Circuit Court for Baltimore City
Case No. 24-C-15-006075

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2651

September Term, 2015

EMPLOYEE A.C.

v.

MARYLAND OFFICE OF THE ATTORNEY GENERAL

Woodward, C.J.,
Leahy,
Friedman,

JJ.

Opinion by Woodward, C.J.

Filed: August 6, 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.

On May 4 and 10, 2012, the Maryland Office of the Attorney General ("Office"), appellee, sent identical letters to Employee A.C., appellant, informing her of her termination from employment as an Assistant Attorney General. Appellant sent a letter of appeal to the Office on June 21, 2012, and in response, the Office dismissed the appeal with prejudice as untimely.

On October 20, 2015, appellant wrote another letter to the Office requesting an appeal from her 2012 termination. The Office did not respond, and appellant filed a petition for judicial review in the Circuit Court for Baltimore City on November 30, 2015. After a hearing on the Office's motion to dismiss, the circuit court dismissed appellant's petition as untimely and denied her request for leave to amend her petition to a mandamus action. Appellant filed this timely appeal.

Appellant presents the following questions for our review:

1. Is an employee at will terminated for alleged misconduct entitled to the procedures outlined in Md. Code Ann., State Personnel and Pensions § 11-106 and to judicial review?

2. Did the circuit court err in dismissing A.C.'s petition for judicial review?

3. Did the circuit court err when it denied A.C.'s request for leave to amend the petition for judicial review to a request for a writ of mandamus?

For the reasons set forth below, we hold that the circuit court did not err in dismissing appellant's petition for judicial review. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

On May 4, 2012, the Office sent a letter to appellant terminating her from her position as an Assistant Attorney General. The termination letter stated in relevant part:

> In accordance with § 11-113 of the State Personnel and Pensions Article, **you may appeal the termination by filing a written appeal** with Deputy Attorney General J.B. Howard, Jr. **within 15 days of your receipt of this notice.** Your appeal may only be based on the grounds that the action was illegal or unconstitutional.[1]

(Emphasis added). The Office also sent a termination letter on May 10, 2012, to an address different from the address appearing on the May 4, 2012 letter. In response, appellant, through counsel, wrote a letter dated June 21, 2012, to the Office appealing her termination.[2] The Office responded to appellant's letter by a letter dated July 19, 2012, stating that, because appellant "failed to appeal within 15 days after she received notice of her termination, the appeal is hereby denied and dismissed with prejudice for failure to

[1] Our review of the record reveals that this letter was not before the circuit court during the hearing on the motion to dismiss. The record extract, however, filed by appellant includes the termination letter, and appellant conceded at the motion to dismiss hearing that she received a letter of termination dated May 4, 2012. We consider the inclusion of this letter to be an admission and consider the letter in this appeal.

[2] With the exception of the termination letter discussed in footnote 1, the background set forth above is derived from the pleadings, motions, and other documents produced at the hearing on the motion to dismiss. *See* Paul V. Niemeyer & Linda Schuett, *Maryland Rules Commentary* 205 (3d ed. 2003) (advising that if it is necessary to make findings to decide subject matter jurisdiction, a legal conclusion collateral to the merits, "the court may consider affidavits or, in connection with any hearing, take testimony"). *See also Bond v. Messerman*, 391 Md. 706, 718 (2006) ("If additional facts are necessary to decide the motion to dismiss for lack of personal jurisdiction, the court may consider affidavits *or other evidence adduced during an evidentiary hearing*, without transforming the motion to dismiss into a motion for summary judgment." (emphasis added) (citing Paul V. Niemeyer & Linda Schuett, *Maryland Rules Commentary* 205 (3d ed. 2003)).

exhaust the administrative remedy provided by law." Appellant did not appeal the Office's determination.

Several years later, on October 20, 2015, appellant wrote the Office requesting a review of her 2012 termination. Appellant insisted that her termination was unconstitutional and illegal because the Office did not comply with Maryland Code, (1993, 2009 Repl. Vol.), § 11-106 of the State Personnel and Pensions Article ("SPP"). Specifically, she averred that the Office did not meet with her "in a meaningful way for consideration of mitigating circumstances before termination[,]" and did not "provide[] anything in writing of the reasons for the decision, so that [she] might appeal to the appointing authority."[3] When the Office did not respond to appellant's letter, appellant filed a petition for judicial review in the circuit court on November 30, 2015.

On December 16, 2015, the Office filed a motion to dismiss appellant's petition for judicial review. The Office argued that the circuit court did not have jurisdiction to consider appellant's petition for several reasons—but primarily because appellant failed to exhaust her administrative remedies by filing an untimely appeal on June 21, 2012. Both parties submitted several retorts pertaining to the Office's motion.

On February 5, 2016, the circuit court held a hearing on the motion to dismiss. In addition to arguing against granting the Office's motion to dismiss, appellant made an oral motion for leave to amend her petition to a mandamus action. The following exchange occurred between appellant, representing herself, and the court concerning her termination

[3] At the same time, appellant also filed a discrimination complaint with the Maryland Commission on Civil Rights.

and appeal in 2012:

> [APPELLANT]: Okay. So my -- the 15-day clock is supposed to start running based on when I'm notified of the termination of disciplinary action. Okay? There's two problems with that. One is what they're claiming to be my notice is this letter that they sent to me. It's dated May 4th. It's got an incorrect address on it. It was sent to the wrong address. **I didn't get it until May 12th.**
>
> **And I admit,** I didn't open it right then, because I had no idea that it was a letter that was advising me that I had been terminated. And it also didn't -- they didn't tell me before I left that a letter was coming. They didn't call me. They didn't do anything
>
> THE COURT: **So May 12th you received it. What was the date of your internal appeal in 2012?**
>
> [APPELLANT]: The date I filed it? **June 21st.**

(Emphasis added).

At the conclusion of the argument, the circuit court recessed to review the applicable legal authority and then made the following oral ruling:

> [Appellant] was a special appointee, and as such, is an at-will, or was an at-will employee at the time of her termination and for all relevant purposes of this case.
>
> * * *
>
> "Section 11-106" - - which is the provision on which [appellant] wished that she'd been given an opportunity to avail itself - - "applies to at-will state employees' misconduct where the disciplinary action taken is other than termination." I think that spot on answers the question here.
>
> * * *
>
> There is no dispute, and as alleged generally in the papers, and as argued here today, that the termination of employment came down in May of 2012 by a letter, and I will give [appellant] the benefit of

the doubt just for purposes of accepting as true all well-pled facts and matters argued here for the relevance of the instant motion, that the letter was received by her on May 12th, 2012. And I look at that fact for purposes of application of § 11-113 with respect to the timeliness of her appeal letter from June 2012.

And so no matter how I look at the timing of the receipt of the letter, notwithstanding its date I believe on the 4th of May, if I look at Section 11-113 of the State Personnel and Pensions Title, it explains at section (b), "An employee or an employee's representative may file a written appeal of a disciplinary action with the head of the principal unit, which must be filed 15 days after the employee receives" -- hence, my note of the May 12th date -- "receives notice of the disciplinary action and may only be based on the grounds that the disciplinary action is illegal or unconstitutional." I do note that that was precisely, I think, what was set forth in the letter as provided by then-Attorney General Gansler.

So I do note that 11-106 procedures with respect to the disciplinary actions, contemplated disciplinary actions, is not applicable to [appellant] pursuant to 11-305. I also find that even had she been entitled to those provisions under [11-]106, her appeal was, as a matter of law and also of fact -- an uncontested fact I might add -- untimely.

I note that with respect to the preclusive effect of Section 11-113(d)(3), the - - you know, for the first appeal in 2012, the appeal letter in May of 2012, was untimely in the first instance in 2012. And what I'm calling the second appeal, which is the letter of October 20th, 2015, if I review that as sort of a second appeal, not only is that untimely, but it is also barred by section 11-113(d)(3), which specifically says that a response to the appeal of 2012 is the final administrative decision. So I don't believe that there is a proper complaint pending in this case as a result.

* * *

[Appellant] has not been met by a closed door, other than by her own failure to act timely in accordance with statutory provisions. In other words, to allow her to leave to amend for purposes of seeking a mandamus remedy would, in short, give her a second bite at the apple to excuse her failure, albeit unintentional, failure to comport with the statutory requirements that would have entitled her to some

> remedy that she seeks through this petition for a judicial review.
>
> And so for that reason, I am going to dismiss the Petition for Judicial Review with prejudice and will decline at this time to entitle [appellant] leave to amend for purposes of seeking a writ of mandamus.

The circuit court entered an order consistent with its oral ruling on February 10, 2016, and appellant filed this timely appeal. We will include additional facts as necessary to the resolve the questions presented in this appeal.

STANDARD OF REVIEW

Our review of the circuit court's decision to grant the Office's motion to dismiss is limited to reviewing the court's legal conclusions. *Forster v. State, Office of Public Defender*, 426 Md. 565, 579 (2012). "Whether a plaintiff must exhaust administrative remedies prior to bringing suit is a legal issue which the Court of Appeals [and Court of Special Appeals] reviews *de novo*." *United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 14 (2016).

DISCUSSION

I. *Exhaustion of Administrative Remedies*

Appellant argues that she is entitled to the procedures set forth in SPP § 11-106, which require, among other things, that "an appointing authority" follow a five-step process before disciplining an employee for misconduct.[4] Appellant contends that her

[4] SPP § 11-106 provides:

> (a) *Procedure*. — Before taking any disciplinary action related to employee misconduct, an appointing authority shall:
> (1) investigate the alleged misconduct;

appeal is timely, because the time to file an appeal cannot begin until after she receives the procedures of notice set forth in SPP § 11-106. The Office responds that the position of Assistant Attorney General is a special appointment, and that Assistant Attorney Generals are at-will employees. The Office contends that *Forster v. State, Office of Public Defender*, 426 Md. 565 (2012), controls this case, and appellant's 2015 appeal is barred for failure to exhaust administrative remedies. We agree with the Office.

Maryland Code (1984, 2014 Repl. Vol., 2017 Supp.), § 6-105(a)(2) of the State Government Article ("SG"), provides as follows:

> (2) **Attorneys, positions that provide direct support to the Attorney General,** and positions that provide direct support to the positions specified in paragraph (3) of this subsection, **appointed under this subsection:**
>
> (i) notwithstanding any other law, and except as provided in paragraph (3) of this subsection, **are deemed special appointments within the meaning of § 6-405(a) of the State Personnel and Pensions Article**;

> (2) meet with the employee;
>
> (3) consider any mitigating circumstances;
>
> (4) determine the appropriate disciplinary action, if any, to be imposed; and
>
> (5) give the employee a written notice of the disciplinary action to be taken and the employee's appeal rights.
>
> (b) *Time Limit*. — Except as provided in subsection (c) of this section, an appointing authority may impose any disciplinary action no later than 30 days after the appointing authority acquires knowledge of the misconduct for which the disciplinary action is imposed.
>
> (c) *Suspension*. — (1) An appointing authority may suspend an employee without pay no later than 5 workdays following the close of the employee's next shift after the appointing authority acquires knowledge of the misconduct for which the suspension is imposed.
>
> (2) Saturdays, Sundays, legal holidays, and employee leave days are excluded in calculating the 5-workday period under this subsection.

> (ii) may not be determined to be special appointments under § 6-405(b) of the State Personnel and Pensions Article; and
> (iii) serve at the pleasure of the Attorney General.

(Emphasis added).

In *Forster*, the petitioner, Nancy Forster, was the State Public Defender; a position that "serves at the pleasure of[ ] the Board of Trustees." *Forster*, 426 Md. at 570-71. On August 21, 2009, the Board of Trustees terminated Forster for refusing to comply with the Board's demands to reorganize the Office of the Public Defender and remove unnecessary personnel. *Id.* at 570, 574-75. On August 16, 2010, Forster filed a complaint for wrongful discharge against the State, and in response, the State filed a motion to dismiss arguing that Forster failed to exhaust administrative remedies and failed to state a claim for wrongful discharge. *Id.* at 576. The circuit court granted the State's motion to dismiss for failure to state a claim, and Forster appealed to this Court. *Id.* at 577-78. Before this Court could consider the case, however, the Court of Appeals issued a writ of certiorari *sua sponte*. *Id.* at 578.

On appeal, the Court examined the statutory scheme that applied to Forster. *Id.* at 581-82. The Court held that Forster's position as State Public Defender was a position in executive service, and therefore was governed by SPP § 11-113, *id.* at 582, which applies to employees "(1) in the management service; (2) *in executive service*; or (3) *under a special appointment described in § 6-405 of this article*." SPP § 11-113 (emphasis added). The Court then explained the procedural process under SPP § 11-113 as follows:

> Under § 11–113, an appeal must be filed within 15 days after the employee receives notice of a disciplinary action taken against him or her. State Pers. & Pens. Art., § 11–113(b)(2)(i). Appeals under

> this section may challenge the disciplinary action based only on grounds that the discipline was illegal or unconstitutional; the employee bears the burden of proof. State Pers. & Pens. Art., § 11–113(b)(2)(ii), (b)(3). The appeal is taken to the head of the principal unit where the employee is, or was, employed, whose decision on the appeal is the final administrative decision. State Pers. & Pens. Art., § 11–113(d)(3).
>
> **Termination of State employees in the management and executive services, as well as special appointees, is governed also by State Personnel & Pensions Article, § 11–305**. **This provision states that employees subject to its terms are at-will employees who serve at the pleasure of the appointing authority and "may be terminated for any reason that is not illegal or unconstitutional, solely in the discretion of the appointing authority."** State Pers. & Pens. Art., § 11–305(b). **When executive branch employees are terminated under § 11–305 they may file a written appeal under § 11–113.** State Pers. & Pens. Art., § 11–305(d). No notice by the appointing authority to the fired employee of the availability of the appeal right is required under § 11–113.

Forster, 426 Md. at 582-83 (emphasis added).

The Court then determined that the statutory scheme for Forster's position was similar to the statutory scheme for probationary employees under SPP § 11-303, which the Court considered previously in *Smack v. Department of Health and Mental Hygiene*, 378 Md. 298 (2003). The Court explained:

> The categories targeted by § 11–303 and § 11–305 are employees with limited rights to continued employment. **Section 11–305(b) makes clear that executive service employees, like Forster, are at-will employees that may be terminated for any (or no) reason as long as the action was not infected by illegality or unconstitutionality, which grounds are recognized expressly in the statutory scheme as having to be raised initially and decided in an administrative appeal**. . . .
>
> The plain language of § 11–305 covers all terminations of at-will employees for any cause, or no cause at all. At-will employees may be terminated at any time, so long as the termination is not

> politically-motivated, illegal, or unconstitutional**. Section 11–305 contains no provision exempting terminations due to misconduct, nor any reference to § 11–106.** Section 11–305, like § 11–303 discussed in *Smack*, contains a separate appeal provision, which limits to illegality or unconstitutionality the grounds upon which an appeal may be maintained. **Section 11–305 is a specific statutory provision providing procedures available only to termination of at-will employees and, therefore, as in *Smack*, is an exception to the more general disciplinary procedures in § 11–106.**
>
> Forster's termination, as an executive service employee, was governed by § 11–305 exclusively. **Forster's argument that her termination was illegal and unconstitutional would have been in the wheel-house of an administrative appeal challenging an at-will employee termination; however, her claims were asserted too late and in the wrong forum in the present litigation. Forster did not appeal administratively (in writing and within 15 days) her termination under § 11–113, as directed by § 11–305(d). Because she did not appeal her termination, the doctrine of exhaustion of administrative remedies bars her complaint for wrongful discharge in the Circuit Court.** Forster's claim that she did not receive written notice of her appeal rights fails also because § 11–305 does not contain a notice provision and no notice is required by § 11–113.

Forster, 426 Md. at 590-91 (emphasis added) (footnote omitted).

Returning to the case before us, we hold that appellant's position as Assistant Attorney General was a special appointment pursuant to the plain language of SG § 6-105(a)(2). Consequently, we hold that appellant's termination is governed by SPP § 11-305 (because that section applies to employees "under a special appointment"), and by the procedures of SPP § 11-113, not SPP § 11-106. *See Forster*, 426 Md. at 590-91 ("Section 11–305 is a specific statutory provision providing procedures [under SPP § 11-113] available only to termination of at-will employees and, therefore, as in *Smack*, is an exception to the more general disciplinary procedures in § 11–106.").

II. *Dismissal of Appellant's Petition for Judicial Review*

Appellant next argues that the circuit court erred in dismissing her petition for judicial review. Given our conclusion that appellant's termination is governed by SPP §11-113, it follows that the circuit court was correct to dismiss her petition based on her failure to exhaust her administrative remedies. "When a legislature provides an administrative remedy as the exclusive or primary means by which an aggrieved party may challenge a government action, the doctrine of administrative exhaustion requires the aggrieved party to exhaust the prescribed process of administrative remedies before seeking '*any other*' remedy or 'invok[ing] the ordinary jurisdiction of the courts.'" *Priester v. Baltimore Cty.*, 232 Md. App. 178, 193 (emphasis in original) (citation omitted), *cert. denied sub nom. Priester v. Baltimore Co.*, 454 Md. 670 (2017).

SPP § 11-113(b)(2) states: "An appeal: (i) *must be filed within 15 days after the employee receives notice* of the disciplinary action[.]" (Emphasis added). At the hearing, appellant admitted that she received her termination letter on May 12, 2012.[5] She was, therefore, required to file her appeal on May 28, 2012 (due to May 27, 2012, falling on a Sunday). Appellant, however, filed her appeal on June 21, 2012. Her appeal was untimely. We discern no error in the circuit court dismissing appellant's petition for judicial review years later after she failed to timely appeal her termination in 2012.

[5] We note, as the Court of Appeals did in *Forster*, that *written* notice is not required under § 11-113 or § 11-305, but we shall accept appellant's admission that she received notice on May 12, 2012, for the purposes of this opinion. *See Forster*, 426 Md. at 591 ("Forster's claim that she did not receive written notice of her appeal rights fails also because § 11–305 does not contain a notice provision and no notice is required by § 11–113.").

Nevertheless, appellant argues that the 15-day appeal period did not begin to run until she discovered her termination was for misconduct. She asserts that Maryland Code, (1974, 2013 Repl. Vol.), § 5-203 of the Courts and Judicial Proceedings Article ("CJP")[6] tolls her case, because the Office's silence and failure to give her the procedures in SPP § 11-106 obstructed her ability to bring her appeal in a timely fashion.

The Office responds that CJP § 5-203 only applies to civil matters before a court, not to an administrative proceeding, because that section applies only to "cause[s] of action," and Maryland Rule 1-202(a) defines an action as "the steps by which a party seeks to enforce any right *in a court* or all the steps of a criminal prosecution." (Emphasis added). And under Rule 2-101(a), the Office continues, a civil action commences once a party files a complaint in a court. The Office also contends that, even if CJP § 5-203 was applicable, appellant has not produced any evidence of fraud required to invoke that section.

Appellant attempts—without legal basis—to rely on the CJP § 5-203 tolling provision. Title 5 of CJP contains provisions dealing with the statute of limitations that apply to the filing of a civil action. *See* CJP § 5-101 ("A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."). These provisions do not govern administrative appeals of disciplinary actions brought under SPP Title 11. Even if CJP § 5-203 did apply, the Court of Appeals has instructed that "[t]he aggrieved

[6] CJP § 5-203 provides: "If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud."

party asserting such fraud or concealment must plead affirmatively and with specificity the supporting facts *in its complaint*[,]" and that the complaint "must go beyond mere conclusory statements" to allege specifically "how the fraud kept the plaintiff in ignorance of a cause of action, how the fraud was discovered, and why there was a delay in discovering the fraud, despite the plaintiff's diligence." *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 170 (2004) (emphasis added) (citations omitted). Appellant did not make any such specific allegations of fraud nor did she provide any evidence thereof.

III. *Mandamus*

Lastly, appellant argues that the circuit court abused its discretion when it failed to permit her to amend her petition for judicial review to a mandamus action. We discern no such abuse of discretion.

The circuit court judge explained correctly in her oral ruling that, for mandamus to be available, "there needs to be a lack of other administrative avenue for relief." The Court of Appeals made this principle clear in *Hovnanian II*, holding that, "in order for mandamus to lie, there must be both no adequate remedy and an alleged illegal, arbitrary, or capricious action." *Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 443 Md. 199, 224 (2015) ("*Hovnanian II*"); *see also Priester*, 232 Md. App. at 187, n.8. In this case, there was an adequate remedy, provided by statute, available to appellant. SPP § 11-113 provided an administrative right to appeal within 15 days of appellant's termination. Her failure to pursue the available avenue of administrative appeal does not allow her to assert mandamus relief alternatively. As the circuit court stated aptly, "to allow [appellant] leave to amend for purposes of seeking a mandamus remedy would, in short, give her a

second bite at the apple to excuse her failure, albeit unintentional, failure to comport with the statutory requirements that would have entitled her to some remedy that she seeks through this petition for judicial review." Accordingly, we hold that the circuit court determined correctly that mandamus relief was not available to appellant under the circumstances in the instant case.

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