The Court of Appeals reversed. The Court held that it was neither arbitrary nor capricious for the Board, under its discretion afforded by statute and regulation, to refuse to send the case to the Office of Administrative Hearings. *Id*. at 531-32. The Court also noted that:

> [a]n agency's prerogative with respect to case referral to the Office of Administrative Hearings is similar in scope to that of the agency's prerogative in . . . forgoing prosecution of a particular individual. In such cases, it is most difficult to apply or even articulate a judicial standard by which the agency's discretionary decision might be deemed arbitrary or capricious. . . .The reviewing court, absent some showing of fraud or egregious behavior on behalf of the agency, will be hard pressed to articulate a reason why the agency acted arbitrarily or capriciously when it did not send the case to the OAH.

Id. at 533. While *Spencer* applied the Maryland Administrative Procedure Act, Maryland. Code Annotated, (1984, 2009 Repl. Vol.), State Government Article § 10-205(b), we are not aware of any case since *Spencer* that has taken a contrary position.

Accordingly, even if Lamson had standing, and we reiterate that she does not, the Ethics Commission's decision here should not be disturbed "absent some showing of fraud or egregious behavior." Lamson did not raise, let alone prove, such an allegation. Consequently, the Ethics Commission's decision will not be disturbed on appeal.

II. Motion to Disqualify Whiteford Taylor

a. Standard of Review

In *Klupt v. Krongard*, 126 Md. App. 179 (1999), we discussed the standard of review of a motion to disqualify opposing counsel. There, we determined that "first, the moving party must identify a specific violation of a Rule of Professional Conduct." *Id*. at 203. If found, "the court must determine whether there was an actual violation of the rule." *Id*. We noted, however, that "[i]t is well settled, however, that the court's finding of a violation of an ethical rule does not result in automatic disqualification. Rather, even after the court's finding of an ethical violation, it remains within the discretion of the court whether to impose the sanction of disqualification." *Id*. at 204. Additionally, we held that while the court's factual findings regarding disqualification would be reviewed for clear error, the court's ultimate decision of whether to disqualify would be reviewed for abuse of discretion. *Id*. (cleaned up).

Maryland Rule 8-131(c) states that "[a] finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." We have stated that "[o]ur task is limited to deciding whether the circuit court's factual findings were supported by 'substantial evidence' in the record. And, to that end, we view all the evidence 'in a light most favorable to the prevailing party.'" *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455-56 (2004) (internal citations omitted).

Under an abuse of discretion standard, we consider whether "no reasonable person would take the view adopted by the [trial] court[,]" whether a circuit court's ruling is

"violative of fact and logic[,]" and whether the decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418-19 (2007) (quoting *Wilson v. John Crane, Inc.*, 385 Md. 185, 198-99 (2005)) (some alteration in original). And, where an order of the trial court "involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

b. Identification of the Proper Rule of Professional Conduct

Applying the test articulated in *Klupt*, we look to the first prong: identification of the specific rule of professional conduct that Lamson claims Whiteford Taylor violated. The circuit court correctly found that Maryland Rule of Professional Conduct ("MRPC") 1.7 (Maryland Rule 19-301.7), applied. *See, Klupt*, 126 Md. App. 179 at 203-04. MRPC 1.7 states:

> (a) Except as provided in section (b) of this Rule, an attorney shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney.
>
> (b) Notwithstanding the existence of a conflict of interest under section (a) of this Rule, an attorney may represent a client if:
>
> (1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

c. Factual Findings

As noted, the circuit court found that Whiteford Taylor represented the County only. The parties agreed that Whiteford Taylor did not provide Lamson with legal representation at any time in the past. The court found that Whiteford Taylor had not previously made an appearance on behalf of any of the County Attorney's staff. The court also found that the Ethics Commission had separate counsel. From the record, we determine that there was sufficient evidence to support the circuit court's findings of fact. For example, Lamson's papers, including Whiteford Taylor's billing records confirm that the law firm represented the County only. There is nothing in the record to suggest that Whiteford Taylor has ever represented the County Attorney, other than to defend it in moving to dismiss Lamson's petition for judicial review. Reviewing these facts in the light most favorable to the County, the prevailing party, we do not perceive clear error in any of these factual findings.

d. Determination of Actual Violation of the Rule of Professional Conduct

Under the second prong of *Klupt*, we next examine the legal determinations that the circuit court made in determining if the County violated MRPC 1.7. We review those determinations without deference to the circuit court. *See*, *Klupt*, 126 Md. App. 179 at 203-04. We determine that the circuit court was legally correct in finding that no violation of MRPC 1.7 occurred.

Lamson insists MRPC 1.7 bars actual and potential conflicts of interest. Her argument is that because Whiteford Taylor represented the management of the County Attorney's Office in two proceedings, namely, Lamson's grievance before the MSPB and Lamson's complaint under the MPIA, it cannot represent the County in the proceedings before the Ethics Commission because to do so creates a conflict. Lamson's argument is obscure but focuses on MRPC Rule 1.7 (a)(1)(2), which states:

> (a) Except as provided in section (b) of this Rule, an attorney shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney.

And subsection (b)(4), which states:

> (b) Notwithstanding the existence of a conflict of interest under section (a) of this Rule, an attorney may represent a client if:
> (4) each affected client gives informed consent, confirmed in writing.

As best we can tell, Lamson asserts that Whiteford Taylor cannot claim that the County Attorney acted ethically while also defending that office against the grievances at MSPB.

The County replies that Lamson's argument is untenable. *First*, if accepted, Lamson's argument would mean that counsel could never defend the employees of a business (or a government) in which the employees deny wrong-doing. *Second*, there can be no conflict where Whiteford Taylor has represented the County Attorney against Lamson's multiple complaints when the County Attorney undertook actions on the County's behalf. In other words, there is no evidence that the County and County

Attorney's interests are adverse. Whiteford Taylor insists that Lamson "simply disagrees with positions the County and [Whiteford Taylor] on the County's behalf have taken against her." Finally, Whiteford Taylor notes that even if there were a conflict between the County and the County Attorney, MPRC 1.7(b) permits different clients to have the same representation, if they desire.

We agree with the County. As we see it, there was no conflict of interest in Whiteford Taylor representing the County and the County Attorney when answering Lamson's complaints.

Preliminarily, we note that Lamson cannot identify a factually similar case that supports her position. As noted, the leading case on conflict of interest disqualification is *Klupt v. Krongard*, *supra*. There, a dispute arose out of a failed attempt to license a disposable cardboard videocassette. *Klupt*, 126 Md. App 183-84. A potential licensee, Krongard, sued Klupt claiming he was defrauded. *Id*. at 184-85. The basis of the claim was the allegedly misleading statements Klupt made to Krongard about the cardboard videocassette. *Id*. *Klupt* implicated MRPC 1.7. and 3.7, codified at Md. Rule 19-303.7 ("[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...."). With regard to MRPC 3.7, Klupt sought representation from an attorney who had represented the original licensee of the invention, and counsel was likely to be called as a witness at trial. *Id*. at 205-06. We held that the trial court was correct that the attorney could not both represent Klupt and be a potential witness. *Id*. at 208-09.

We undertook a separate analysis of Rule 1.7 because it is referenced in the comments of Rule 3.7. *Id*. at 209. We held that "a lawyer's interest in testifying truthfully

but adversely to his client must inherently conflict with the client's own interests." *Id*. at 209-10. Further, we determined that an attorney testifying against a client was a non-waivable conflict, "inherently [in] conflict with the client's own interest." *Id*. at 210.

Further, we find guidance in *McAllister v. McAllister*, 218 Md. App. 386 (2014), where the father in a custody dispute moved to disqualify the children's court-appointed Best Interest Attorney ("BIA"). *Id*. at 394. The father did not assert a violation of the Rules of Professional Conduct, but, instead, argued that the BIA was incompetent. *Id*. Because the father sought to disqualify the children's attorney, it was appropriate "to view the claim with some measure of skepticism." *Id*. at 404. We affirmed the circuit court's denial of father's request after undertaking the analysis for disqualification outlined in *Klupt*. *Id*. at 405. We noted that the father "ha[d] identified no . . . ethical violation," but "vociferously" disagreed with how the BIA represented the children. *Id*. "The short answer to Mr. McAllister's contention is that he does not have the right to disqualify another person's lawyer merely because he disagrees with the strategy and tactics that the lawyer has employed." *Id*.

We hold that *Klupt*'s *and McAllister*'s analysis applies here. "When an opposing party moves for disqualification of the other party's counsel, the court will take a hard look at such a motion." *Klupt*, 126 Md. App. at 206. Here, as discussed, the circuit court correctly found that Lamson had no direct conflict with Whiteford Taylor as she was never their client. Lamson's assertion that Whiteford Taylor should be disqualified from representing the County and the County Attorney seem based on the flawed premise that Whiteford Taylor cannot represent both entities in the myriad lawsuits that Lamson has

launched against the County Attorney. We find no merit in Lamson's assertions. We perceive her attempt to disqualify Whiteford Taylor stems from her disagreement with the legal positions that Whiteford Taylor has taken on behalf its clients. *McAllister*, 218 Md. at 45. As the County Attorney, Lamson's employer and the focus of the complaint here, is charged with acting in the County's interests, we conclude that their interests are not adverse as Lamson argues.

Finally, we agree with the County that even if there was a conflict of interest between it and the County Attorney, they could have waived the conflict. We do not agree with Lamson that the court was obliged to press either to determine whether any conflict that Lamson perceived was waived in writing under MRPC 1.7(b)(4), since the court found that there was no conflict in the first instance. For these reasons, the circuit court did not abuse its discretion in denying Lamson's motion to disqualify opposing counsel Whiteford Taylor.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.