Circuit Court for Baltimore City
Case No. 24-C-15-004630

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2605

September Term, 2016

DARRYL K. LEWIS, JR.

v.

CITY OF BALTIMORE CIVIL SERVICE COMMISSION, *et al.*

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

JJ.

Opinion by Kenney, J.

Filed: October 19, 2018

*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.

Appellant Darryl K. Lewis, Jr. appealed his termination by the Baltimore City Fire Department ("BCFD") to the City of Baltimore Civil Service Commission ("Commission").[1] The Commission upheld the termination, and appellant sought judicial review in the Circuit Court for Baltimore City, which affirmed the Commission's decision. In his appeal to this Court, appellant presents the following questions, which we have slightly rephrased for our review:

1. Did Appellees violate Appellant's right to due process in the proceedings below when:

   a. Appellant's termination was based solely on the results of breath tests in violation of the statutory mandates of Health-General Article § 17-214?

   b. Appellees relied on a BCFD issued aftercare agreement to impose discipline on Appellant in violation of the Memorandum of Understanding between IAFF Local 734 and BCFD, prohibiting such agreements?

   c. Appellees denied Appellant fundamental fairness throughout the administrative proceedings?

2. Did Appellees' reliance on a BCFD aftercare agreement constitute an unlawful practice in light of the Memorandum of Understanding prohibiting such agreements?

3. Did the record's lack of any evidence of Appellant's willful breach of any aftercare agreement render the Hearing Officer's finding and conclusion of just cause erroneous?

4. Should the reviewing court exercise its discretion under Maryland Rule 8-131(a) to review the questions of law presented by Appellant?

For the reasons that follow, we affirm the judgment of the circuit court.

[1] BCFD and the Commission are the appellees.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was an Emergency Medical Technician (EMT)/Firefighter for BCFD and a member of the Internal Association of Firefighters (IAFF), Local 734. On May 10, 2013, he arrived nine hours and ten minutes late for his scheduled day shift, and was ordered to Mercy Medical Center/Public Safety Infirmary ("Mercy/PSI") for drug testing. He tested positive for alcohol and was charged with violations of Civil Service Commission Rule 56(2)(h)[2], BCFD Rules and Regulations 43:01(e)[3], and BCFD Manual of Procedure ("MOP") 336-7(c).[4]

A departmental disciplinary hearing conducted by Frank H. Hazzard, Deputy Chief, was held on July 30, 2013.[5] According to the hearing report, appellant stated that he was late because he had "lost track of his work schedule and . . . thought May 10[, 2013] was a scheduled day off." But, he "admitted that he tested positive for alcohol and

[2] Civil Service Rule 56(2) provides, "The following are recognized as just and sufficient causes for suspension, demotion or discharge of an employee from the Civil Service, although charges may be based on grounds other than those enumerated which demonstrate just cause. . . . (h) That the employee has committed acts while on or off duty which amount to conduct unbecoming to an employee of the City."

[3] Rules and Regulations 43:01(e) provides, "All personnel of the Fire Department are expected, while on or off shift, to be familiar with and observe all regulations, procedures for the administration and operation of the Department."

[4] MOP 336-7 provides, "Reasonable suspicion drug and alcohol testing following direct observation of behavior exhibited by the employee which may render the employee unable to perform the employee's job or which may pose a threat to safety or health."

[5] The report of that hearing was addressed to James S. Clack, Chief of the Fire Department. John Burke of IAFF, Local 734 was present as appellant's union representative.

that he had a drinking problem," and stated that "he had signed an aftercare agreement and was complying with the provisions in it." Because appellant had reported to work "unfit for duty" and had "violated the drug and alcohol policy," Deputy Chief Hazzard recommended that appellant be suspended without pay for 29 days with credit for time served, and that he "sign an 'aftercare agreement' upon completion of treatment."

A letter[6] dated July 5, 2013, printed on what appears to be Mercy/PSI letterhead and signed by appellant, James D. Levy, M.D., Medical Director of BCFD, and Beth Clark, stated that appellant was eligible to return to work, and recommended twelve unannounced follow-up tests for alcohol be performed over the next twelve "calendar" months. The letter was addressed to "Roman Clark, Aide to the Chief."

Some weeks after returning to work, appellant, on September 24, 2013, signed a document entitled "After Care Contract,"[7] which stated in pertinent part:

> As a result of my being allowed to attend and successfully complete a program for rehabilitation from substance abuse, an After Care Contract, as outlined below, is a condition of my continued employment with the Baltimore City Fire Department.
>
> * * *
>
> I understand agree to the following:
>
> 1. That the Fire and Police Clinic may do spot checks at any time for illicit drugs and/or alcohol.

[6] We will refer to it as the "Mercy Letter."

[7] The header of this document reads "Baltimore City Fire Department – After Care Contract – Conditions of Employment." On the top right corner, it reads, "MOP 336-9-2." We will refer to it as the "BCFD After Care Contract."

> 2. That I will abstain from use or abuse of illicit drugs and/or alcohol for the duration of my employment with the Baltimore City Fire Department.
>
> * * *
>
> 5. That if I do not fulfill the above, I will be terminated from my job.

This document was signed by appellant and two witnesses.[8]

On July 24, 2014, appellant was ordered to Mercy/PSI for alcohol testing. Two breathalyzer tests, the first a screening test and the second a confirmatory test, were administered; the result of each was positive for alcohol. Based on these results, appellant was immediately suspended without pay.

A departmental disciplinary hearing was held on August 27, 2014.[9] Appellant was charged with violations of Civil Service Rule 56(2)(h)[10], Rules and Regulations 43:01(e)[11], and MOP 336-9.[12] At that hearing, appellant argued that the breathalyzer was

[8] According to appellees, the witnesses were Lisa Conic (Mercy Medical Director and Vice President) and Lt. Jones (Mercy/PSI liaison).

[9] The hearing was conducted by Deputy Chief Hazzard; the report of that hearing was addressed to Niles Ford, PhD, Chief of the Fire Department. John Burke of IAFF, Local 734 was present as appellant's union representative, and Henry Burris, of the Vulcan Blazers, was appellant's personal representative.

[10] *See supra* footnote 2.

[11] *See supra* footnote 3.

[12] MOP 336-9 provides:

> Any member warranting disciplinary action for substance abuse a second time will be **dismissed from the Department.**

not properly calibrated and that the aftercare agreement permitted testing for drugs[13], but not alcohol. He also argued that because his supervisor did not smell alcohol on his breath and he was not visibly drunk on the morning of July 24, 2014, his supervisor had no reason to believe that he was unfit for duty or to order testing.[14] The Deputy Chief sustained the charges and recommended appellant's dismissal from BCFD. Upon receiving the termination letter on December 4, 2014, appellant appealed to the Commission.

In accordance with the Commission's Disciplinary Hearing Procedures, an investigatory hearing was conducted on February 26, 2015 before Hearing Officer Jeffrey G. Comen.[15] Appellant and his representative advanced two principal arguments at this hearing: (1) that the breathalyzer test was flawed because the testing instrument was not properly calibrated; and (2) that his punishment was unfair and discriminatory when

> Any willful breach of the Aftercare Contract or Substance Abuse Agreement, or the Rehabilitation Program will be cause for the disciplinary action resulting in dismissal from the Department.

(Emphasis in original.)

[13] Appellant is apparently referring to the Mercy Letter, in which, of the testing options "(drugs), (alcohol), or (drug and alcohol)," only "(drugs)" is circled. The BCFD After Care Contract refers to both "drugs and/or alcohol."

[14] *See supra* footnote 4.

[15] Henry Burris, member of the Vulcan Blazers, was appellant's representative at the hearing. Appellant and Captain Roman Clark testified. Captain Clark was the Fire Chief's liaison with Mercy/PSI, which handles all drug and alcohol testing for BCFD. He testified that he has worked with Mercy/PSI for over 20 years and that breathalyzer tests had been administered there "as long as I know that I've been working there."

compared to other BCFD members who had abused alcohol more egregiously but were still employed.[16]

In his Recommendation to the Commission, the Hearing Officer found "no merit" in the argument that the breathalyzer test was flawed because "documented evidence" indicated that "it is more likely than not that . . . the instrument functioned properly" and appellant had "offered no hard evidence" otherwise. The Hearing Officer also concluded that appellant's comparison of his punishment to previous cases involving alcohol abuse was irrelevant because all of the facts and circumstances of those cases was not known, and they occurred under the administration of a previous Fire Chief. The Hearing Officer also determined that "[p]rocedural due process was afforded in that [appellant] received notice . . . and an opportunity to be heard."

As to whether there was just cause for termination, the Hearing Officer explained:

> Just cause for discipline is present based on ordinary contract principles.
>
> CSC Rule 56(2) reads as follows: "The following are recognized by the Commission as just and sufficient causes for suspension, demotion or discharge of an employee from the Civil Service, *although charges may be based on grounds other than those enumerated which demonstrate just cause*." (Emphasis supplied.) The rule then goes on to list sixteen categories of offending behavior. My focus in this case is not on any of those sixteen categories, but on the italicized language above. A reading of this language makes it clear that employee discipline charges do not have to stem solely from the list of conduct in Rule 56(2). Therefore, charges may be brought for negative conduct outside of that listed in the rule. I find that charges may stem from breaching a contract with a city agency.

[16] Appellant contends that, during this hearing, he made other arguments, including on the issue of the two after care agreements. We address this contention in our discussion of the preservation of issues for appellate review.

> Therefore, this part of my investigation is resolved based on ordinary, common law contract principles. In the [BCFD After Care Contract], "as a condition of continued employment", Lewis agreed to ". . . abstain from the use . . . of . . . alcohol for the duration of [his] employment with the Baltimore City Fire Department." Lewis failed to abstain from alcohol when he tested positive for alcohol in his system during his work shift on July 24, 2014. Therefore, "just cause" exists by contract, outside the boundaries of [CSC] Rule 56(2).

He concluded:

> Just cause is established. Discharge is appropriate. I recommend pursuant to Section 19(j)[17] of the Disciplinary Hearing Procedures that the discharge action taken by BCFD be upheld.

Appellant filed timely exceptions to the Hearing Officer's Recommendation, to which BCFD responded.[18] In accordance with Section 20[19] of the Disciplinary Hearing Procedures, the Commission upheld his termination on June 16, 2015, stating:

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[17] Section 19.A. states:

> The Hearing Officer shall prepare a report of findings and recommendations which shall use the following format:
>
> * * *
>
> (j) Recommendations to the Commission to sustain, modify or reverse the disciplinary action taken by the appointing officer, including appropriate back pay, seniority and other compensation.

Disciplinary Hearing Procedures, Revised October 2007.

[18] Exceptions were to be filed on or before April 6, 2015. The record reflects the exceptions being filed on April 6, 2015. A letter from Mr. Burris to the Commission dated April 9, 2015, attaching the Mercy Letter, was not received until April 10, 2015. According to Mr. Burris, he did not receive the Mercy Letter until April 9, 2015 "after repeated requests starting in February 2015."

[19] "Each Commissioner shall review each Hearing Officer's proposed findings and recommendations, and any exceptions filed to the Hearing Officer's report, and render a decision to support, modify or reject the Hearing Officer's recommendations. The

> The [Commission] concurs with the Hearing Officer's recommendation. Pursuant to the evidence adduced at the hearing, there was sufficient evidence to uphold the ruling of the hearing officer. There is just cause for the termination of the Appellant.

Appellant filed a petition for reconsideration with the Commission on July 15, 2015, which was denied.[20] Appellant sought judicial review, and on May 5, 2016, the Circuit Court for Baltimore City affirmed the Commission's determination. Appellant filed this timely appeal.

STANDARD OF REVIEW

In this case, we look through the decision of the circuit court and review the decision of the Commission, *Libit v. Baltimore City Board of School Comm'rs*, 226 Md. App. 578, 583 (2016), to determine whether there was substantial evidence in the record as a whole to support its findings and conclusion. *See, e.g.*, *Employees' Retirement System of City of Baltimore v. Dorsey*, 430 Md. 100, 110 (2013); *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999). We "review the agency's decision in the light most favorable to it," *Dorsey*, 430 Md. at 110, and we do not "substitute [our] judgment for the expertise of those persons who constitute the administrative agency." *Banks*, 354 Md. at 68.

Commission may require that further investigation be conducted by the same or a different Hearing Officer." Disciplinary Hearing Procedures, Revised October 2007.

[20] On August 11, 2015, the Commission denied reconsideration, stating that appellant's argument "does not provide grounds to support a Section 22 Reconsideration." Section 22 of the Disciplinary Hearing Procedures provides, "For 30 calendar days after the date of its decision, the Commission may reconsider its decision only upon receipt of 1) evidence of fraud, mistake or irregularity in the making of the decision or 2) evidence which was not available through due diligence in time for introduction at the hearing."

An administrative agency's factual finding must be upheld if a reasoning mind reasonably could have found it from the record. *Schwartz v. Maryland Dep't of Natural Resources*, 385 Md. 534, 554 (2005). But, while we afford deference to the agency "interpreting or applying the statute [which it] administers," we are not constrained "to affirm an agency decision premised solely upon an erroneous conclusion of law." *Dorsey*, 430 Md. at 111 (internal citations omitted).

DISCUSSION

The Baltimore City Charter confers jurisdiction on the Commission to dismiss, demote, or suspend an employee for "any just cause" after an investigatory hearing. City Charter, Article VII, §§ 95(f) and 100(a). Civil Service Rule 56 provides, "Discharge shall be only for (a) unsatisfactory conduct which cannot be corrected through training, rehabilitation or lessor forms of disciplinary action, (b) conduct which causes irreparable harm to the health or safety to any person or, (c) conduct which causes an irreparable breach of trust." The rule provides sixteen illustrative "just causes" for suspension, demotion, or discharge, but also states that "charges may be based on grounds other than those enumerated which demonstrate just cause." Civil Service Rule 56(2).

In this case, the Commission adopted the Hearing Officer's findings and recommendation. The Hearing Officer found just cause to terminate appellant's employment based on his breach of "a contract with a city agency." The contract referred to by the Hearing Officer was the BCFD After Care Contract, under which, "as a condition of continued employment" after his first alcohol violation, appellant agreed to

"abstain from the use or abuse of . . . alcohol for the duration of [his] employment with [BCFD]." When appellant "tested positive for alcohol in his system during his work shift on July 24, 2014," he lost his right to continued employment.

Contentions

Appellant contends that his due process rights under both the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights were violated in the administrative proceedings. He argues first that administering breathalyzer tests was specifically prohibited by § 17-214 of the Health-General Article ("HG"), which governs controlled substance testing by employers, and denied him a right to have the sample retested. Asserting that the Commission's decision was based on an error of law, which is subject to *de novo* review, appellant contends that we are permitted to modify or reverse under § 4-602(d) of the Labor and Employment Article ("LE")[21], which is substantially similar to § 10-222(h) of the State Government Article ("SG").[22]

[21] LE § 4-602(d) provides, in whole:

> In an appeal under subsection (a) of this section, the circuit court may:
>
> (1) remand the case for further proceedings;
>
> (2) affirm the final decision; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
>
> (iii) results from an unlawful practice;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
>
> (vi) is arbitrary and capricious.

Md. Code Ann. (1991, 2016 Repl. Vol.).

Second, he contends that the Commission's reliance on the BCFD After Care Contract was improper because Article 12 of the Memorandum of Understanding ("MOU") between the firefighters' union and the City of Baltimore prohibited BCFD from issuing aftercare agreements to firefighters.[23] In his view, the Mercy Letter, which was the only valid aftercare agreement, was no longer in effect when the breath tests were administered. He argues that he made repeated requests to obtain the Mercy Letter prior to the investigatory hearing and was unable to do so, but he submitted it before the Commission rendered its final decision and the Commission refused to consider it. All of which, he asserts, undermined the legal conclusion that "due process was afforded" to

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[22] SG § 10-222(h) provides, in whole:

> In a proceeding under this section, the court may:
>
> (1) remand the case for further proceedings;
>
> (2) affirm the final decision; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
>
> (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
>
> (vii) is arbitrary or capricious.

Md. Code Ann. (1984, 2014 Repl. Vol.).

[23] Section N of Article 12 of the MOU states: "The Fire Department shall not administratively issue its own aftercare agreements for violations of MOP 336, after agreements are only to be issued by the Mercy/PSI for proper cause under the MOP."

him. More particularly, he argues that the Commission's reliance on the BCFD After Care Contract constituted an "unlawful practice," which prejudiced his substantial right to continued employment and warrants reversal under LE § 4-602(d)(3)(iii).

Third, he contends the record reflects an "aggregate of occurrences," including the use of breath tests and the BCFD After Care Contract, that demonstrates the denial of due process and the "fundamental requisites of fairness," as "demand[ed]" by the particular situation, citing *Reese v. Dep't of Health & Mental Hygiene*, 177 Md. App. 102, 150 (2007) and *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 142 (2002).

Fourth, he contends that the record does not establish a willful breach of any aftercare agreement. In doing so, appellant cites MOP 336-9, which provides that "any willful breach of the Aftercare Contract . . . will be cause for the disciplinary action resulting in dismissal from the Department." Willful, he argues, means "done voluntarily and intentionally but not accidental or through inadvertence."

Appellees respond that the Hearing Officer's factual conclusions were supported by the record and substantiated the determination to terminate appellant for just cause. They further contend that issues that appellant is now raising were not preserved because they were not raised at the administrative hearing. But, even if they were, they would be meritless because HG § 17-214 does not apply to the City, appellant did not file a grievance alleging that the BCFD After Care Contract violated of Article 12 of the MOU, and he was afforded due process as demonstrated by his pre-termination and post-termination opportunities to respond and defend against the allegations that led to his

termination and to present evidence to challenge or to mitigate the just cause for his termination.

Preservation of Issues

Our review of the record indicates that appellant's contention that the BCFD After Care Agreement conflicted with the MOU was first raised in his exceptions to the Hearing Officer's Recommendation to the Commission. He first mentions a due process violation in his petition to the Commission for reconsideration. And, his contentions relating to the Health-General Article and the use of breath tests and that no willful breach of any aftercare agreement was established were not raised until this appeal.

Appellant, for the most part, does not argue that his contentions on appeal were raised before the Hearing Officer. He argues instead that he is presenting "questions of law," which under either SG § 10-222(h) or LE § 4-602(d) are to be reviewed *de novo*.[24] In his view, "the facts necessary to decide the issues are in the record," and the Hearing Officer made specific findings and "conclusions of law," including a determination that due process was afforded.

He asserts that use of a breathalyzer, which did not comply with HG § 17-214, resulted in a due process violation because no specimen was available to him for

[24] Appellant notes that the two statutes share "substantially similar" language and that while SG § 10-222(h)(3)(iii) reads "unlawful procedure," LE § 4-602(d)(3)(iii) reads "unlawful practice." And, either would permit our review of errors of law *de novo*.

independent testing.[25] In other words, his right to be heard was "stifled" because he was denied the opportunity to challenge the results of the substance abuse tests. As to the Commission's reliance on the BCFD After Care Contract, he characterizes it as an "unlawful practice" that infected the entire process and denied him "fundamental fairness." In addition, he argues that under the MOP 336-9, "dismissal from the

[25] Appellant argues that Maryland, by statute, provides additional due process protection, regulating the methods by which drug or alcohol testing for job-related reasons are to be performed by certified laboratories.

HG § 17-214 provides, in pertinent part:

> (b)(1) Except as provided in paragraph (2) of this subsection, an employer who requires any person to be tested for job-related reasons for the use or abuse of any controlled dangerous substance or alcohol shall:
> (i) Have the **specimen** tested by a laboratory that:
> 1. Holds a permit under this subtitle; or
> 2. Is located outside of the State and is certified or otherwise approved under subsection (f) of this section; and
> (ii) At the time of testing, at the person's request, inform the person of the name and address of the laboratory that will test the specimen.
>
> * * *
>
> (e)(1) A person who is required to submit to job-related testing, under subsection (b) or (c) of this section, may request **independent testing of the same specimen for verification of the test results** by a laboratory . . . .

Md. Code Ann. (1982, 2015 Repl. Vol.). (Emphasis added.)

HG § 17-214(a)(11) defines "specimen" as "(i) Blood derived from the human body; (ii) Urine derived from the human body; (iii) Hair derived from the human body as provided in subsection (b)(3) of this section; or (iv) Saliva derived from the human body." Hair, however, may only be used for pre-employment purposes. HG § 17-214(b)(3)(ii).

Department" must be based on a "willful breach" of an after care contract, and that the results of the breath tests do not establish "willful conduct."[26]

As to the appropriate aftercare agreement, appellant asserts that he testified during the hearing before the Hearing Officer that, referring to the Mercy Letter, he had signed an aftercare agreement at Mercy/PSI, which was different than the one presented at that hearing, and that he requested the Hearing Officer to look into the discrepancy.[27] The transcript of the hearing reflects the following testimony regarding the two aftercare agreements:

> [Appellant:] . . . And I would also like to add this. This was my last test, my absolute last test. So the [Mercy Letter] says for a year. So for the whole year, 12 times I've been tested. . . . **So that [BCFD] Aftercare Contract in my eyes, it was null and void because it was over a year.**
>
> * * *

[26] Even were we to consider appellant's willful breach contention, we note, without deciding and assuming the accuracy of the breath tests, the record before us would support an inference that the breach was willful. Nor do we read MOP 336-9 as necessarily requiring a finding of willful breach of an aftercare agreement in the case of a second time offender. MOP 336-9 states in separate paragraphs:

- Any member warranting disciplinary action for substance abuse a second time will be dismissed from the Department.
- Any willful breach of the Aftercare Contract or Substance Abuse Agreement, or the Rehabilitation Program will be cause for the disciplinary action resulting in dismissal from the Department.

The first provision seems to exist separate to the second one relating to willful breach of an aftercare agreement.

[27] Appellant did not have the Mercy Letter at the hearing. He contends that the document was submitted to the Commission on April 10, 2015, which gave it ample time to consider the document, elicit additional testimony, or elicit a response from BCFD before reaching its final decision on June 16, 2015.

> [Mr. Burris:] . . . The Aftercare program, who actually gave you that agreement, the Fire Department or PSI?
>
> [Appellant:] **PSI gives you one and obviously the Fire Department gives you one. I was already back at work when I signed [the BCFD After Care Contract].** So I don't know why the Fire Department would start their Aftercare Agreement after they already allowed me to come back.
>
> * * *
>
> [Appellant:] And also, I think **we need to look into the two Aftercare Agreements that I signed because one was a year. The year was already ran out** . . . .
> So I'm not going in to speak saying I didn't sign that, but it is another one that was signed by Mercy. And I don't know if I can ask Mr. Clark, but you know, I'm pretty sure he's familiar with ones that signed at Mercy.
>
> [Captain Clark:] This one was signed September 23rd 2013.
>
> [Appellant:] So why was I allowed back on the job if July the 5th - September 13?
>
> [Hearing Officer:] I noticed in the records it said that you were supposed, ask how long it takes or maybe somebody forgot. Just to let you know there was a significant time lag. You're correct about that. Anything else you want to say?
>
> [Appellant:] No, sir.

(Emphasis added.)

We distill from that exchange that appellant had signed two aftercare agreements, one with Mercy/PSI and a second one with BCFD several weeks after he had returned to work. Further, he indicated that the Mercy Letter, which the Hearing Officer did not have to consider at the hearing, only required random testing for one year and had

expired before the date of the breath tests.[28] That said, however, we are not persuaded that the issues now being raised were adequately preserved for our review. In short, appellant did not argue that the BCFD After Care Agreement conflicted with the MOU or, in any way, violated his due process rights.

Appellant argues that Maryland Rule 8-131(a) permits the exercise of our discretion to decide unpreserved issues:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The exercise of discretion under the rule is "to prevent the trial of cases in piecemeal fashion, thereby saving time and expense and accelerating the termination of litigation." *Zellinger v. CRC Dev. Corp.*, 281 Md. 614, 620 (1977). Stated differently, its purpose is to "promote the interests of fairness and judicial economy." *Anderson v. Litzenberg*, 115 Md. App. 549, 568 (1997). But, as the Court of Appeals has stated in *Chaney v. State*, 397 Md. 460, 468 (2007):

> It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a

[28] The Mercy Letter, dated July 5, 2013, provided for "drug" testing "over the next twelve calendar months," and appellant's breathalyzer tests were administered on July 24, 2014. Appellees argue in their brief that August would have been the next calendar month.

We note that Merriam-Webster defines "calendar month" as "one of the months as named in the calendar," or "the period from a day of one month to the corresponding day of the next month if such exists or if not to the last day of the next month (as from January 3 to February 3 or from January 31 to February 29)." https://www.merriam-webster.com/dictionary/calendar%20month.

> proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

And, under the ordinary constraints imposed on judicial review, it is particularly important for the agency to have the first opportunity to consider and respond to the challenges to its determination even when those challenges are presented as questions of law and constitutional violations.

Appellant cites several cases where Maryland appellate courts have exercised discretion to review unpreserved issues. In *Allmond v. Dep't of Health & Mental Hygiene*, 448 Md. 592, 606-07 (2016), the Court of Appeals reviewed an unpreserved facial constitutional challenge to a statute under substantive due process, where the statute required further agency action every 90 days ("so it is extremely likely that . . . there will be another appeal raising the same issue in just a few months") and by deciding the issue, "we may avoid the expense and delay of another appeal." According to the Court:

> Mr. Allmond asserts that he is challenging the statute on its face and that no factual record needs to be made for a facial challenge. This is largely correct. An as-applied challenge depends on the challenger's circumstances, but a facial challenge can be resolved without delving into the particular circumstances of the challenge. We need only ensure that there are sufficient facts to show that Mr. Allmond has standing to make this challenge. It is certainly undisputed that Mr. Allmond has been the subject of several orders authorizing forced medication under HG § 10-708. Finally, while the ALJ never had the opportunity to consider and respond to the constitutional challenge, the Circuit Court did, and the parties have adequately briefed the substantive due process issue before this Court, so there is no question of surprise or inadequate opportunity to consider and respond.

Id. at 607.

In *Chaney*, the Court of Appeals reviewed a challenge to the sentencing court's restitution order because, in its view, it constituted plain error, "transcend[ed] this case," and "may affect hundreds of cases that flow through our criminal and juvenile courts and that implicates important Constitutional and statutory rights, and guidance is needed." 397 Md. at 468.

In *Santo v. Santo*, 448 Md. 620, 631 n.5 (2016), the Court of Appeals reviewed the circuit court's grant of tie-breaker authority in a child custody case because it was an issue "decided by the trial court" and met the *Chaney* standards. In *Burden v. Burden*, 179 Md. App. 348, 355 (2008), we reviewed an issue regarding paternity and child support, explaining that the problem presented was "highly likely to recur" and "an appellate ruling would be desirable for trial court guidance."

Appellant advances several reasons encouraging the exercise of our discretion in this case:

1. Appellant's 14th Amendment and Article 24 property right to continued employment was at issue.

2. The Commission generally concluded that, as a matter of law, appellant was afforded due process.[29]

3. If the breath tests violated the Health-General Article, or if the issuance of the BCFD After Care Agreement violated the MOU, then appellant was denied fundamental fairness and his right to due process.

[29] The Hearing Officer's Recommendation states, "Procedural due process was afforded in that Lewis received notice of the underlying charges and an opportunity to be heard at a pre-termination hearing. He received sufficient notification of the outcome of that hearing and was advised of his right to this investigation."

4. The due process issues raised transcend the present case, and appellees and other public employers could benefit from guidance in dealing with other employees.

5. The legal questions above can be decided on the record before us.

We are not persuaded. As important as issues raised by appellant may be, it does not appear that "hundreds of cases" will be affected. And, even constitutional issues raised for the first time on appeal "are not automatically entitled to consideration on the merits under Maryland Rule 8-131(a)." *Hartman v. State*, 452 Md. 279, 300 (2017).[30]

Judicial review restricts us "to the record made before the administrative agency," and discourages "pass[ing] upon issues presented . . . for the first time on judicial review and that are not encompassed in the final decision of the administrative agency." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001) (holding that the circuit court erred in awarding attorneys fee because that issue was not raised in administrative proceedings). In short, we "review an adjudicatory agency decision solely on the grounds relied upon by the agency." *Id.*

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

[30] In *Hartman*, the Court of Appeals wrote, "Our established policy is to decide constitutional issues only when necessary." 452 Md. at 300 (internal quotations omitted). *Hartman* cites *Oku v. State*, 433 Md. 582, 588-89 (2013) (declining to consider unpreserved Sixth Amendment and Fourteenth Amendment claims) and *Baltimore Teachers Union v. Board of Education*, 379 Md. 192, 205 (2004) (declining to consider unpreserved argument claiming violation of Article VIII, § 1, of the Maryland Constitution).