Circuit Court for Baltimore City
Case No. 24-C-18-001757

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2768

September Term, 2018

FREDERICK WARE-NEWSOME

v.

DEPARTMENT OF HUMAN SERVICES

Kehoe,
Nazarian,
Gould,

JJ.

Opinion by Kehoe, J.

Filed: January 13, 2020

This is an appeal from a judgment of the Circuit Court for Baltimore City, the Honorable Sylvester B. Cox, presiding, that affirmed a decision of an administrative law judge dismissing Frederick Ware-Newsome's grievance against his employer, the Maryland Department of Human Services, on the ground that the grievance was untimely filed. To this Court, Ware-Newsome raises two contentions, which we have reworded slightly:

l. Did the Office of Administrative Hearings err by applying the wrong statute of limitations and dismissing the grievance as untimely?

2. Did the Office of Administrative Hearings hear and address the issue of timeliness and thus preserve the first issue for review by this Court?

We will affirm the judgment of the circuit court.

Background

The underlying facts are straightforward. Ware-Newsome was employed as a Family Investment Specialist by the Baltimore City Department of Social Services, a unit of the Department. Ware-Newsome asserts that, for a total of thirty-eight working days from June 5 through July 26, 2017, he temporarily assumed the work responsibilities of employees whose pay rates were higher than his. He asserts that he was eligible for "acting capacity pay," which is additional compensation, for serving in those capacities. *See* COMAR l7.04.02.06.[1] According to Ware-Newsome, the relevant time-line is as follows:

[1] The regulation provides in pertinent part:

> • June 5, 2017 – July 11, 2017: Ware-Newsome assumed his supervisor's duties while the supervisor was out of the country.
>
> • July 11, 2017 – July 26, 2017: Ware-Newsome assumed the job duties of a lead worker.
>
> • At some point in early August 2017: Ware-Newsome asked his supervisor about why he hadn't received acting-capacity pay. The supervisor indicated that Ware-Newsome would not be receiving acting-capacity pay.
>
> • August 18, 2017: Ware-Newsome filed a grievance asserting that he was entitled acting-capacity pay for the period between June 5 and July 18, 2017.

An employment relations officer denied the grievance on October 30, 2017, and Ware-Newsome sought review by the Office of Administrative Hearings. The Department filed a motion to dismiss or, in the alternative, for summary adjudication. The Department asserted that Ware-Newsome was not entitled to acting-capacity pay and, relevant to the issues before us, that his grievance was not timely filed. It was the Department's position that Ware-Newsome was required to file his grievance within twenty days of the date that he knew or reasonably should have known that he was not going to receive the additional compensation. The Department's representative took the position that the twenty-day calendar began to run on the first day that Ware-Newsome assumed his temporary job

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> A. An employee designated by an appointing authority to perform on a temporary basis all the duties of a position in a classification that has a rate of pay which is higher than that of the employee's classification shall be paid additional compensation, known as acting capacity pay. . . . The amount of the acting capacity pay shall be the amount which the employee would be paid if permanently promoted to the higher classification unless otherwise provided by law.
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> • • •

responsibilities. The Department's representative asserted that the applicable statute of limitations was found in Md. Code Ann., State Personnel and Pensions Article ("State Pers. & Pens."), § 12-203, which states in pertinent part (emphasis added):

> (a) A grievant may initiate a grievance proceeding by filing a written grievance with the grievant's appointing authority. The grievant shall provide a copy of the grievance to the grievant's supervisor when the grievance is filed.
>
> (b) A grievance procedure must be initiated by an employee *within 20 days after*:
>
> (1) the occurrence of the alleged act that is the basis of the grievance; or
>
> (2) *the employee first knew of or reasonably should have known of the alleged act that is the basis of the grievance*.

• • •

At the administrative hearing, Ware-Newsome did not contend that § 12-203 was inapplicable; instead he argued that the twenty-day limitations period began on the day in early August that he spoke to his supervisor, who told him that he would not be receiving additional compensation. Therefore, he asserted, his grievance was timely because it was filed on August 18, 2017.

The administrative law judge granted the Department's motion for summary adjudication. She did not agree with the Department's position that the twenty-day limitations period began to run on the first day that Ware-Newsome assumed his additional duties. Instead, the administrative law judge concluded that the limitations period began on the date that Ware-Newsome knew or should have known that he was not going to receive additional compensation. The administrative law judge decided that Ware-Newsome

should have realized that management did not intend to pay additional compensation by reviewing his paychecks. She explained:

> [State Pers. & Pens. § 12-203] places the onus on the employee to file the grievance once he or she should have known the basis for it. I conclude that it is reasonable for an employee to check his third paycheck after assuming supervisory duties to see if he is being compensated for them. Counting twenty days from the July 12, 2017 paycheck, [Ware-Newsome]'s grievance regarding the first period of supervisions would have to have been filed by August 1, 2017. As it was filed August 18, 2017, the grievance is untimely.
>
> My analysis regarding the second period of supervision is somewhat different. . . . [Ware-Newsome] fulfilled the lead worker duties until July 26, 2017. He received a paycheck on July 26, 2017 covering the first week of fulfilling the lead worker duties and another paycheck on August 9, 2017, covering the second week of fulfilling those duties. By the time he completed the extra duties on July 26, 2017, it is reasonable that he would have checked his pay and realized he was not receiving acting capacity pay for the lead worker position[.]

Ware-Newsome filed a petition for judicial review. To the circuit court, he presented two arguments. First, he asserted that, assuming that § 12-203 was applicable, the administrative law judge erred in concluding that he should have known that he wouldn't be receiving the additional compensation by July 26. Second, he contended that the administrative law judge erred as to the applicable statute of limitations. He stated that the applicable statute was State Pers. & Pens. § 2-407, which states in pertinent part (emphasis added):

> (a) If an appointing authority does not report payroll information in

accordance with § 2-402 of this subtitle,[2] the employee or the employee's exclusive representative may initiate a grievance under the grievance procedure established under Title 12, Subtitle 2 of this article.

(b)(1) Except as provided in paragraph (2) of this subsection, and notwithstanding § 12-203 of this article, a grievance under subsection (a) of this section shall be initiated within 20 days after the failure to pay occurred.

(2) *If the failure to pay is not known to, or discovered by, the employee within 20 days after the failure to pay occurs, a grievance under subsection (a) of this section may be initiated no later than 6 months after the date on which the failure to pay occurred.*

• • •

[2] State Pers. & Pens. § 2-402 states in pertinent part:

(a) Except as provided in subsection (b) of this section and notwithstanding any other law, the Central Payroll Bureau of the Office of the State Comptroller shall provide for the payment of all wages to:

(1) each officer and employee of the State who is paid from funds appropriated by the General Assembly; and

• • •

(c)(1) In this subsection:

(i) "wage" means all compensation that is due to an employee; and

(ii) "wage" includes:

• • •

6. any other remuneration promised for service.

(2) The Central Payroll Bureau shall:

(i) establish regular pay periods; and

(ii) except as provided in paragraph (3) of this subsection, pay each employee at least once every 2 weeks or twice each month.

• • •

(d) Each appointing authority shall accurately and timely calculate and report to the Central Payroll Bureau the payroll information for each employee.

The circuit court did not agree with either of these contentions and affirmed the administrative decision.

Analysis

1.

The standard of appellate review in cases such as this is well-established. The decision of the agency or, as in this case, the administrative law judge, is presumptively correct. *Wallace H. Campbell & Co. v. Maryland Comm'n on Human Relations*, 202 Md. App. 650, 662 (2011). When reviewing a decision of an administrative agency, we "look through" the circuit court's decision, *Kor-Ko Ltd. v. Maryland Department of the Environment*, 451 Md. 401, 409 (2017), and examine "whether there is substantial evidence in the record to support the agency's findings and conclusions and whether the agency's decision is premised upon an erroneous conclusion of law." *McClellan v. Department of Pub. Safety & Corr. Servs.*, 166 Md. App. 1, 18 (2005). We will accept the agency's factual findings if they are supported by substantial evidence but exercise *de novo* review over the agency's legal determinations. *Christopher v. Montgomery County Department of Health and Human Servs.*, 381 Md. 188, 198 (2004).

2.

In his brief, Ware-Newsome presents but one substantive argument. He asserts that the administrative law judge erred by applying the twenty-day limitations period in State Pers. & Pens. § 12-203. Instead, he argues that State Pers. & Pens. § 2-407 sets out the applicable

limitations period.[3] Ware-Newsome's premise is correct—the administrative law judge did not address § 2-407. But the administrative law judge can hardly be faulted in this regard because no one suggested to her that § 2-407 was applicable to Ware-Newsome's claim.

Ware-Newsome recognizes, as he must, that in judicial review proceedings courts do not entertain arguments that were not first presented to or decided by the administrative agency. *See, e.g., Public Service Comm'n v. Panda–Brandywine, L.P.*, 375 Md. 185, 204 (2003) ("An issue that was not raised before the Commission or encompassed in the final decision of the agency should not be addressed by the appellate court on judicial review of that decision."). Ware-Newsome presents two reasons as to why this Court should nonetheless address his statutory argument. We will consider them separately.

A.

Ware-Newsome's first contention is based on Md. Rule 8-131(a) which provides that, with the exception of certain jurisdictional issues, "[o]rdinarily, the appellate court will not decide any . . . 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." He correctly points out

[3] The very limited focus of Ware-Newsome's appellate contentions was made clear by the following exchange during oral argument:

> The Court: I understood your brief to be based solely on the contention that the administrative law judge erred by not applying § 2-407. Am I correct on that?
>
> Appellant's Counsel: Yes.

that this Court and the Court of Appeals have interpreted Rule 8-131(a) to allow appellate courts to consider arguments that are variations or elaborations on contentions raised in the trial court. From this premise, Ware-Newsome asserts that he "focused on the relevant facts under [State Pers. & Pens.] § 2-407(b)" when he testified that he first became aware that he was not going to receive acting capacity pay during his conversation with his supervisor, which took place in early August less than twenty days before he filed his grievance. He argues that "[t]he failure to invoke the correct statute at the hearing does not absolve [the Department] of setting the whole series of error in motion by invoking the wrong statute[.]" Ware-Newsome's invocation of Rule 8-131(a) is not persuasive.

By its plain language, Rule 8-131(a) pertains to appellate review of *judicial* decisions. Rule 8-131(a) is designed to encourage judicial efficiency and fairness. As the Court explained in *Chaney v. State*, 397 Md. 460, 468 (2007):

> This Court does have discretion under Maryland Rule 8–131(a) to address an issue that was not raised in or decided by the trial court, however. 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 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.

For these reasons, appellate review of issues not raised before trial courts is generally limited to matters involving plain error or issues where guidance to lower courts is needed. *Id.*

To be sure, considerations of fairness to the parties and adjudicative efficiency are also present in judicial review proceedings. But the reason why courts do not address contentions that were not raised to an administrative agency is based upon the principle of separation of powers:

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

Bulluck v. Pelham Wood Apartments, 283 Md. 505, 518–19 (1978) (quoting *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)); *see also Delmarva Power & Light Co. v. Pub. Serv. Comm'n of Maryland*, 370 Md. 1, 32, *mandate modified on other grounds*, 371 Md. 356, 378–79 (2002) (Courts cannot "resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency."); *Dep't of Nat. Res. v. Linchester Sand & Gravel Cor*p., 274 Md. 211, 228–29 (1975) (holding that a statute providing for de novo review of administrative decisions to grant or deny wetlands permits violated the doctrine of separation of powers); *Dep't of Labor v. Boardley*, 164 Md. App. 404, 415 (2005) ("It is the function of the reviewing court to review only the materials that were in the record before the agency at the time it made its final decision.").

In his reply brief and at oral argument, Ware-Newsome pointed to *McDonnell v. Harford County Housing Authority*, 462 Md. 586, 602 (2019), as support for the proposition that Md. Rule 8-131(a) authorizes courts to address unpreserved issues in judicial review actions. Ware-Newsome is correct but only up to a point. The relevant issue

in *McDonnell* was whether she had preserved for appellate review her contention that the administrative hearing in question had violated her procedural due process rights. McDonnell filed a pro se petition for judicial review, in which she asserted that her hearing had been "unfair." The circuit court affirmed the administrative decision.

On appeal, and with benefit of counsel, McDonnell asserted that the administrative hearing violated her procedural due process rights. In an unreported opinion, and relying upon Md. Rule 8-131(a), a panel of this Court held that her due process argument was not preserved for appellate review because it was not presented to the circuit court. 462 Md. at 596. The Court of Appeals granted McDonnell's petition for a writ of certiorari. In concluding that McDonnell's due process argument was preserved for appellate review, the Court of Appeals concluded that her procedural due process contention was "narrowly preserved" because "due process is concerned with the fundamental fairness of the proceeding" and that McDonnell, "having raised generally the fairness issue, arguably preserved a due process claim." *Id*. at 602 (cleaned up).

The *McDonnell* Court's preservation analysis is focused exclusively on what was raised at the circuit court level, and not what was argued at the agency hearing. The decision does not support Ware-Newsome's argument to us.

For these reasons, our review of Ware-Newsome's appeal is limited to contentions raised to or decided by the administrative law judge. At the administrative hearing, he did not challenge the Department's assertion that § 12-203 set out the applicable limitations period. His argument was: (1) he did not know nor was there any reason for him to believe

that management would not give him acting capacity pay until his conversation with his supervisor in August, 2017; and (2) his grievance was timely because it was filed within twenty days of that meeting. There is no way that we can transmute these contentions into an argument that § 12-203 didn't apply to the case at all.

B.

Ware-Newsome's second argument is that we have the authority to consider his § 2-204 argument pursuant to the doctrine of plain error review. We do not agree.

"Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which vitally affect a defendant's right to a fair and impartial trial." *Malaska v. State*, 216 Md. App. 492, 524 (2014) (cleaned up). Plain error review is restricted to direct appeals of criminal cases. *Walker v. State*, 343 Md. 629, 647 (1996). More than twenty years ago, we observed that no Maryland appellate court had applied the plain error doctrine in a civil case. *Gittin v. Haught Bingham*, 123 Md. App. 44, 50 (1998); *see also Nesbitt v. Bethesda Country Club, Inc.*, 20 Md. App. 226, 233 (1974) (The doctrine of plain error review "is not applicable in civil matters."). We reiterate: plain error review is not available in civil cases.

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

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/2768s18cn2.pdf