

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1495

(Delegate Cullison, *et al.*)

Health and Government Operations

Judicial Proceedings

State Government - Administrative Procedure Act - Contested Cases - Judicial Review

This bill expands the circumstances under which a court may reverse or modify a final decision in a contested case involving termination of employment or employee discipline under the Administrative Procedure Act (APA). Under the bill, a court may reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency.

Fiscal Summary

State Effect: Assuming the bill results in a minimal increase in the volume of appeals from Office of Administrative Hearings (OAH) decisions, general fund expenditures increase minimally for affected State agencies, as discussed below. Revenues are not affected.

Local Effect: The bill is not expected to materially affect circuit court caseloads.

Small Business Effect: Potential meaningful. Small business law firms that litigate these types of cases may benefit from an increase in the demand for their services.

Analysis

Current Law/Background: Generally, a party aggrieved by the final decision in a contested case is entitled to judicial review of the decision. An agency, including an agency that has delegated a contested case to OAH, is entitled to judicial review of a decision if the agency was a party before the agency or OAH. In a judicial review proceeding under

APA, a reviewing court may either remand the case for further proceedings, affirm the agency's final decision, or reverse or modify the decision. The court may reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:

- is unconstitutional;
- exceeds the statutory authority or jurisdiction of the final decision maker;
- results from an unlawful procedure;
- is affected by any other error of law;
- is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
- is arbitrary or capricious.

In general, a petition for judicial review must be filed with the circuit court for the county where any party resides or has a principal place of business.

In *Maryland Aviation Administration v. Noland*, 386 Md. 556 (2005), the Court of Appeals held that when an adjudicatory administrative agency imposes a lawful and authorized discretionary sanction upon an employee, the agency does not need to "...justify its exercise of discretion by findings of fact or reasons articulating why the agency decided upon the particular discipline."

Provisions relating to discipline apply to all State Personnel Management System employees and former employees, except temporary employees. In addition, the appointing authority has the burden of proof by a preponderance of the evidence in a disciplinary action, and the standard must be applied during appeals. Some of the allowed disciplinary actions are set forth below:

- a written reprimand;
- forfeiture of up to 15 work days of accrued annual leave;
- suspension without pay;
- denial of a pay increase;
- demotion; or
- termination with or without prejudice, with the approval of the agency head, depending on the severity of the offense.

Certain acts by an employee, such as intentionally injuring another person, theft of State property, and conviction of a felony, can result in automatic termination of employment. Otherwise, there are two categories of discipline: (1) conduct-related discipline; and (2) performance-related discipline. The former may result from employee misconduct

stemming from either an action or inaction of the employee that violates a statute, regulation, policy, directive, or order. Examples of behavior resulting in conduct-related discipline include:

- being negligent in the performance of duties;
- engaging in intentional misconduct, without justification, that injures another person;
- stealing State property with a value under \$300; and
- using leave contrary to law or policy.

Performance-related discipline may result from inefficient or incompetent job performance or a lack of qualifications for the position.

Before taking a disciplinary action, the appointing authority has 30 days to investigate the alleged misconduct, meet with the employee, consider mitigating evidence, impose the discipline, and advise the employee of appeal rights. The appointing authority has only five days from the employee's last shift to complete this process if the employee is to be suspended without pay. An employee may appeal a disciplinary action. The following outlines the disciplinary appeals process:

- Employees in the skilled service and the professional service have 15 days to file an appeal to the head of the principal unit. If the employee is on initial probation, the employee bears the burden of proof on appeal and may only appeal on the grounds that the action was illegal or unconstitutional. The appeal should explain issues of fact and law that warrant rescinding the action. Upon receipt of the appeal, the agency has 15 days to address, point-by-point, the issues in the appeal.
- After receiving the decision of the agency head, the employee has 10 days to appeal to the Secretary of Budget and Management. If no settlement is reached after 30 days, the appeal is referred to OAH.
- OAH has 30 days to schedule a hearing and notify the parties of the hearing date, and must dispose of the appeal according to the provisions of APA. At the close of the hearing, the office has 45 days to issue a decision. The decision of the office is the final administrative decision.

As mentioned earlier, terminating an employee in the skilled service or professional service requires the approval of the agency head. Terminated employees become "former employees," and with the exception of special appointment employees, may appeal the decision. At each stage in the appeals process, the decision maker can uphold the disciplinary action, or rescind or modify the action and restore lost time, compensation, status, or benefits. As with the grievance procedure, if the agency has a peer review panel,

the employee may bypass the above process and file a disciplinary appeal with the peer review panel. A decision by a peer review panel is the final administrative decision.

Employees in the management service, the executive service, or special appointments may appeal a disciplinary action to the agency head. Employees in these services have the burden of proof in an appeal and may only appeal on the grounds that the action was illegal or unconstitutional. The decision of the agency head is the final administrative decision.

Neither the Maryland Department of Transportation (MDOT) nor Morgan State University (MSU) is covered under this process. Chapter 317 of 2005 altered the disciplinary process that MDOT must follow when an employee is accused of misconduct to make it much more similar to the process outlined above. MSU utilizes a process where disciplinary action cases go to OAH first and then go to the Department of Budget and Management (DBM) on appeal for “exception hearings.”

According to DBM’s *Annual Personnel Report for Fiscal Year 2015*, 431 disciplinary action appeals were resolved at DBM and 197 appeals were forwarded to OAH during fiscal 2015. DBM’s report included information relating to the State Personnel Management System and MDOT (except for the Maryland Transportation Authority and the union employees of the Maryland Transit Administration). It does not include information from the University System of Maryland, Baltimore City Community College, the Injured Workers’ Insurance Fund, or legislative or judiciary employees (to whom APA does not apply).

State Expenditures: Assuming the bill results in a minimal increase in the number of appeals from OAH decisions, general fund expenditures for affected agencies increase minimally. Agencies fund their assistant Attorneys General and litigation-related expenses. The impact of the bill’s provisions on caseloads depends on how many employees subject to discipline or termination (1) decide to proceed to a judicial review by the circuit court solely because OAH’s decision (which comes after the employee has gone through an agency decision and DBM’s settlement process) fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency and (2) the complexity of these cases. This impact cannot be reliably determined at this time.

OAH advises that it can handle the bill’s requirements with existing budgeted resources since (1) the bill addresses appeals to a court from OAH decisions and (2) OAH does not anticipate a significant increase in case volume from the bill.

OAH advises that should an agency not include information regarding the basis for the termination, discipline, penalty, etc. in its decision, an administrative law judge would have

to get that information from the agency at the hearing in order to include the information in OAH's decision.

The bill may result in an operational impact on agencies. APA, to which the bill is drafted, is an umbrella law that provides an appeal route from State administrative actions. APA applies to a wide array of decisions. While the provisions of APA are broad, various State agencies have their own statutory provisions delineating requirements for their decisions, since agencies handle different types of decisions. Statutory requirements for State employment disciplinary actions are set forth under State Personnel and Pensions Article, Title 11, Subtitle 1.

While the bill applies to appeals from OAH decisions on State employment actions, agencies likely need to incorporate the bill's requirements in their decisions and make those findings clear at OAH hearings, since agencies do not wish to have their decisions reversed by the courts should OAH not include the required information in its decisions. "Nature" and "extent" are not defined under the bill. DBM advises that the termination of employment form already requires information on the reason for termination of employment and an explanation for the termination. The discipline form requires information on the reasons for discipline. DBM advises that assuming that "nature" is the type of discipline imposed and "extent" is the level of discipline, it can amend the discipline form to reflect the bill's requirements and train employees with existing budgeted resources.

Additional Comments: As previously noted, the bill applies to decisions by OAH, not decisions by an agency. The bill does not require an agency to state in its decision the basis for the termination, sanction, penalty, etc., since those requirements are enumerated in the State Personnel and Pensions Article, not APA. Also, the right to judicial review created by the bill applies if OAH does not state the required information in its decision, even if the agency stated that information in the agency's decision. In such a situation, an agency may have to litigate an appeal in circuit court even if its decision stated the required information, since agencies do not have control over OAH's decisions.

Additional Information

Prior Introductions: None.

Cross File: SB 942 (Senator Ramirez, *et al.*) - Judicial Proceedings.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of Budget and Management, Maryland Department of Transportation, Office of Administrative Hearings, Department of Legislative Services

Fiscal Note History: First Reader - March 2, 2016
min/kdm Revised - House Third Reader - April 11, 2016

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