

Circuit Court for Baltimore City
Case No. 24-C-15-003693

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2539

September Term, 2015

CHRISTOPHER LONG

v.

DEPARTMENT OF JUVENILE SERVICES

Krauser,*
Kehoe,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Kehoe, J.

Filed: February 6, 2018

*Krauser, J., now retired, participated in the hearing of this case while an active member of this Court and as its Chief Judge; after being recalled pursuant to Article IV, Section 3A of the Maryland Constitution, he also participated in the decision and the preparation of this opinion.

**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. *See* Md. Rule 1-104.

In this judicial review action, the Circuit Court for Baltimore City, the Honorable Lynn Stewart Mays presiding, reversed a decision by an administrative law judge that: (1) concluded that the Department of Juvenile Services unlawfully terminated Christopher Long; (2) ordered his immediate reinstatement as a resident advisor at one of the Department's residential facilities; and (3) awarded him back pay and benefits. Mr. Long has appealed from that judgment and presents one issue:

Was the administrative law judge's decision supported by substantial evidence and free of reversible legal error?

We will affirm the judgment of the circuit court.

Background

A. Mr. Long's Employment with the Department

In 2011, Mr. Long began to work as a resident advisor¹ at the Department's Cheltenham Youth Facility. Cheltenham is a secure residential facility that provides educational, medical, behavioral, and recreational services to its residents. Resident advisors have a variety of custodial and supervisory duties and work eight hour shifts. Under normal conditions, the proper staffing level at Cheltenham is one resident advisor for every eight residents. However, staffing requirements can, and routinely do, increase for a variety of reasons. For example, when a juvenile is injured and must be transported to a hospital, two staff members are required to accompany the juvenile (one of whom

¹ For part of his period of employment, Mr. Long was classified as a resident advisor trainee.

must be the same gender as the juvenile). Additionally, when a juvenile is placed on suicide watch, a resident advisor is assigned to supervise that individual exclusively. Resident advisors are required to work when other staff are unexpectedly absent for illness or other reasons, and when there is a disturbance at the facility. All of these scenarios require resident advisors to work overtime. For this reason, the Department has identified the ability to work overtime when required as an essential function of the resident advisor position. Although resident advisors may volunteer to work overtime, it is necessary for the Department to require resident advisors to do so in order to assure safe staffing levels at its residential facilities.

When he started at Cheltenham, Mr. Long worked overtime when required to do so. Unfortunately, he then suffered a heart attack and began to experience episodes of exhaustion and excessive perspiration after working for more than eight consecutive hours. In 2012, Mr. Long applied for leave under the Family and Medical Leave Act (“FMLA”). Mr. Long’s application was supported by a report from his cardiologist, Barbara Hutchinson, M.D. In her report, she stated that:

Mr. Christopher Long’s condition is permanent and chronic. Hence my recommendations have no time limit. Mr. Long working overtime is not safe for him or the company.

The Department approved Long's request for FMLA in September of 2012. The record indicates that, in the ensuing year, Long used FMLA leave on 60 separate occasions in eight hour increments to avoid working mandatory overtime.²

Mr. Long exhausted his FMLA leave on September 5, 2013. He reapplied for FMLA leave about a month later. In conjunction with this request, Dr. Hutchinson updated the Department on Long's condition. Although she did not specifically address overtime, she reiterated that Mr. Long "may work 8 hours per day, and a total of 5 days per week." At the request of the Department, Long was evaluated by the State Medical Director. The Medical Director delegated this function to Mike P. Lyons, M.D. Dr. Lyons concluded that if Long's "treating cardiologist believes that he is able to safely perform the full duties of the position for eight hours, I see no medical contraindication to working overtime when required." However, Dr. Lyons also noted that there were no medical records available to him at the time of the evaluation and that his understanding of Long's medical history was based primarily upon what Long told him during the evaluation.³

² Neither party suggested that Long's use of FMLA leave was for any purpose other than to avoid overtime work.

³ Dr. Lyons's rendition of an opinion without reviewing Long's prior medical records was apparently a departure from the norm. At the hearing, Philip Deitchman, the Director of Human Resources for the Department, testified that review of an employee's past medical records was necessary:

Because the opinions of Long’s treating physician and the State Medical Director were conflicting, Long underwent an independent medical evaluation. The parties do not dispute that the IME’s recommendation is binding on both of them.⁴ The parties agreed that John P. Hakim, M.D., a cardiologist, would perform the evaluation. After reviewing Mr. Long’s medical records and performing a physical examination, Dr. Hakim issued an opinion to the parties. It consists of three parts. The first is a typed summary, which states (emphasis added):

To Whom It May Concern:

I performed an independent evaluation of Mr. Christopher T. Long on 3/21/2014. He suffers from morbid obesity, sleep apnea, and has had a heart attack in the past.

* * *

He suffers from sleep apnea and fatigue due to his heart attack, morbid obesity,

because [the State Medical Director] will do a full and complete physical which also looks at past medical records so he can understand what’s happened in the past, where [Long] is today and where he may be in the future.

So in order to do a complete physical, [the Medical Director] needs the full picture and not just what’s happening today.

Mr. Deitchman’s testimony notwithstanding, no one at the administrative level appeared to notice the deficiency in Dr. Lyons’s report.

⁴ Mr. Deitchman testified that the “FMLA law . . . says

if there’s two doctors with FMLA that are contradicting each other, then we can go to . . . an independent doctor who would then have the final decision. And that person would break the tie and that decision is binding on everybody.

Mr. Deitchman did not elaborate on this point but neither party has asserted to this Court that the IME’s evaluation is not binding.

and the medications he is on. *I believe that it is safe for him to work 8 hours a day for 5 days a week. Long work hours put stress on his body that he cannot tolerate. I would not advise or recommend for him to work 16 hour shifts at work, as he could fall asleep at the job and not be alert, and make mistakes.*

The second part consists of a “Task Analysis of Employee,” which is a pre-printed form with blanks filled in by Dr. Hakim. The form defined the pertinent job task to be evaluated as the ability to work 16 consecutive hours, in other words, a double shift. (This information was provided to Dr. Hakim by the Department.) Dr. Hakim responded “no,” and provided the following explanation (emphasis added):

Patient is a 42 year old male with sleep apnea . . . with health related obesity conditions (morbid obesity). He cannot work long hours without falling asleep. He has suffered a heart attack in the past and *cannot work 16 hour days.*

He cannot work 16 hour days due to medication he is prescribed to stay alive. He is on a beta blocker of [indecipherable] which is known to keep people alive longer after a heart attack and with coronary diseases. This . . . can make person tired and cause fatigue. He needs this to stay alive. At the current time he cannot work 16 hr days and needs time to rest and sleep.

The third part of the report consists of Dr. Hakim’s typewritten notes. It states in pertinent part (emphasis added):

[Long] experiences severe fatigue, malaise and sweating if he works long hours. When he was working a 16 hour day 3 or 4 days a week, he was very symptomatic and could not tolerate it. When he was young he could work 16 hour days, but since the heart attack he has not been able to push himself that hard.

He has been able to work 8 hour days without dizziness, fatigue or malaise. It appears that an eight hour day is his limit for working. Although it is impossible to determine why he gets sweating and fatigue after more than 8 hours of work, I suspect it is due to his old MI, aging, and deconditioning.

The Department interpreted Dr. Hakim’s report as limiting Long to a work day of no

more than eight hours. Accordingly, it sent Long a letter stating that the eight-hour restriction did not allow him to perform an essential job function, specifically, working overtime. The letter asked Long for suggestions as to possible accommodations. {T. 120}. Mr. Diechtman testified that the Department had considered job restructuring, reassignment, and working from home as potential accommodations. However, the Department ultimately rejected those accommodations “because they will not allow you to perform the duties and responsibilities” of a resident advisor. The Department stated that “predictable attendance is an essential duty of the position of a [resident advisor] as well as remaining on duty and being available for overtime until dismissed. The Department terminated Long’s employment on the ground that he was unable to perform an essential function of his job. (T. 164; DJS Ex. 20, Notice of Termination; E. 17, 18.) Mr. Long appealed this decision to the Secretary of the Department of Budget and Management, who referred the case to the Office of Administrative Hearings for adjudication. On April 30, 2015, an administrative law judge held a hearing on the merits. E. 12.

B. The Administrative Law Judge’s Decision

The administrative law judge began her opinion by explaining that it was the Department’s burden to prove that Mr. Long could not perform the essential duties of his job, even with a reasonable accommodation. She noted, correctly in our view, that:

While an inordinate amount of time at the hearing was spent on the effect of the FMLA on the events involved in this case, and [Long] claimed that [the Department] violated certain provisions of that Act [Long] was not

terminated as a result of his use of FMLA leave and there is nothing in the FMLA that requires an employer to retain an employee indefinitely if the employee cannot perform the functions of the job.

She then described the Department's documentary evidence, starting with the position description signed by Mr. Long in 2011 stating that the ability to work overtime was mandatory. The description indicated that the overtime duty was 5% of time or importance, but it did not quantify that requirement. However, the position description that Mr. Long signed in 2012 listed mandatory overtime under work schedule, but not under essential job functions.

In addition to the documentary evidence, the administrative law judge discussed the testimony of the Assistant Superintendent at Cheltenham, Claude Waters. He testified that resident advisors and trainees had always been required to work overtime because the facility needs employees to cover emergencies, absences, and other circumstances requiring additional staff. Mr. Waters explained that employees are assigned overtime on a rotating basis, but did not testify to any particular length of time an employee was required to be available to work overtime.

From this, the administrative law judge concluded that the Department proved that it was a mandatory requirement of the resident advisor position that the employee remain on duty until properly relieved, even if that required the employee to work overtime. However, she concluded that the Department had not proven that an employee was regularly required to work a specific minimum number of hours beyond a normal shift.

Next, the administrative law judge reviewed the evidence to determine if Mr. Long

was able to perform the overtime requirement. After reviewing Mr. Long’s work history, the evidence presented by the Department, and the medical reports, the administrative law judge found that:

the only restriction recommended by Dr. Hakim was against working sixteen-hour shifts. In fact, a careful review of the report does not reflect support for the observation that eight hours “appears” to be the limit.

* * *

[Long] testified that he was able to work four hours overtime, or a total of twelve hours [per day], and pointed out that he had done so frequently after his heart attack, before applying for FMLA, without incident. There is no contrary evidence in the record. There is nothing in Dr. Hakim’s report to indicate that eight hours per day is [Long’s] work limit.

* * *

Thus, the evidence does not support the conclusion that [Long] cannot perform the mandatory overtime requirement of his job, which is defined only as the requirement to remain on duty until properly relieved.^[5]

The administrative law judge ultimately concluded that Long’s termination was unlawful because the Department did not meet its burden:

(a) to establish the extent of the essential overtime requirement; (b) to establish that [Long’s] medical condition prevented him from fulfilling that requirement; or, in the alternative, (c) that a limitation on the number of hours or the number of consecutive days that [Long] was required to work overtime was not a reasonable accommodation for his condition.

The administrative law judge ordered the Department to reinstate Mr. Long’s

⁵ As we will explain later, the administrative law judge misinterpreted the relevant part of the job description.

position as Resident Advisor with full back pay and benefits from the date of his termination to the date of his reinstatement. {E. 24}.

C. The Judicial Review Proceeding

On July 15, 2015, the Department filed a petition for judicial review in the Circuit Court for Baltimore City. {E. 3}. On December 21, 2015, the circuit court judge reversed the administrative law judge's decision. {E. 11}. The court stated:

The administrative law judge found that the [Department] failed to meet its burden a) to establish the extent of the essential overtime requirement; b) to establish that the Employee's medical condition prevented him from fulfilling that requirement; or in the alternative, c) that a limitation on the number of hours was not a reasonable accommodation for his condition.

{E. 7}. After reviewing the administrative law judge's decision, the circuit court found that the first and second of the administrative law judge's conclusions were not supported by substantial evidence, and the third was an error of law. {E. 7}.

The Standard of Review

This is a contested case brought under Maryland's Administrative Procedure Act. In a judicial review proceeding, a court may reverse the agency decision if, among things, the decision is affected by a material error of law or is unsupported by substantial evidence in light of the record considered as a whole. Md. Code, State Government Article § 10-222. An appellate court does not consider whether "the circuit . . . court erred, but rather whether the administrative agency erred." *Bayly Crossing, LLC v. Consumer Protection Division*, 417 Md. 128, 136 (2010) (citations, internal quotation marks, and brackets omitted). For that reason, we "look through" the circuit court's

decision, in order to “evaluate the decision of the agency” itself. *People’s Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 66 (2008). In this exercise, we accept an agency’s factual findings if they are supported by substantial evidence, that is, relevant evidence in the record that logically supports the agency’s factual conclusions. *Bayly Crossing*, 417 Md. at 139. Courts do not, however, defer to the agency’s conclusions of law. *Id.* at 137.

The administrative decision-making process often involves the application of law to the evidence. If the agency has correctly identified the applicable legal standard, courts defer to the agency’s application of the law to the facts before it, as long as the findings are supported by substantial evidence. *See Baltimore Lutheran High School Assoc. v. Employment Security Administration*, 302 Md. 649, 662 (1985). On the other hand, conclusions based upon an incorrect legal premise merit no deference from a reviewing court. Under that scenario, reviewing courts generally remand the case to the agency for the agency to reconsider the matter in light of the court’s explanation of the applicable legal standard. *See Board of Public Works v. K. Hovnanian’s Four Seasons*, 425 Md. 482, 522 (2012). We need not remand, if a remand would be futile. *County Council of Prince George’s County v. Zimmer Development*, 444 Md. 490, 581 (2015).

Analysis

The administrative law judge’s reasoning can be summarized as follows:

The Department demonstrated that an ability to work *some amount* of overtime was an essential requirement of the resident advisor position. However, the Department failed

to quantify the amount of overtime necessary to satisfy that requirement. Although the evidence demonstrated that Long could not “work sixteen hours a day on demand,” he testified that he could safely work up to four hours of overtime, and this evidence was un rebutted. Because the Department did not establish “the extent of the essential overtime requirement,” the Department failed to demonstrate that Long was unable to perform the essential functions of his position with reasonable accommodations. The Department also failed to prove that limiting the number of hours that Long could work was not a reasonable accommodation for his condition.

Unsurprisingly, Long agrees with the administrative law judge with but one exception. He asserts that the Department failed to prove that the ability to work overtime was an essential job function.

For its part, the Department asserts that the administrative law judge’s finding that the ability to work overtime is an essential component of a resident advisor’s job duties was supported by substantial evidence and was legally correct. However, the Department challenges the remainder of the administrative law judge’s factual analysis and contends that she misunderstood and misapplied the law.

We conclude that the administrative law judge’s finding that the ability to work overtime is an essential component of a resident advisor’s job duties was supported by substantial evidence and legally correct. Unlike the administrative law judge, however, we conclude that the Department did demonstrate that Long was unable to perform the essential functions of his position. The administrative law judge’s finding to the contrary

is not supported by substantial evidence. Finally, the Department was not under a legal obligation to make accommodations for an employee who is unable perform an essential job function. For these reasons, we affirm the judgment of the circuit court.

1. The administrative law judge’s conclusion that the ability to work overtime is an essential component of a resident advisors’ job duties was legally correct and supported by substantial evidence.

We begin with a brief summary of the applicable law.

Maryland Code, State Personnel and Pensions Article (“SPP”) § 2-303(b)(3) states in pertinent part:

Before . . . an employee [is] terminated for medical reasons, the appointing authority or a designee of the appointing authority shall document in writing: (i) that, under relevant provisions of federal and State law and regulations, reasonable accommodations were considered; (ii) the specific accommodations that were considered; and (iii) the reasons for rejecting those accommodations.

In a private cause of action for employment discrimination based upon the employer’s refusal to accommodate an employee, a “plaintiff must show: (1) that he or she was an individual with a disability; (2) that the employer had notice of his or her disability; (3) that with reasonable accommodation, he or she could perform the essential functions of the position (in other words, that he or she was a “qualified individual with a disability”); and (4) the employer failed or refused to make such accommodations.”

Adkins v. Peninsula Regional Medical Center, 224 Md. App. 115, 139 (2015), *aff’d*, 448 Md. 197 (2016) (citations omitted).

This case is not a private cause of action, but rather a judicial review of the Department’s decision to terminate Long’s employment. The Department does not dispute that it bears the burden of proof in this proceeding. *See* SPP § 11-103(a). Although the administrative law judge did not make a specific finding, it is clear that she viewed Long’s heart condition as a “disability” for purposes of State and federal law, and that the Department was aware of Long’s health problems.⁶ The Department argues that Long was not a qualified person with a disability, that is, he could not perform the essential functions of his position with a reasonable accommodation, and whether the Department failed to make such accommodations.

Deciding what constitutes the essential functions of a position is a factual inquiry. *Adkins*, 224 Md. App. at 149–50 (citing, among other cases, *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir.1988)), and *Gaither v. Anne Arundel County*, 94 Md. App. 569, 590 (1993). As we noted in *Adkins*, factors to be considered include:

written job descriptions; the employer’s judgment as to which functions are essential; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function, the work experience of past incumbents in the job; and the current work experience of incumbents in similar jobs.

⁶ In its brief, the Department argues that Long was not “disabled” as that term has been defined in federal and state law. However, the Department did not present this contention at the administrative hearing. We will not address it for the first time. *See, e.g., Priester v. Baltimore County*, 232 Md. App. 178, 191 (2017) (In a judicial review proceeding, a court will not ordinarily consider an issue that was not presented to the administrative agency.), citing, among other cases, *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248–49 (2008).

224 Md. App. at 149 (citations, quotation marks and bracketing omitted).

In the present case, the Department presented evidence that the ability to work overtime was an essential job function. The written job description for resident advisors identified working overtime as an essential function. At the hearing, Claude Waters, Cheltenham's Assistant Superintendent, testified that potential resident advisors were informed in their job interviews that working overtime was mandatory and was an essential part of the position. Additionally, Mr. Waters described the critical role that resident advisors play in assuring the safety and well-being of the facility's residents. This was a sufficient basis for the administrative law judge to conclude that working overtime was an essential function for resident advisors working at Cheltenham.

However, the administrative law judge also found that the Department had not established that a resident advisor was regularly required to work a specific minimum number of hours beyond a normal shift. She found that:

[T]he evidence does not support the conclusion that [Long] cannot perform the mandatory overtime requirement of his job, which is defined only as the requirement to remain on duty until properly relieved.

This conclusion is based upon a misreading of the job description, which states in pertinent part:

Regular and predictable attendance. [Maryland Corrections Training Commission] mandated employee^[7] shall remain on duty, including **mandatory overtime**, until properly relieved of duty in accordance with facility procedures.

⁷ Long was a MCTC mandated employee.

(Emphasis in original.)

This part of the job description does not mean that Long's obligation to work overtime was limited to those occasions when his replacement failed to show up to work on time after he had completed his regularly-scheduled eight hour shift. It means that Long was required to remain on duty, whether that duty was regularly-scheduled or mandatory overtime, until replaced.

The administrative law judge was correct that the Department did not present evidence as to the amount of time that employees typically worked overtime. This factor might be relevant in a case in which the medical evidence demonstrated that the employee could safely work some overtime but not 16 consecutive hours. However, the Department's failure to present such evidence was irrelevant in this case because the record is clear that Long could not work any overtime. We turn to this issue.

2. The Department established by un rebutted evidence that Long was unable to work overtime without risk to his own health.

As we have stated, Long was evaluated by three physicians. The critical evaluation is Dr. Hakim's, because the parties were bound by it. When read in its entirety, Dr. Hakim's report stands for two factual propositions.

First, and in response to the specific inquiry presented by the Department, Dr. Hakim opined that Long was unable to work 16 hour shifts. Dr. Hakim's second conclusion is that Long was not able to work more than eight hours without dizziness, fatigue, or malaise. Dr. Hakim made this clear when he wrote that:

It appears that an eight hour day is his limit for working. Although it is impossible to determine why he gets sweating and fatigue after more than 8 hours of work, I suspect it is due to his old MI, aging, and deconditioning.

There is no ambiguity in this evaluation. Dr. Hakim was asked by the Department whether Long could safely work for 16 consecutive hours. He responded that Long could not, and further noted that Long could not safely work for more than eight consecutive hours. The administrative law judge's finding that the Department established only that Mr. Long could not work a 16 hour shift and that "a careful review of the report does not reflect support for the observation that eight hours 'appears' to be the limit," simply ignores Dr. Hakim's second conclusion and cannot be reconciled with Dr. Hakim's report when it is read as a whole.

The only support for the administrative law judge's conclusion that Long was able to work overtime was his testimony that he believed that he could work up to four hours of overtime without risk. However, Long's testimony was unsupported by any medical or objective evidence, and is contrary to the medical expertise of Dr. Hakim and Dr. Hutchinson. Long's subjective belief, no matter how sincerely held, is beside the point. *See Otto v. City of Victoria*, 685 F.3d 755, 758–59 (8th Cir. 2012) ("While it is true that Otto told [his employer] that he could still perform these functions, his assertion was undermined by his own physician's determination that Otto's disability permanently restricts his ability to work."); *Alexander v. Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003) ("[T]he employee's belief or opinion that she can do the function is simply

irrelevant. The ADA does not require an employer to permit an employee to perform a job function that the employee’s physician has forbidden.”).

3. Because Long was unable to perform an essential job duty, the Department was not required to provide him with a reasonable accommodation.

Because the ability to work overtime is an essential function of a resident advisor’s position, and the controlling medical evidence was that Long was not able to safely work overtime, the Department was not required to accommodate his situation. *See Adkins*, 224 Md. App. at 152–53 (“[A]n employer is not required to transfer job responsibilities to another employee to satisfy its obligation to [provide a reasonable accommodation.]” (footnote omitted), (citing, among other cases, *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 687 (4th Cir. 1997) (“The ADA simply does not require an employer to hire an additional person to perform an essential function of a disabled employee’s position.”)); *Champ v. Baltimore County*, 884 F. Supp. 991, 999 (D.Md. 1995), *aff’d* 91 F.3d 129 (1996) (“An accommodation is unreasonable if it requires elimination of an essential duty.”); and *Moore v. Jackson County Board of Education.*, 979 F.Supp.2d 1251, 1265 (N.D. Ala. 2013) (“[Moore’s] request [for accommodation] would not *allow* her to perform the essential functions of her job; instead, it would *exempt* her from performing those functions.”) (Emphasis in original.)).

We sympathize with Mr. Long but the medical evidence is that he cannot safely work overtime in light of his health condition. That Mr. Long is willing to risk his own health to retain his job is, unfortunately for him, neither here nor there. This is because the role

of a resident advisor at Cheltenham is to protect the children who are entrusted to the care of the Department and are required to reside at that facility. We will not require the Department to place their lives and safety at risk. Nor will we require the Department to shift Mr. Long's obligation to work overtime to his fellow employees.

**THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY
IS AFFIRMED. APPELLANT TO PAY COSTS.**