The Maryland State Bar Association

Section of Administrative Law

Newsletter

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REPORT FROM THE CHAIRPERSON

Greetings! A busy season for the Administrative Law Section.

As you know, last year, under the skillful leadership of ALJ Yvette Diamond, the Administrative Law Section and the Maryland Office of Administrative Hearings completed and aired Branded D.U.I., a compelling video that explores the consequences of underage drinking and driving through the powerful stories of eleven young people arrested for drunk driving. In Branded D.U.I. teens describe the experience of going to jail, being on probation, losing a driver's license, missing out on school activities and sports, attending alcohol programs, losing college scholarships, and in the case of two teens, living with the knowledge that each teen's conduct resulted in the loss of life. Branded D.U.I. has been embraced by educators, attorneys, judges, and other State officials, and has been endorsed by the Maryland Judiciary, the Maryland State Department of Education, and the Motor Vehicle Administration. It has been distributed to every high school and college in Maryland, all driver education schools and probation offices, and many other State agencies. If you have other suggestions for ways that the section might share this powerful work with the community, please contact Yvette Diamond at YDiamond@oah.state.md.us.

Branded D.U.I. was named a winner of the Fall 2006 Teachers' Choice Poll and aired by Maryland Public Television in November and December. For more information, go to: www.thinkport.org/classroom/itv/itvpoll.tp .

The section will also be presenting Branded D.U.I. to Spring Asper Fellowship students at the University of Maryland Law School on Monday, February 26th from 3:10 to 5:00 p.m., and to Professor Rochvarg's administrative law students at the University of Baltimore on Monday, March 12th from 12:15 to 2:15 p.m.

On February 9, 2007, the administrative law section players presented "Procedural Pitfalls to Avoid at the OAH: A Case Study" at the University of Baltimore as a continuing legal education program. This year the program co-chairs, Andrew H. Baida, Kathleen Chapman and Judith Plymyer, conceived of an innovative hypothetical case in which to explore the application of the OAH rules of procedure. In Hubbard v. Allegany County Department of Social Services, Mother Hubbard's application to run a foster care home was denied by the Department based on a prior record of indicated child neglect (Wee Willie Winkie was observed running about in a nightshirt). Mother Hubbard appealed the denial of her application to the Office of Administrative Hearings. During the morning session, Administrative Law Judges Wayne Brooks, James Murray and Deborah Buie (collectively the "Three Blind Mice") commented on various vignettes chronicling Mother Hubbard's efforts to navigate the OAH rules on pretrial and preliminary matters. During the afternoon session, Judge Glenn Harrell ("Old King Cole"), Professor Arnie Rochvarg ("Ten O'Clock Scholar"), retired Judge John Fader ("Humpty Dumpty"), and retired Chief ALJ John Hardwicke ("Jack Sprat") commented on the ensuing administrative proceeding and hot topics in judicial review. Special thanks to the talented administrative law players: Chief ALJ Thomas E. Dewberry, Robert H. Drummer, AAG Laura McWeeney, AAG Sandra Barnes, ALJ Kathleen Chapman, Andrew H. Baida, Elissa Levan, ALJ Marc Nachman, ALJ Yolanda Curtin, ALJ Wayne Brooks, ALJ James Murray, ALJ Deborah Buie, the Honorable Glenn Harrell, Professor Arnie Rochvarg, retired Judge John Fader, and retired Chief ALJ John Hardwicke. The section also wishes to recognize the extraordinary efforts of scriptwriter Judith Plymyer.

Of note, please make plans to attend the section's spring dinner on April 24, 2007, Sheraton Baltimore City Center Hotel, (formerly Wyndham Inner Harbor). 101 W. Fayette Street, Baltimore, MD 21201, with guest speaker Attorney General Douglas F. Gansler. Tickets are $50. Questions: Bruce P. Martin (410-576-6316) bmartin@oag.state.md.us.

Also, Professor Rochvarg's new book on Maryland administrative law is now available from MICPEL.

Michele McDonald
Chair

RECENT OPINIONS OF THE COURT OF APPEALS IMAGINED TO BE OF SOME INTEREST TO OAH ADMINISTRATIVE LAW JUDGES

By Judge Glenn T. Harrell, Jr.

In this issue, we provide discussions of recent administrative law cases which may be of interest to our members. We are grateful to the Hon. Glenn Harrell, Jr., of the Court of Appeals, and to the Hon. James Eyler and the Hon. James Kenney of the Court of Special Appeals for sharing these materials, which were assembled for a Fall, 2006 program presented at the Office of Administrative Hearings.

1. Massey v. Secretary, Department of Public Safety & Correctional Services, 389 Md. 496, 886 A.2d 585 (2005) (Wilner, J.).

FACTS: On 19 June 2002, appellant, Raymond L. Massey, Jr., then an inmate at the Western Correctional Institution in Cumberland, submitted a Request for Administrative Remedy to the warden of that institution. The handwritten request challenged the lawfulness of certain Department of Corrections (DOC) written directives which, as applied to his situation, allegedly extended his period of incarceration by depriving him of certain credits earned while incarcerated.

On or about 24 June, the Institutional Coordinator, apparently acting for the warden, dismissed the request on the ground that Massey had exceeded the monthly limit of five requests. In accordance with DOC Directive 185-100, Massey appealed to the Commissioner who, on 1 June 2002, dismissed the appeal after concluding that the Institutional Coordinator properly dismissed the complaint pursuant to DOC Directive 185-205.

In accordance with Md. Code, Correctional Services (CS) Art., § 10-206, Massey submitted a grievance to the Inmate Grievance Office (IGO). He stated his grievance to be that DOC Directive "185-002, which restricts the number of administrative complaints, is both unconstitutional and ineffective per the Administrative Procedure Act (State Gov't Art., § 10-113)." He made clear in Attachments that the basis of his complaint was that the directive that contained the five requests/month limitation had not been adopted validly. The Executive Director administratively dismissed the appeal as "being on its face wholly lacking in merit." He did not base his rejection of the appeal on the five requests/month limitation, however, and, indeed, stated that it would not be necessary to address "the procedural issue associated with the dismissal of your ARP [Request for Administrative Remedy] complaint because I am prepared to address the substantive issue. In that regard, he stated:

> "Not only did your original ARP complaint fail to adequately set forth a specific complaint, but more importantly the general basis which you referred to was erroneous. While the documents you mentioned (e.g., disciplinary rules, etc.) were properly referred to as 'directives', you later erroneously referred to them as 'regulations' as falling under the Maryland Administrative Procedure Act (APA). 'Directives' and 'Regulations' are two separate and distinct entities."

Clearly implicit in that ruling is IGO's determination that the directives issued by the Secretary – at least those applicable to Massey's complaint and grievance – were not regulations as defined in the APA and did not need to be adopted as such. Massey then filed a petition for judicial review in the Circuit Court for Allegany County. He argued to that court that his complaint was specific, that he challenged the validity of directives that subjected him to increased punishment and restricted his access to the courts, that the directives qualified as regulations that had to be adopted in accordance with the APA, and that they did not constitute guidelines as to routine internal management. The State's response was that the DOC Directives 105-4 and 105-5 concerned only internal management and did not affect directly the rights of the public or procedures available to the public, and that they therefore did not have to be adopted in conformance with the State Government Article (SG), title 10, subtitle 1.

After a hearing, at which Massey appeared (as he had throughout) without counsel, the court, on 10 March 2003, entered an order affirming the IGO decision. No reasons were given. Massey then filed an application for leave to appeal to the Court of Special Appeals. That court eventually granted the application and transferred the case to its regular docket, but, before argument, the Court of Appeals granted certiorari on our initiative to review the two issues raised in Massey's brief – whether the directives relevant to this case are subject to SG, title 10, subtitle 1, and whether the IGO should have set the matter in for hearing.

HELD: Reversed. The Court agreed with Massey that the Secretary's Directives constituted regulations under the APA, that they had not been adopted in conformance with the statutory requirements, and that they were therefore ineffective. The Court delayed the issuance of its mandate for 120 days in order to give the Secretary of the Department of Corrections an opportunity to pursue the statutory requirements.

Title 10, subtitle 1 of the State Government Article (SG), which is part of the Administrative Procedure Act, sets forth certain requirements for the adoption of regulations by Executive agencies subject to the statute. The Department of Public Safety and Correctional Services and DOC are subject to the statute.

SG §§ 10-110 and 10-111 require that a unit desiring to adopt a regulation, other than as an emergency measure, publish

(continued on page 3)

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the proposed regulation in the Maryland Register and send a copy of it to the Joint Legislative Committee on Administrative, Executive, and Legislative Review (AELR Committee) for that Committee's review. Section 10-111(a) provides that a unit "may not adopt a proposed regulation" until that is done. Section 10-112 specifies that, in order to have a proposed regulation published in the Register, it must be accompanied by a notice (1) states the economic impact of the proposed regulation on State and local government revenues and expenditures and on groups that may be affected by it, and (2) sets a date, time, and place for public hearing. A unit may not change the text of any regulations "unless it is proposed anew and adopted in accordance with the requirements of §§ 10-111 and 10-112 . . ." SG § 10-113.

Section 10-114 requires that, if the regulation is adopted, the unit must submit a notice of adoption for publication in the Maryland Register. SG § 10-117 provides that the effective date of a non-emergency regulation is the tenth calendar day after notice of adoption is published in the Maryland Register (unless a later effective date is specified). Thus, a unit may not adopt a regulation until there has been compliance with §§ 10-110 and 10-111, and a non-emergency regulation duly adopted does not become effective until ten days after notice of its adoption is published in the Register.

None of the procedures mandated by those statutes were followed by DOC prior to adopting or, from time to time, amending the directives at issue in this case. None of the proposals were submitted to the AELR Committee, published in the Maryland Register, or subjected to public hearing. No notice of final adoption was ever submitted to or published in the Maryland Register. Thus, if the subject matter of the directives challenged by Massey fall within the definition of, and thus constitute, a regulation as defined in § 10-101(g), they are ineffective.

Section 10-101(g)(1) defines a regulation as including, in pertinent part, a statement that has general application and future effect, is adopted to "detail or carry out a law that the unit administers" or "govern the procedure of the unit," and is in any form, including a standard, statement of interpretation, or statement of policy. Section 10-101(g)(2) exempts from that definition a statement which otherwise would be included within it but which "concerns only internal management of the unit," or "does not affect directly the rights of the public or the procedures available to the public."

DOC directives that establish a basis for administering inmate discipline fall within the subsection (g)(2) exemptions. The Court observed that, although an exemption from some of the procedural requirements for adopting regulations that pertain only to the internal management of an agency had been part of the Model Administrative Procedure Act for about 50 years and was common in the various State laws, there was surprisingly little comment in the literature on the general meaning and scope of that exemption.

The available cases and commentary indicated that it was a "pragmatic and balanced" exemption. On the one hand, applying the procedural requirements "too far into the internal workings of the agency would completely stifle agency activities if it were enforced," but on the other, "agencies could too easily subvert public rulemaking requirements if they could avoid those procedures for *anything* they called an internal directive to staff."

Arthur E. Bonfield, who seemed to be the most prolific commentator on this subject, in his treatise, *State Administrative Rule Making*, § 6.17.2 at 402, viewed the internal management exemption as a "very narrowly drawn provision with several important qualifications" meant "to assure that matters of internal agency management that are purely of concern to the agency and its staff are effectively excluded from normal rule-making and rule-effectiveness requirements." The kinds of directives falling within the exemption, he concluded in his law review article, "face inwards" and do not "substantially affect any legal rights of the public *or any segment of the public.*" 60 IDAHO L.REV. 8334. He gave as examples "purely internal personnel practices and directions." *Id.* (Emphasis added).

2. Motor Vehicle Administration v. Weller, 390 Md. 115, 887 A.2d 1042 (2006) (Cathell, J.).

FACTS: Early in the morning of 16 May 2004, Steven W. Weller was stopped by a police officer upon being observed driving a vehicle over a set of double yellow lines on a public road. The officer detected a strong odor of alcohol on Weller's breath, as well as bloodshot and watery eyes. Weller admitted that he had consumed six beers. He failed the field sobriety tests that were administered and the results of a preliminary breath test (PBT) suggested that he had a blood alcohol concentration of 0.16.

As a result of this information, the officer arrested Weller for driving under the influence of alcohol, pursuant to Md. Code. (1977, 2002 Repl. Vol.), § 21-902 of the Transportation Article. The officer then requested that he submit to the chemical breath test authorized under § 16-205.1 of the Transportation Article, to determine Weller's blood alcohol concentration. Prior to Weller's decision, the officer advised him of the administrative sanctions Weller would face if he refused to take the breath test for a first or subsequent time. Weller refused to take the test and acknowledged his refusal in writing by signing a DR-15 ("Advice of Rights") form. Pursuant to § 16-205.1 of the Transportation Article, the officer issued Weller an Order of Suspension.

(continued on page 4)

(continued from page 3)

Pursuant to his rights under § 16-205.1(b)(3)(v)(1), Weller requested an administrative "hearing to show cause why his driver's license should not be suspended concerning the refusal to take the [chemical breath] test." On 28 June 2004, a hearing was conducted in front of an Administrative Law Judge (ALJ) at the Office of Administrative Hearings, acting in place of the Motor Vehicle Administration ("Administration"). Eight years earlier, Weller had refused such a test and therefore was facing a possible one-year suspension, pursuant to § 16-205.1(b)(1)(i)(2)(B). The Administration presented several documents at the hearing which were admitted into evidence by the ALJ, including a DR-15A "Officer Certification and Order of Suspension" and the Weller-signed DR-15 "Advice of Rights" form acknowledging his refusal to take the chemical breath test and which contained Weller's PBT result. Weller did not object to the introduction into evidence of any of the Administration's documents.

At the conclusion of the hearing, Weller asked the ALJ to exercise her discretion and not suspend his driver's license for the full one-year period mandated for repeat offenders by § 16-205.1(b)(1)(i)(2)(B). He asked that the ALJ grant him the opportunity to use his company vehicle without restriction, because the ignition interlock could not be installed on that vehicle, and that he be allowed to use his personal vehicle with an ignition interlock. The ALJ declined to recommend the proposed disposition. The Administration then suspended his privilege to drive in Maryland for one-year, as provided for in § 16-205.1(b)(1)(i)(2)(B).

Weller sought judicial review in the Circuit Court for Carroll County of the Administration's decision. The Circuit Court issued an Order reversing the decision of the Administration and vacating the one-year suspension of Weller's Maryland driving privileges.

The Administration then filed a Petition for Writ of Certiorari to this Court, which was granted.

<u>HELD:</u> Reversed. The Circuit Court for Carroll County was incorrect in its interpretation of § 16-205.2(c) of the Transportation Article; preliminary breath test results are admissible in administrative hearings as such hearings are not "court actions" or "civil actions." The Circuit Court also improperly substituted its judgment for that of the ALJ when it reversed and vacated the agency's decision.

3. Motor Vehicle Administration v. Illiano, 390 Md. 265, 888 A.2d 329 (2006) (Battaglia, J.)

<u>FACTS</u>: On 30 October 2003, Maryland Transportation Authority Police Officer J. Marll was in a marked patrol car parked on the shoulder of Route 170 in Anne Arundel County. He was operating a stationary radar unit when a Saturn pulled up approximately ten feet behind him and sat idling for a few minutes. After approaching the passenger side window of the Saturn, Officer Marll asked the driver, Carmelina Illiano, why she had stopped on the shoulder, to which she replied that she should not be driving because she had consumed one beer and one mixed drink. Observing that her eyes were bloodshot and glassy and that her speech was slurred, the officer requested Illiano's driver's license and asked her to perform various field sobriety tests.

After Illiano failed the field sobriety tests, Officer Marll placed her under arrest for Driving Under the Influence and read to her from the DR-15 Form. Initially, Illiano agreed to take a chemical breath test and was taken to the Maryland State Police Barracks where the test was to be administered. When Illiano arrived, however, she changed her mind, refused to submit to the test and, thereafter, pursuant to Section 16-205.1(b)(3) of the Transportation Article, Officer Marll confiscated Illiano's driver's license, served her with an order of suspension for one year, issued her a temporary license, and informed her of her right to a hearing and the required administrative sanctions.

The ALJ upheld the one-year suspension of Illiano's driver's license at an administrative show cause hearing. Illiano subsequently filed a Petition for Judicial Review of the Administrative Law Judge's decision in the Circuit Court for Anne Arundel County. The Circuit Court reversed the suspension. It ruled that Section 16-205.1 (b)(2) of the Transportation Article "clearly requires that an officer have reasonable grounds for detaining someone for driving under the influence of alcohol," and therefore the results of the field sobriety tests were irrelevant in determining whether the officer had reasonable grounds to detain Illiano to perform the chemical test. Based on that logic, the trial court found that there was no substantial evidence to conclude that the officer had reasonable grounds to detain Illiano. The Motor Vehicle Administration then filed a petition for writ of certiorari to the Court of Appeals, which was granted.

<u>HELD</u>: Based upon the plain meaning of Section 16-205.1 (b)(2)'s use of the conjunction "or" in the provision that if a police officer "stops or detains" an individual who the officer has reasonable grounds to believe is driving under the influence, the officer may request that the person submit to a breath test, the ALJ's determination was not clearly erroneous that Section 16-205.1 (b)(2) permits reasonable grounds to arise *post-stop* in order to justify the detention and request for a breath test. Furthermore, based upon the evidence in the record, which included the officer's detection of a strong odor of alcohol emanating from Illiano's vehicle, Illiano's statement that she stopped because she should not be driving, her admission to having consumed two alcoholic drinks, her bloodshot and glassy eyes, her slurred speech, and her failure of the field sobriety tests,

(continued on page 5)

(continued from page 4)

a reasoning mind could have reached the factual conclusion of the ALJ. Therefore, the Court held that the decision of the ALJ upholding the suspension of Illiano's license was supported by substantial evidence and was not premised upon an error of law.

4. Secretary, Department of Public Safety & Correctional Services v. Demby, 390 Md. 580, 890 A.2d 310 (2006) (Greene, J.)

FACTS: This matter has its origin in multiple decisions of the Inmate Grievance Office ("IGO") dismissing the grievances of Quinton Demby, Jesse Baltimore, Kenneth E. Woodall, Daniel Falcone, and Earl F. Cox, Jr. All are, or were, inmates serving sentences in the Division of Correction ("DOC"). In his respective grievance, each inmate alleged that amendments to the Code of Maryland Regulations ("COMAR") adopted by the Department of Public Safety and Correctional Services ("the Department") were *ex post facto* laws, in violation of the U. S. Constitution and Article 17 of the Maryland Declaration of Rights. The regulations concerned "special project" diminution of confinement credits that were awarded to inmates for being double-celled.

The dismissed grievances were each appealed to the respective circuit courts in the counties in which the inmates were confined. All of the dismissals were affirmed. Each inmate filed an application for leave to appeal the decisions to the Court of Special Appeals. The intermediate appellate court, in a reported opinion, granted each respective application and consolidated the matters, ultimately reversing the circuit courts and remanding with instructions to reverse the Secretary and order further proceedings. *Demby, supra, v. Secretary, Dep't of Pub. Safety and Corr. Servs.*, 163 Md. App. 47, 877 A.2d 187 (2005). We subsequently granted the petition for writ of certiorari filed by the Secretary of Public Safety and Correctional Services ("the Secretary") and the cross-petition for writ of certiorari filed by the inmates.

The substance of each inmate's IGO complaint, essentially, was that his eligibility to earn special housing credits for double-celling was terminated by the amendments to COMAR 12.02.06.05N, and that this violated the *ex post facto* clause. Previously, all of the inmates were eligible for special project credits for double-celling, but were precluded from earning such credits in the future as a result of the 1 January 2002, amendment to COMAR 12.02.06.05 ("the amendments").

The dismissals of the grievances were affirmed by the Circuit Courts for Somerset and Washington Counties. After granting the inmates' petitions for leave to appeal, the Court of Special Appeals held that the COMAR amendments were laws for *ex post facto* purposes, "by virtue of the legislative discretion granted to the Secretary and the Commissioner pursuant to Corr. Serv. § 3-707." *Demby*, *supra*, 163 Md. App. at 67-68, 877 A.2d at 199. Further, the intermediate appellate court held that the amendments violated the *ex post facto* prohibition because the "application of current COMAR § 12.02.06.04F . . . alters [the inmates'] punishments by increasing the lengths of their sentences." *Id.* at 64, 877 A.2d at 197.

HELD: Affirmed. The amendments made to former COMAR 12.02.06.05N (now COMAR 12.02.06.04E) are laws for purposes of the *ex post facto* clause, in part because, unlike a purely verbal expression of policy intent or Department of Corrections' directives, the Secretary of Correction's amendments were submitted as emergency regulations pursuant to Md. Code (1984, 2004 Repl. Vol.), § 10-111(b) and were published in the Maryland Register, subject to public comment, and committee approval. The amendments are clearly "regulations" pursuant to the definition of "regulation" in the Administrative Procedure Act ("APA"), Md. Code (1984, 2004 Repl. Vol.), § 10-101(g) of the State Government Article. The amendment was adopted for the purposes of determining who is eligible for special project housing credits, and substantively affected the rights of a specific group of inmates by taking away the eligibility for those credits. The amendments are legislative, rather than interpretive, and are not merely guides that may be discarded where circumstances require, but instead are substantive, pursuant to properly delegated authority in Md. Code (1999), § 2-109(c). They have the force of law as they effectively create a new law governing who shall receive special project credits.

For the purposes of the *ex post facto* clause, the amendments are clearly retroactive as they concern the now-ineligible crimes committed prior to the adoption of the amendments. The retroactive alteration of the COMAR regulations determining respondents' eligibility for credits that would permit an early release implicates the *ex post facto* clause because those credits count as one of the determinants of the inmates' prison terms and the inmates' effective sentences are altered once this determinant is changed. The amendments impose a punishment on the inmates that is more severe than the punishment assigned by law when the act to be punished occurred because the inmates would have had the opportunity to obtain double-celling special project credits in the future, and thus, decrease the amount of time they would have to serve on their respective sentences, but for the amendment which disqualified one of their previously qualifying crimes. The increased punishments caused by the amendments, in these cases, are not speculative and attenuated as the inmates will clearly serve a longer period of time as a result of the amendments. The amendments are constitutionally valid when applied to inmates who committed any of the enumerated disqualifying crimes after the date that the amendments took effect, 2 January 2002; the Court's holding applies only to those

(continued on page 6)

(continued from page 5)

inmates who committed one or more of the enumerated disqualifying crimes prior to the adoption of the amendments.

5. *Department of Natural Resources v. Heller*, 391 Md. 148, 892 A.2d 497 (2006) (Battaglia, J.) (Dissent by Raker, J., joined by Harrell and Greene, JJ.)

FACTS: On 18 October 1998, James Heller was hired as the manager of the Somers Cove Marina ("Somers Cove") in Crisfield, Maryland, and was informed by his direct supervisor, Joseph Ward, Park Service Supervisor, and Ward's supervisor, Daryl DeCesare, Regional Manager for the Eastern Region, Department of Natural Resources (DNR), that the marina had posted a loss the previous fiscal year and that some of his responsibilities were to identify the reasons for the loss and to make the marina profitable.

From November 1998 through April 2001, Heller, Ward, and DeCesare exchanged numerous memoranda concerning the Somers Cove budget and the use of funds generated by the marina.

On 18 January 1999, Mary Taylor was hired by DNR to work at Somers Cove as an office secretary to report directly to Heller. On 9 April 2001, Taylor met with Ward and expressed that she felt threatened and intimidated and that she was being sexually harassed by Heller. Ward forwarded her concerns to DeCesare who ultimately forwarded them to DNR's Equal Employment Opportunity Office ("EEO Office").

On 14 April 2001, DeCesare and Ward met with Heller and informed him that he could not work in the same office as Taylor and that he was being temporarily reassigned to Pocomoke River State Park.

William Bias, Chief of the Office of Fair Practice, DNR, investigated Taylor's claims of sexual harassment and issued a report on 30 May 2001, concluding that there was probable cause to find that Taylor had been discriminated against because of her gender. He recommended the following actions be taken by management: (1) transfer Heller to another location; (2) issue Heller a written reprimand for his actions emphasizing the seriousness of the offense and DNR's zero tolerance policy with respect to sexual harassment; (3) require Heller to attend sexual harassment training; and (4) advise Heller not to retaliate against Taylor, all of which were put into effect. Heller was not demoted in grade and did not incur any loss of pay.

Heller filed an administrative appeal of the disciplinary action, pursuant to Sections 11-109 and 11-110 of the State Personnel and Pensions Article, which he settled prior to it being heard by the Office of Administrative Hearings (OAH). Pursuant to that settlement, Heller could pursue a whistleblower action against the DNR.

In his "whistleblower" action under Section 5-301 *et seq.* of the State Personnel and Pensions Article ("Whistleblower Act"), Heller alleged that the 21 June 2001 disciplinary action was not a consequence of the probable cause finding of sexual harassment, but was retaliatory for the protected disclosures that Heller alleged that he made regarding purported fiscal irregularities in the Somers Cove's operating budget.

The DBM denied his whistleblower claim; Heller appealed to the OAH. An evidentiary hearing was held by an Administrative Law Judge ("ALJ"), who found that Heller failed to meet his burden of proof that he was transferred in reprisal for his disclosure that funds were being improperly diverted from Somers Cove and that DNR did not violate Section 5-305 of Maryland's Whistleblower Statute.

Heller filed a petition for judicial review in the Circuit Court for Somerset County where the judge concluded that the ALJ had not erroneously precluded Heller from litigating the merits of the sexual harassment claim. Heller then filed a notice of appeal to the Court of Special Appeals, which reversed the decision of the ALJ and the Circuit Court's affirmance of that decision. DNR filed a petition for writ of certiorari to the Court of Appeals, which was granted.

HELD: The Court of Appeals reversed the Court of Special Appeals and held that the ALJ's determination, that Heller's allegations regarding alleged fiscal impropriety did not constitute protected disclosures under the Maryland Whistleblower Act, was supported by substantial evidence and was not premised on an erroneous interpretation of the law. The Court also held that the ALJ did not erroneously exclude Heller's proffered evidence relating to the merits of the underlying sexual harassment claim because the ALJ did not preclude Heller from challenging testimony about the motive for his disciplinary action, and also permitted Heller to introduce evidence that the decision was in fact based on the allegedly protected disclosures.

The Dissent, among the points with which it disagreed with the Majority opinion, expressed two views of potential interest to Administrative Law afficionados. Regarding the interpretation and application of Maryland's Whistleblower Law, the Majority held that, in order to come within the protections of the Law, the protected disclosures must be made by the employee to someone in authority who actually has the power to remedy the proffered wrongs that were the subject of the disclosure. Analyzing the same federal cases relied on by the Majority in support of this proposition (which, although interpreting the analogous federal statute, are persuasive as to the Maryland statute), the Dissent concludes that, even if the employee makes his or her disclosures to a supervisor who in fact lacks the authority to correct the "wrongs," the employee's reasonable belief in the validity of the "wrongs" suf-

(continued on page 7)

(continued from page 6)

ficiently comes within the protections of the Law.

The second major point made by the Dissent addressed the Majority opinion's holding that the ALJ did not err in excluding Heller's evidentiary proffer going to the merits of Taylor's sexual harassment claim (which Heller had settled the resultant grievance with DNR) and prohibiting Heller's cross-examination of the DNR person who investigated Taylor's claim against him. The Dissent observed that both lines of defense were relevant to Heller's contention that his reassignment within DNR was in reality in retaliation for his allegations of fiscal improprieties within DNR. Even though it was Heller's reassignment that was at issue in the contested case, his defense that Taylor's claim was merely a pretextual basis for this retaliation made the sought after evidentiary inquiries relevant.

The Dissent also expressed concern that the Court of Special Appeals, in its opinion, seemed to have engaged in appellate fact-finding and endeavored to tie the hands of the ALJ on remand. With this caveat, the Dissenters would have affirmed the judgment of the Court of Special Appeals.

6. *Board of Education of Talbot County v. Hester*, 392 Md. 131, 896 A.2d 342 (2006) (Harrell, J.)

FACTS: The Court here considered whether a provision included in all employment contracts for primary and secondary public school teachers in the State of Maryland (as required specifically by the Code of Maryland Regulations (COMAR)), providing that, in the case of breach, "salary already accrued will be forfeited, in the discretion of the Local Board of Education," was a valid

(continued on page 7)

RECENT REPORTED DECISIONS OF INTEREST TO ADMINISTRATIVE LAWYERS

OTHER RECENT APPELLATE CASES CONCERNING ADMINISTRATIVE LAW:

Case: *Maryland Board of Physicians v. Robert Michael Elliott,* CSA No. 1137, Sept. Term 2005. Reported. Opinion by Moylan, J., ret'd, spec. assigned. Filed Sept. 13, 2006.
Issue: Did the Maryland Board of Physicians properly deny a dermatologist's application to reinstate his state medical license?
Holding: Yes; reversed. The board had substantial evidence that the doctor lied on his application. The board appropriately applied a preponderance of the evidence standard in evaluating the evidence.

OPINIONS OF THE ATTORNEY GENERAL CONCERNING ADMINISTRATIVE LAW:

ALCOHOLIC BEVERAGES
LICENSES – HOLDER OF NONRESIDENT DEALER PERMIT MAY NOT HAVE AN INTEREST IN A LICENSED WHOLESALER
91 Op. Atty Gen 174

Question 1: May the Comptroller issue a nonresident dealer permit to an applicant after the normal review process if the applicant is in compliance with all the requirements of the alcoholic beverages law at that time, but the Comptroller believes that the applicant will purchase a licensed wholesaler in the future?

Question 2: If, after obtaining the nonresident dealer's permit, a nonresident dealer purchases a licensed wholesaler, must the dealer relinquish the permit?
Answer: If an applicant for a nonresident dealer permit satisfies the statutory prerequisites at the time of application, the Comptroller may issue the permit. Indeed, the Comptroller may not deny the permit solely on the basis of an anticipated future acquisition. If the dealer should later obtain an interest that would render it ineligible for the issuance of a permit, it should relinquish the permit; otherwise, the Comptroller may cancel the permit.

ALCOHOLIC BEVERAGES
LICENSES – WHETHER A *DE MINIMIS* INTEREST IN THE HOLDER OF A NONRESIDENT DEALER PERMIT DISQUALIFIES A PERSON FROM OWNING A LICENSED WHOLESALER
91 Op. Atty Gen 239

Question: Whether the holder of a nonresident dealer permit should relinquish its permit or the permit could be canceled by the Comptroller if a corporation which shares some common ownership with the dealer were to purchase a Maryland wholesaler.
Answer: A scenario in which the owners of the Maryland wholesaler would have a 5.6% interest in the nonresident dealer would not be permissible under §2-101(i)(2)(ii). A scenario in which the owners of the Maryland wholesaler would have a 0.33% interest in the nonresident dealer would not offend §2-101(i)(2)(ii), as it would be a *de minimis* interest. *See* 84 *Opinions of the Attorney General* 21, 26-28 (1999) (discussing the concept of "insignificant interests" in the context of Article 2B).

(continued from page 7)

and enforceable liquidated damages clause or an unenforceable penalty.

James D. Heister and Christina L. Marvel, Appellees, teachers in the Talbot County Public Schools at the times relevant to this litigation, breached in 2003 their employment contracts with the Talbot County Board of Education (the "County Board") by failing to provide notice of their resignations prior to the contractually required May 1 deadline. Following their resignations, accrued, but unpaid, salary for the school year August 2002 through August 2003 for Heister and Marvel was withheld, pursuant to the forfeiture provision in their employment contracts. Professionally certificated employees in the public schools of Maryland are required to execute one or the other of two employment contracts, depending on his or her certification status. The Regular Teacher's Contract states that "[i]f any of the conditions of this contract shall be violated by the certificated employee named herein, salary already accrued will be forfeited, in the discretion of the Local Board of Education." COMAR 13A.07.02.01.B(2).

On appeal, Dr. Karen B. Salmon, the then Interim Superintendent of the Talbot County Public Schools, in accordance with § 4-205(c) of the Education Article of the Maryland Code (1978, 2001 Repl. Vol.), upheld the forfeitures against Heister and Marvel. Heister and Marvel separately appealed the Superintendent's decisions to the County Board. The County Board, in written memoranda on 25 February 2004, affirmed the Superintendent's decision. Consolidating their cases, Appellees appealed the County Board's decisions to the Maryland State Board of Education (the "State Board").

Affirming the decisions of the County Board, the State Board determined that the forfeiture provision was valid and enforceable. After acknowledging its broad statutory authority, the State Board noted that its "regulations are generally considered valid provided that the regulations do not contradict the statutory language or purpose." The State Board then highlighted that the purposes of the forfeiture provision not only included deterring late resignations, which makes it difficult for the local board to recruit and hire qualified teachers, but also attempts to reasonably compensate the local board for damages in recruiting and training replacement teachers as well as the cost of using substitute teachers. After examining the legal elements of an enforceable liquidated damages clause, the State Board determined that the forfeiture provision in the teachers' employment contracts satisfied those elements and thus was a valid liquidated damages clause.

Appellees sought judicial review in the Circuit Court for Talbot County of the State Board's decision. The Circuit Court reversed the decision of the State Board and remanded the case to the State Board for further proceedings consistent with its ruling. The trial court concluded that the salary forfeitures were not set forth to be imposed uniformly because the clause did not mandate its imposition in every case. Thus, the Circuit Court determined that the exercise of discretion was arbitrary and thus the forfeiture provision was not valid and enforceable.

The County Board appealed the Circuit Court's judgment to the Court of Special Appeals. On our initiative, we issued a writ of certiorari, before our colleagues on the intermediate appellate court could decide the case.

7. *Department of Public Safety & Correctional Services v. Myers*, 392 Md. 589, 898 A.2d 465 (2006) (Wilner,, J.)

<u>FACTS:</u> Petitioners included seven correctional institution employees, each of whom is involved in procurement for the Department of Public Safety & Correctional Services. Prior to 1999, DPSCS used the unitary "Agency Buyer" (AB) classification series for all procurement positions. As a result of a 1999 classification study, a separate "Agency Procurement Specialist" (APS) series was promulgated for employees who purchased items using the competitive bidding or negotiation process. The Department of Budget & Management (DBM) examined the 23 positions in the DPSCS that were involved with procurement activities and issued a report. Petitioners were not satisfied with the analysis and filed grievances for further reclassification. The grievances proceeded through the three step grievance process and were referred to the OAH. After an evidentiary hearing, the ALJ filed a memorandum and order in which he granted the grievances filed by two employees and denied the others. DPSCS filed a petition in the Circuit Court for Baltimore County for judicial review of the ALJ's decision to reclassify the two employees and the other five grievants filed a cross-petition seeking review of the denial of relief. The court found no error as to the reclassification, but concluded that the ALJ exceeded the scope of his authority by actually ordering the reclassification and directed the ALJ to modify his order and remand the cases to DBM for restudy. The court affirmed the ALJ's decision as to the other five employees. The Court of Special Appeals held that the ALJ did not exceed his authority in ordering the reclassification and reversed the judgment of the Circuit Court on that point and affirmed the Circuit Court ruling as to the other five employees. The Court of Appeals granted *certiorari* to consider both those issues.

<u>HELD:</u> Affirmed. An ALJ has the authority to direct that an employee be placed into the proper classification if he or she concludes that an employee is performing duties that entitle the employee to be in a different classification. Maryland Code, State Personnel & Pensions Art. (SPP) § 12-103 provides that, unless another procedure is provided by

(continued on page 9)

(continued from page 8)

SPP, the grievance procedure "is the exclusive remedy through which a nontemporary employee in the [SPMS] may seek an administrative remedy for violations of the provisions of this article." The ALJ is the final decision maker and pursuant to SPP § 12-401, the decision maker shall determine not only the "proper interpretation or application of the policy, procedure, or regulation involved in the grievance" but also the "appropriate remedy." Section 12-402(a) makes clear that the remedies include the restoration of "rights, pay, status or benefits" and § 12-402(b) contemplates that back pay must reflect the additional compensation attached to the position the employee should have had. The Court affirmed the Court of Special Appeals with regard to the other five employees.

8. *Fowler v. Motor Vehicle Administration*, ___Md.___ (2006) (No. 111, September Term, 2005) (opinion filed 30 August 2006) (Harrell, J.)

FACTS: Zachary Shawn Fowler was stopped for making an unsafe lane change by a Howard County police officer. The officer asked Fowler to submit to a preliminary breath test ("PBT"), used as a guide by police officers to determine whether to make an arrest. Fowler refused. After Fowler performed poorly on field sobriety tests, the officer arrested him for drunk driving and transported him to the police station.

At the police station, the officer provided Fowler with a DR-15 Advice of Rights form. This form has a dual purpose. First, it advises an arrested driver that, under §16-205.1 of the Transportation Article, Maryland Code (1977, 2002 Repl. Vol.), refusing to take a chemical alcohol concentration breath test, or submitting to a test and registering a blood alcohol concentration result in excess of 0.08, will result in a mandatory suspension of the driver's license. Second, it certifies that the arresting officer complied with the statute's advice of rights requirement. Both Fowler and the arresting officer signed the DR-15 Advice of Rights form and, consequently, Fowler was charged with refusing the chemical breath test, in violation of §16-205.1. Fowler requested a hearing before the Motor Vehicle Administration to contest his license suspension. He filed also a motion to subpoena the arresting officer to testify at that hearing, but deferred action on his motion to an OAH's administrative law judge ("ALJ") conducting the suspension hearing.

At his hearing before the ALJ, Fowler disputed that he was fully advised of his rights by the officer. Fowler testified that when he was provided the DR-15 form, the officer informed him that his license was being suspended because Fowler already had refused to take the test. Fowler believed the officer's statement referred to the PBT, and that in signing the DR-15 Advice of Rights form he was merely acknowledging his refusal of the PBT requested by the officer on the street. He argued, therefore, he did not knowingly refuse a chemical breath test at the station. While Fowler conceded that he was given the DR-15 form to read and sign, he stated that he merely "skimmed over it" before signing it and that the officer did not read it to him. Fowler asserted that if the arresting officer were subpoenaed, the officer would testify consistently with Fowler's version of events.

The ALJ found that Fowler's testimony that he "was told to read [the DR-15 form] and . . . skimmed over it" bolstered "the certification of the officer," and concluded there was no need " to call the officer to clarify anything." The ALJ noted also that there was "no indication the PBT was relied on or not relied on." Consequently, the ALJ denied Fowler's motion to subpoena the officer and suspended his license for 120 days, but modified the sentence to only five days of suspension on the condition that Fowler participate in the Ignition Interlock Program for one year.

Fowler sought judicial review of the ALJ's decision in the Circuit Court for Montgomery County. The Circuit Court affirmed, relying upon *Motor Vehicle Administration v. Karwacki,* 340 Md. 271, 666 A.2d 511 (1995). The Circuit Court concluded that the ALJ properly exercised his discretion by resolving the conflicting evidence of Fowler's testimony and the officer's certification on the DR-15 Advice of Rights form. The court emphasized further that under *Karwacki*, "[t]he ALJ was under no obligation to believe Petitioner over the officer's sworn statement." The Court of Appeals granted Fowler's Petition for Writ of Certiorari.

HELD: Reversed and remanded to the ALJ for further proceedings. The Court of Appeals determined that the ALJ incorrectly denied Fowler's subpoena request where the ALJ was faced with the officer's certification on the DR-15 Advice of Rights form and Fowler's conflicting testimony and proffers of what the officer would state if called to testify, and the driver disputed that he was fully advised by the arresting police officer of the consequence for refusing to take a chemical breath test. Noting *Forman v. Motor Vehicle Administration*, 332 Md. 201, 630 A.2d 752 (1993), the Court reemphasized the three options for an ALJ during a §16-205.1 hearing where the arrested driver files a motion for a subpoena request of the certifying officer and proffers evidence to support the request: accept the proffer and deny the subpoena, reject the proffer and deny the subpoena, or issue the subpoena to receive additional evidence. The Court of Appeals distinguished *Karwacki* because, unlike in the present case, no subpoena request was filed in *Karwacki*.

The Court noted also that an ALJ's treatment of the proffer must be indicated clearly. In the present case, the record contained no specific or explicit statement indicating whether the ALJ accepted or rejected Fowler's proffered tes-

(continued on page 10)

(continued from page 9)

timony as to what the certifying officer would say. Although it recognized that the ALJ might have attempted to comply with one of the options outlined in *Forman*, the Court ultimately remanded the case because, while the ALJ clearly denied the subpoena request, the basis for his decision was not apparent. The Court emphasized further that, in order for reviewing courts to perform proper appellate review, an ALJ's decision must contain "full, complete and detailed findings of fact and conclusions of law."

9. Certiorari Granted, but Awaiting Decision and/or Argument

a. Maryland-National Capital Park & Planning Commission v. Anderson, No. 1122, September Term, 2005

"Was the Commission entitled to appeal the Administrative Hearing Board's decision of 'not guilty' under either the Law Enforcement Officers Bill of Rights (LEOBR statute) or the Administrative Procedure Act?"

b. Clipper Windpower, Inc. v. Sprenger, No. 136, September Term, 2005

"Is a person who does not formally intervene in a Public Service Commission proceeding entitled to seek a rehearing and thereby stay the time limit for filing a petition for judicial review?"

What About Bob?

By Bruce Martin, Asst. Attorney General

On April 27, 2006, at the Lowe's Annapolis the Administrative Law Section held its annual Spring Dinner meeting, a roast titled "What about Bob?" The roasted Bob was Robert A. Zarnoch, the incomparable Counsel to the Maryland General Assembly, longtime member of the Section Council, and acknowledged expert in administrative law, constitutional law, and just about everything else.

The stature of the roasters provided an impressive commentary on Bob Zarnoch's importance to the State government and the legal community at large: Judge Glenn T. Harrell of the Court of Appeals, Judge Diana G. Motz of the United States Court of Appeals for the Fourth Circuit, Thomas V. "Mike" Miller, President of the Maryland Senate, former Maryland Attorney General Stephen H. "Steve" Sachs, Delegate Samuel I. "Sandy" Rosenberg, Vice-Chair of the House Judiciary Committee, former delegate Timothy F. "Tim" Maloney, and former Assistant Attorney General Francis X. "Frank" Pugh. Judge Harrell performed ably as the ringmaster and emcee.

The dinner was completely sold out, but that did not stop a few party crashers from attending anyway. (No one is pointing fingers, but you know who are). Everyone had a wonderful time since the pre-roast cocktail party was lively, the dinner was tasty, and the roasters were hilarious.

Bob's many accomplishments in the field of administrative law, including his critical work on the Commission to Revise the Administrative Procedure Act, his service on the State Advisory Council on Administrative Hearings, and his role as a driving force on the MSBA's Administrative Law Section Council, were largely ignored by roasters bent on obtaining laughs at Bob's expense. The roasters exhibited exceptional skill in this regard. For example, Attorney General Sachs' remarks created a minor medical emergency as several people in attendance laughed so hard that they actually damaged internal organs. Or so they said.

On a more serious note, Attorney General J. Joseph "Joe" Curran, Jr. made a special guest appearance to present an Exceptional Lifetime Achievement Award to Bob from the Administrative Law Section acknowledging Bob's many significant contributions to the field of administrative law. The award read:

> The Maryland State Bar Association Administrative Law Section presents this Exceptional Lifetime Achievement Award to Robert A. Zarnoch for decades of immeasurable contribution to the field of State administrative law and to the Maryland State Bar Association Administrative Law Section; for the unselfish dedication of his time, talent, and ideas to Bar Association activities and the Office of Administrative Hearings Advisory Council; for his leadership in creating, developing, organizing, and implementing activities and events of the Administrative Law Section Council; for his invaluable contribution to virtually every major piece of administrative law legislation and litigation for more than twenty-five years; for his patient and even-handed willingness in assisting clients, colleagues, and professional associates as they attempt to solve difficult, unique and complex questions of State administrative law, all the while maintaining the highest legal and ethical standards; and for demonstrating unparalleled creativity, humor, and brilliance in every facet of his professional life.

It is safe to say that the Administrative Law Section Spring Dinner was a resounding success.

RECENT OPINIONS OF THE COURT OF SPECIAL APPEALS IMAGINED TO BE OF SOME INTEREST TO OAH ADMINISTRATIVE LAW JUDGES

By Judge James Eyler and Judge James Kenney

1. *Department of Health and Mental Hygiene v. Rznarzewski,* 164 Md. App. 252 (2005) (Meredith, J.)

FACTS: This case came to the Court of Special Appeals from the Circuit Court for Baltimore City. The Maryland Department of Health and Mental Hygiene ("DHMH") appealed a judgment of the circuit court that ordered DHMH to comply with an order of an administrative law judge to reinstate a terminated employee, Rynarzewski, with back pay and benefits. After an ALJ ruled in favor of Rynarzewski in a grievance proceeding, concluding that Rynarzewski should not have been terminated for insubordination, neither party filed a petition for judicial review. The ruling that concluded Rynarzewski's termination was improper is, therefore, final and not subject to further appeal. But Rynarzewski and DHMH were never able to come to an agreement as to the terms and conditions of Rynarzewski's return to duty, and Rynarzewski filed a complaint in the circuit court to enforce the ALJ's order. The circuit court ordered DHMH to comply with the ALJ's ruling that Rynarzewski be reinstated, and also ruled that Rynarzewski was fit to return to work as of March 3, 1999. The DHMH appealed.

HELD: Judgment affirmed in part and reversed in part. Case remanded to the Circuit Court for Baltimore City for further proceedings not inconsistent with this opinion.

The Court of Special Appeals concluded that the circuit court properly ordered DHMH to comply with the ALJ's ruling that the employee be reinstated and affirmed that portion of the judgment. However, the Court of Special Appeals concluded that the circuit court erred in construing the administrative decision to establish that the employee was fit to return to work as of March 3, 1999, because that issue was not within the scope of the grievance filed by Rynarzewski. Consequently, the Court of Special Appeals vacated that portion of the order that held that employee's entitlement to back pay should be calculated as if he had been fit to return to work on March 3, 1999.

The Court of Special Appeals held that the extent of the relief the courts can provide to Rynarzewski pursuant to his petition to enforce the administrative order dated July 31, 2002, is for the circuit court to order DHMH to reinstate Rynarzewski to the status he enjoyed on February 22, 1999, such that he will be in the same position he would have been in had the errant order to return to work as of February 1, 1999, and had the concomitantly errant notice of termination dated February 12, 1999, never been issued. Such order of enforcement shall be without prejudice to the right of Rynarzewski to pursue a new grievance in the event he is not satisfied with the employer's calculation of the compensation to which he is entitled in the way of back pay, leave, or other benefits of employment.

2. *Metz v. Allstate Insurance Co.*, 164 Md. App. 386 (2005) (Krauser, J.)

FACTS: In this dispute between an insurance company and one of its former agents, we are asked to decide who owns the agent's book of business or "expirations" for purposes of § 27-503 of the Insurance Article ("Ins."). Enacted primarily to prevent insurance purchasers from losing their coverage when their agent and their company parted ways, this legislation transfers, when that occurs, ownership of the information contained in the agent's book of business to the insurer and then requires the insurer to renew all policies produced by the agent. To off-set the agent's loss of his "expirations," it further requires the insurer, under § 27-503(b)(2), to provide the agent with 90 days' notice of termination and then, under § 27-503(b)(3), to renew the agent's policies, through him or her, for at least two years or until the policies are placed elsewhere. Because the purpose of subsection (2) of § 27-503(b) is to provide the agent with adequate notice of termination and that of subsection (3) is to ensure policy renewal, they are known respectively as the "notice rule" and the "renewal rule."

These rules do not apply, however, when the insurance producer is a "captive agent," that is, an agent who works exclusively for a company or group of companies, whose termination will not interfere with the renewal of any of the policies of his customers, and whose book of business is owned by that entity. As there is no dispute that appellant David B. Metz worked exclusively for appellee Allstate Insurance Company and that the termination of his agreement did not imperil his customers' policies with Allstate, the only issue before us is whether he or Allstate owned his book of business. If he did, then he was entitled to the protections afforded by the notice and renewal rules; if he did not, then he fell within the "captive agent" exception to the applicability of those two prophylactic provisions.

Determining who owned Metz's expirations is no mean task. Under his contract with Allstate, Metz was professionally neither fish nor fowl, that is to say, neither "captive" nor "independent" agent, but a combination of both. He was one of Allstate's "exclusive independent agents," a company designation which conveys the paradoxical nature of his position. As a "exclusive independent agent," he was both an independent contractor and an exclusive agent, traditionally incompatible positions. He did not "own" his book of business, according to Allstate; yet he had an undefined "economic interest" in it, which he

(continued on page 12)

could sell to a buyer approved by Allstate or pledge as collateral for a loan. Indeed, given the novelty and complexity of the parties' business arrangement, it is understandable that the Insurance Commissioner and the circuit court came to different conclusions as to who owned Metz's expirations for purposes of § 27-503(b)(2) and (3). The Insurance Commissioner accepted Metz's claim that he owned his expirations; the Circuit Court for Baltimore City did not. Reversing the Commissioner's decision, the circuit court declared that, under the parties' agreement, the expirations clearly belonged to Allstate and that Metz was therefore not entitled to the statutory benefits he claimed.

HELD: Affirmed. The insurer and its agents are free to negotiate the terms of their contractual relationship, including who owns the expirations. Indeed, when the legislative purpose of Ins. § 27-503 of protecting insureds is addressed in a contract between insurer and agent, by assigning ownership of the expirations to the insurer at the outset, as occurred here, the insurer and agent are free to agree to any terms which they feel meet their respective needs and goals. Compliance with the notice and renewal rules is required when the agent to be terminated owns his expirations; when he does not, he falls within the captive agent exception of that statute and no such compliance is necessary; were it otherwise, the insurer would, in effect, be required by law to compensate a former agent for expirations that it, not he, owns.

3. *Department of Labor Licensing and Regulation v. Boardley*, 164 Md. App. 404 (2005) (Meredith, J.)

FACTS: This case came to the Court of Special Appeals from the Circuit Court for Prince George's County upon judicial review of a Department of Labor, Licensing and Regulation ("DLLR") Board of Appeals' decision. Appellee Boardley applied for unemployment benefits after he was fired by his employer. The employer contested the request for benefits and a hearing was held before a hearing examiner who found that Boardley was terminated for gross misconduct and denied Boardley benefits. Boardley appealed to the DLLR Board of Appeals which affirmed the hearing examiner's decision to deny Boardley benefits. Boardley then petitioned the Circuit Court for Prince George's County for judicial review. The circuit court reversed the DLLR's decision and remanded the case to the agency for further proceedings. DLLR noted an appeal.

On appeal to the Court of Special Appeals, DLLR asserted that the circuit court erred in remanding the case where it made its own findings of fact and failed to determine whether substantial evidence existed to support the Board's decision that Boardley's termination of employment was for gross misconduct.

HELD: Judgment reversed. Case remanded to the circuit court with directions to affirm the administrative decision.

The Court of Special Appeals held that the evidence regarding Boardley's misconduct was sufficient to support the conclusion of the DLLR Board of Appeals that Boardley became unemployed as a result of his own gross misconduct in the workplace.

When the case was being reviewed by the circuit court, Boardley presented new issues in support of his request for reversal of the DLLR's decision which were not presented before the Board of Appeals. Consequently, the circuit court was precluded from considering the new issues in the course of the court's review of the Board of Appeals decision. 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.

4. *Cremins v. County Commissioners of Washington County*, 164 Md. App. 426 (2005) (Barbera)

FACTS: On November 7, 2002, Mr. Crampton filed an "Ordinance Amendment Application" ("the application") with the Washington County Planning Commission. Crampton proposed to reclassify a 97.27 acre parcel of land ("the property") in Washington County from its "A" Agricultural zoning designation, to the "A" Agricultural Planned Unit Development ("PUD") zone.

In accordance with § 16.5(a)(2) of the Zoning Ordinance of Washington County ("zoning ordinance"), the Planning Commission scheduled a joint public hearing on Crampton's application before both it and the County Commissioners of Washington County.

On January 13, 2003, a joint public hearing on the application was held. None of the witnesses was placed under oath. The Planning Commission and County Commissioners heard a report from a Planning Commission staff member, and received statements in favor of the application from Crampton, his attorney, and an engineer with Fox & Associates.

More than 25 members of the public, several of whom are appellants, spoke in opposition to the application. The protestants generally asserted that the existing public schools did not have the capacity to handle the influx of children the development of the PUD would produce, the PUD was not compatible with neighboring properties, and the development would adversely affect traffic along Marsh Pike.

On March 3, 2003, the Planning Commission voted three-to-one to recommend that the County Commissioners deny the application. In a letter dated the following day, the Planning Commission informed the County Commission-

(continued on page 13)

(continued from page 12)

ers of its recommendation. The Planning Commission stated that it "based this recommendation on" the traffic study submitted at the January 23, 2003 hearing, and on "concerns that the residential development density proposed for the [property] was not consistent with the residential density in adjacent developments." The Planning Commission also stated its "opinion that the road infrastructure in the immediate vicinity of the [property] was defici[ent.]"

On March 13, 2003, the County Commissioners held a regular meeting to consider and vote on the application. The County Commissioners voted unanimously to accept "the findings of fact as set forth in the report from the County Attorney." The County Commissioners also voted three-to-one to approve the rezoning of the property to PUD, thereby rejecting the Planning Commission's recommendation that the application be denied.

Appellants filed a petition for judicial review of the County Commissioners' decision, in the Circuit Court for Washington County. After a hearing, the court issued an opinion and order affirming the County Commissioners' decision.

On appeal to the Court of Special Appeals, appellees contended as they had before the circuit court, that the County Commissioners' decision was not based on substantial evidence because the "evidence" was obtained from witnesses who had not been sworn; and that the County Commissioners did not properly interpret the County's zoning ordinance.

HELD: Affirmed. Appellants' failure to object to the witnesses' not being sworn at the joint hearing before the Planning Commission and the County Commissioners constituted a waiver of appellants' right to raise the complaint for the first time on judicial review.

The County Commissioners properly construed the zoning ordinance. When read together with the county's Adequate Public Facilities Ordinance, the County Commissioners are not required to find, before approving the rezoning of land to a PUD, that an adjacent roadway is currently adequate to handle both existing and future traffic. Instead, the statutory scheme as a whole mandates that the Planning Commission monitor adequacy of roadway facilities throughout the PUD review and approval process, and throughout the period of development.

5. *Dozier v. Department of Human Resources*, 164 Md. App. 526 (2005) (Kenney, J.)

FACTS: Levi Dozier, a public at will employee, was terminated by written notice from his position at the Baltimore City Department of Social Services, where he had been employed for eighteen years. The written notice provided no justification for the termination. Dozier filed a written appeal, in which he argued that several days after the termination, the Department director made a statement that Dozier interpreted to be defamatory. The Employer-Employee Relations Unit held a discretionary conference with Dozier and issued a written decision affirming his termination. The decision by the Unit was the "final administrative decision."

Dozier filed a petition for judicial review, which was dismissed by the circuit court. After the court denied Dozier's Motion to Alter Judgment, he noted an appeal to the Court of Special Appeals.

HELD: Affirmed. For a proceeding to meet the definition of "contested case" under the Administrative Procedure Act, which provides a statutory right to judicial review, certain "trial type" procedures must be afforded to the complaining party in a hearing. In this case there was no "trial type" proceeding; neither the Secretary nor the Unit was acting in an "adjudicatory capacity."

The General Assembly has made it quite clear when it intends to afford State employees a "contested case" hearing. No such right is provided to at will employees. Therefore, Dozier was not entitled to judicial review under the Administrative Procedure Act.

Dozier's argument that the circuit court's dismissal of his petition for judicial review constituted a denial of his due process rights was not raised before the circuit court and therefore was not properly preserved for appeal.

Were the Court to address Dozier's constitutional claims, it would conclude that they are without merit. As an at will employee, Dozier did not have a property interest in continued employment. Additionally, the statement Dozier alleged was made against him does not rise to the level of misconduct impugning his honesty and therefore did not implicate a protected liberty interest.

6. *Maryland-National Capital Park and Planning Commission v. Anderson*, 164 Md. App. 540 (2005), *cert. granted*, 390 Md. 500 (January 9, 2006) (Hollander, J.)

FACTS: Kathleen Anderson, an officer with the Maryland-National Capital Park and Planning Commission (the " Commission"), was found not guilty of engaging in an unauthorized vehicular pursuit by an Administrative Hearing Board convened pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"). Thereafter, the Commission sought judicial review in the Circuit Court for Prince George's County, which affirmed.

HELD: Affirmed. In this case of first impression, the Court of Special Appeals was asked to consider whether the Commission has a right to judicial review when an officer is found not guilty of administrative charges. In doing so, the

(continued on page 14)

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Court construed LEOBR. It focused, inter alia, on Md. Code, § 3-108(a)(3) of the Public Safety Article ("P.S."), which provides: "A finding of not guilty terminates the action." In contrast, P.S. § 3-108(c) provides that, upon a finding of guilt, an appeal may be taken in accordance with P.S. § 3-109. Applying principles of statutory construction, the Court concluded that the Commission does not have a right of judicial review when an officer is found not guilty under LEOBR.

Cert: *Maryland-National Capital Park and Planning Commission v. Anderson*, No. 112, September Term 2005.

ISSUE - ADMINISTRATIVE LAW - WAS THE COMMISSION ENTITLED TO APPEAL THE ADMINISTRATIVE HEARING BOARD' S DECISION UNDER EITHER LEOBR OR THE ADMINISTRATIVE PROCEDURE ACT?

7. *Mombee, TLC, Inc. v. Mayor and City Council of Baltimore,* 165 Md. App. 42 (2005) (Krauser, J.)

FACTS: To obtain a nonconforming use permit for the adult entertainment presented at its bar, "Club Bunns," appellant Mombee TLC, Inc., filed a "use" application with Baltimore City's Department of Housing and Community Development. When the Office of the Zoning Administrator denied that application, appellant took the matter before the City's Board of Municipal and Zoning Appeals (the "Board"). Three of the five Board members voted to allow appellant to continue presenting adult entertainment - two did not. Because a super majority of the Board, that is, four out of its five members, must approve such an application, it was denied. Md. Code (1957, 2003 Repl. Vol.), Art. 66B § 2.08(i)(1).

Appellant filed a petition for judicial review in the Circuit Court for Baltimore City. When that court affirmed the Board's decision, appellant noted this appeal.

HELD: Judgment vacated. A prevailing minority is required to issue findings of fact and conclusions of law so as to permit judicial review of its decision.

8. *McClellan v. Department Of Public Safety and Correctional Services*, 166 Md. App. 1 (2005) (Eyler, Deborah S. J.)

FACTS: The appellant, Stanley McClellan, was a Correctional Officer II with the Division of Pretrial Detention and Services. In November 2001, McClellan informed a security guard at Mondawmin Mall that an unidentified individual had fired shots at him while he was alone in a nearby parking lot. Solothal Thomas, a former BCDC inmate supervised by McClellan, had been shot and wounded at the same time and location. Thomas informed the police that McClellan was present with him when a man shot at them. McClellan was interrogated by BCPD detectives. On December 3, 2001, the BCPD contacted the Division about the incident and McClellan submitted a Matter of Record, explaining that he did not see Thomas at the time of the shooting. The following day, McClellan submitted a second MOR, stating that he had reported to the detectives that he noticed a red car on the day of the shooting. Detective Robar, in a memorandum received by the Division on December 20th, recounted the events of the interrogation and informed he would investigate further to determine McClellan's involvement in the shooting. Major Richardson, Commander of the Division's Bureau of Special Operations, submitted a memorandum to Division Commissioner Flanagan, informing him of the pending investigation.

In 2002, a BCPD report issued to the Division revealed that gunshot residue had been found on McClellan's left hand. McClellan, in an MOR on April 11, 2002, explained that a mistake was made in the report, as he had not been near a firearm. Division Major Richardson advised the Commissioner that McClellan had violated several Department Standards and provisions of COMAR. Deputy Commissioner Brown signed McClellan's Notice of Termination. The termination notice was approved, and McClellan's appeal to the Secretary was denied. The appeal was forwarded to the Office of Administrative Hearings, where McClellan filed a motion to dismiss the termination as untimely. The ALJ found that the Division had complied with the 30-day period and affirmed the termination by the Division. In an action for judicial review, the circuit court affirmed the ALJ's decision.

HELD: Vacated and remanded to the circuit court with instructions to remand to the Department for further administrative proceedings not inconsistent with this opinion. There was not substantial evidence in the record to support the ALJ's finding that McClellan's appointing authority did not, under SPP section 11-106(b), acquire knowledge of the misconduct for which discipline was imposed more than 30 days before the date that disciplinary action was taken. Action was taken on April 30, 2002. Commissioner Flanagan was, by statute, the appointing authority for McClellan. Deputy Commissioner Brown was acting as McClellan's appointing authority upon delegation by Commissioner Flanagan. Major Richardson and the Bureau employees working directly for him were acting as agents of Commissioner Flanagan; therefore, the knowledge acquired by them was imputed to Commissioner Flanagan. The evidence showed that McClellan was terminated for misconduct occurring in November and December 2001 and April 2002. The appointing authority had knowledge in December 2001 of misconduct sufficient to order an investigation, even absent the gunshot residue results, with one exception - the appointing authority did not have knowledge until April 11, 2002, of McClellan's false statements in the MOR submitted on that date. The disciplinary action based on misconduct in November and December 2001 was not taken timely; action based on misconduct in April 2002 was taken timely.

(continued on page 15)

(continued from page 14)

9. *State Commission on Human Relations v. Baltimore City Department of Recreation and Parks*, 166 Md. App. 33 (2005) (Adkins, J.)

FACTS: Robert Reuter filed a complaint of discrimination with the State Commission on Human Relations against the City alleging that several parts of the Cylburn Arboretum and Mansion were inaccessible to those who use wheelchairs. The Commission investigated and requested a hearing with the OAH alleging that the City had engaged in unlawful public accommodations practice. Before a hearing was held, the Commission, Reuter, and the City entered into a settlement agreement requiring the City to modify the Arboretum, Mansion, and grounds to make them wheelchair accessible. The OAH issued a consent order adopting the settlement agreement as its final order.

The City failed to make the changes required by the settlement agreement by the required date so the Commission filed a petition for judicial enforcement of the administrative order in the Circuit Court for Baltimore City. Subsequently, the circuit court ruled that the settlement agreement was *ultra vires* because it had not been approved by the Board of Estimates and the City Solicitor had not endorsed the contract as required by the Baltimore City Charter.

HELD: Reversed and remanded to the circuit court with direction to remand to the OAH for further proceedings. The ALJ's consent judgment, which adopted as a final order the settlement agreement between the City and the Commission, was void *ab initio* and unenforceable because it was based on an *ultra vires* agreement. Because the consent judgment was unenforceable, the parties were restored to the status quo prior to the date of the settlement agreement, effectively reviving the Commission's right to proceed against the city at the administrative level.

10. *Montgomery County v. Post*, 166 Md. App. 381 (2005) (Eyler, J.)

FACTS: The Director declared appellee's dog "potentially dangerous," based on a finding that the dog attacked and injured another animal, and ordered appellee "to keep [the dog] muzzled and on a non-retractable nylon or leather leash when off [appellee's] premises." Appellee appealed to the Board.

On March 22, 2004, the Board held a hearing and, on April 27, 2004, issued an opinion and order affirming the Director's decision.

On May 4, 2004, appellee filed a petition for judicial review in circuit court. The circuit court mailed a copy of the petition to the Board, as required by Rule 7-202(d)(1).

The Board did not give written notice to all parties to the proceedings before it, as required by Rule 7-202(d)(3), and did not file a certificate of compliance with section (d), as required by Rule 7-202(e).

By letter dated May 17, 2004, the circuit court mailed a letter to counsel for appellee and to the Animal Services Division, but not to the County Attorney's office, counsel for the Director, advising that the case had been specially assigned to a particular judge.

Rule 7-206(c) provides that "the agency shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives [a]... petition for judicial review." The record "shall include the transcript of testimony and all exhibits and other papers filed in the agency proceeding . . . ." Rule 7-206(a). The agency may require the petitioner to pay the expense of transcribing testimony, which "shall be taxed as costs." Id.

The Board did not transmit the record to the circuit court, as required by Rule 7-206(c).

On September 10, 2004, appellee filed, in circuit court, a motion to reverse the Board's decision, based on the Board's failure to transmit the record. According to the certificate of service, appellee's counsel mailed a copy of the motion to the Director but not to the County Attorney's office. No response was filed to the motion.

On October 14, 2004, the circuit court mailed notice of a hearing, scheduled for October 28, to counsel for appellee and to the Animal Services Division but not to the County Attorney's office. On October 28, 2004, the court held a hearing and, by order bearing the same date, reversed the Board's decision.

The circuit court mailed copies of the October 28 order, but it is not clear to whom they were mailed. At some point, the Board and the County Attorney's office apparently received the order. The Board caused a transcript of testimony to be prepared at its expense and, on December 1, 2004, forwarded the record, including the transcript, to the circuit court. On December 2, 2004, appellant, through the County Attorney, filed, in circuit court, a response to the petition for judicial review and a motion for reconsideration. Appellant asserted that the Board's staff had failed to take action, but contended that reversal of the Board's decision was not an appropriate remedy.

On December 14, 2004, appellee filed an opposition to the motion. On March 23, 2005, the court held a hearing and, by order bearing the same date, denied the motion, based on the Board's untimeliness.

HELD: Reversed. A court on judicial review of an administrative decision cannot summarily reverse the agency's de-

(continued on page 16)

(continued from page 15)

cision for failing to transmit timely the record of its proceedings. Our governmental structure prevents the judiciary from reversing an administrative agency unless the agency's decision fails to pass muster under the applicable standard of review. When the Board failed to send notice of the petition for judicial review to the parties before it and failed to transmit the record, the court, under Rule 7-206, had the authority to dismiss the petition for judicial review or to extend the time for transmitting the record. There is nothing in the Maryland Rules permitting summary reversal of such an agency's decision, without review of the record.

11. *Neutron Products v. DOE*, 166 Md. App. 549 (2006), *cert. denied*, 392 Md. 726 (May 12, 2006) (Hollander, J.)

FACTS: Neutron Products, Inc. ("Neutron" or "PI"), appellant, challenged the administrative penalty assessed by the Maryland Department of the Environment ("MDE"), appellee, for violations of various State regulations pertaining to the control of ionizing radiation and licenses. In particular, following an administrative hearing, NPI was found to have committed approximately 3,600 violations of license conditions and regulations, for which MDE imposed a penalty totaling $40,700.

The Maryland Radiation Act, §§ 8-101 to 8-601 of the Environment Article ("Envir.") of the Maryland Code (1996 Repl. Vol., 2004 Supp.), and Title 26 of the Code of Maryland Regulations ("COMAR"), provide authority to MDE to assure compliance with radiation laws and regulations. The penalty was imposed pursuant to Envir. § 8-510(b), which permits a penalty of up to $1,000 for each day of violation, not to exceed a total of $50,000.

Neutron sought review of the agency's decision in the Circuit Court for Montgomery County. That court affirmed in part and remanded solely to verify that the penalty did not exceed the statutory maximum of $1,000 for a single violation.

HELD: Affirmed. The Court observed that the assessment of a penalty is within the discretion of the administrative agency. Therefore, the agency has broad latitude in fashioning sanctions within legislatively designated limits. It rejected Neutron's contention that the penalty was improper because it "impose[d] an aggregate penalty without providing a per violation breakdown."

The Court explained the MDE was not required to assign a particular dollar amount for each category of violation or individual violations, so long as it did not impose a fine of more than $1,000 per violation, and the total fine did not exceed the statutory cap of $50,000. However, the Court agreed with the circuit court that a remand was necessary to assure that MDE did not impose a fine of more than $1,000 for a single violation.

12. *Albert S. v. Department of Health*, 166 Md. App. 726 (2006) (Hollander, J.)

FACTS: Appellant, Albert S., applied for Medical Assistance benefits on October 1, 2002. The State Review Team ("SRT") determined that he was not disabled, and the Department of Health and Mental Hygiene, Baltimore County Department of Social Services, appellee, denied his application. Appellant appealed and, after an evidentiary "fair hearing" to review the matter, at which medical evidence was presented, the administrative law judge ("ALJ") remanded to the SRT for reconsideration in light of the evidence presented at the hearing. Appellant then appealed to the Board of Review of the Department of Mental Health and Hygiene, which affirmed. After appellant sought judicial review in the Circuit Court for Baltimore County, the court dismissed the appeal as moot because, in the interim, appellant had reapplied for Medical Assistance, was found eligible as of October 1, 2003, and was not financially responsible for medical expenses incurred prior to his approval.

HELD: Reversed. Although the case was technically rendered moot by appellant's receipt of Medicaid, the Court was of the view that the public importance of the issue warranted appellate consideration.
The ALJ erred in remanding the matter to the SRT for further consideration of medical evidence presented at the hearing. Federal and state law governing Medical Assistance based on a disability require that, upon consideration of sufficient evidence presented at a "fair hearing" as to disability, the ALJ must render a final decision as to a person's eligibility for benefits. Once an applicant contests the SRT's determination, it is the ALJ's responsibility to render a final decision in the matter, provided that the evidence is sufficient.

13. *Bergman v. Board of Regents of University System of Maryland,* 167 Md. App. 237 (2006) (Adkins, J.)

FACTS: Four University of Maryland ("UM") students challenged the constitutionality of the school's methods of deciding a student's domicile for purposes of qualifying for lower, in-state tuition. The students sued the Board of Regents of the University System of Maryland and the State, seeking class certification and claiming that the Board violated their constitutional rights when it refused to reclassify them as in-state residents which would have afforded them a substantial tuition reduction that is offered only to Maryland residents.

When initially applying to UM while residing out-of-state, students are classified as out-of-state for tuition purposes. However, under the UM policy, if the student believes that he or she meets the in-state residency criteria, the student can file a petition with the Office of Records and Registration ("ORR"). The petition and supporting documentation

(continued on page 17)

are then reviewed by the Campus Classification Officer ("CCO"), who is also the Director of Records and Registration. A student who is dissatisfied with the decision of the CCO may appeal to the Campus Review Committee ("CRC"), which renders a final decision. A student who wishes to challenge the CRC decision must sue UM.

After exhausting the administrative remedies, the students filed suit against UM, seeking certification for class action. The circuit court denied class certification. Both the Board of Regents and the students filed motions for summary judgment; the Board's motion was granted on the ground that its "denials of the [reclassification] petitions are supported by substantial evidence[.]"

At issue is the standard of review applicable to tuition domicile determinations. The students argued that the circuit court should have treated a challenge to UM's denial of in-state tuition as "de novo" litigation. Conversely, UM argued that the court should have treated it as judicial review of an administrative decision.

The students also contended that the Board's tuition charge differential policy violated their substantive and procedural due process rights, as well as their rights to equal protection under the Maryland constitution as enunciated in Frankel v. Board of Regents of University of Maryland Systems, 361 Md. 298 (2000)(holding that a tuition policy that required that a student could not have in-state tuition status if more than one-half of the student's financial support came from a person or persons who live out-of-state violated Maryland's equal protection clause because it "places in one class bona fide Maryland residents whose primary source of funds is within the State, and places in another, higher paying class, bonafide Maryland residents whose primary source of funds is outside the State".)

HELD: Summary judgment vacated and case remanded to circuit court for further proceedings including remand to the university for further actions. The statutory framework governing the University, i.e., pursuant to art. 12, subtitle 1 of the Education Article, UM is a State instrumentality and the Board acts as its administrator, making rules and regulations and prescribing policies and procedures with respect to governance matters entrusted to the University – makes it clear that UM's tuition domicile decisions are administrative adjudications by a State instrumentality; thus, domicile determinations, when made to determine appropriate tuition charges for its students, are properly reviewed under the deferent standard that applies to review of administrative decisions. Whether a particular student is domiciled in Maryland is a mixed question of law and fact that may be challenged on the same grounds as other administrative decisions, e.g., a person aggrieved by the challenged residency classification must show that the decision is unsupported by substantial evidence.

As to the equal protection argument, this Court held that, in accordance with Frankel, the Board's application of its in-state tuition policy violated the Students' equal protection rights under rational basis review. Although a rebuttable presumption that a student was residing in state primarily for the purpose of attending an educational institution if the student was not financially independent and was financially dependent upon nonresident was valid, the presumption as applied by UM violated the equal protection clause because standards were not static, nor were they applied consistently.

14. *State Department of Assessments and Taxation v. Reier*, 167 Md. App. 559 (2006), *cert. granted* 393 Md. 245 (June, 14, 2006) (Davis, J.)

FACTS: Appellee David Reier was a tax assessor, employed by appellant, State Department of Assessments and Taxation, ("SDAT"), since 1990. The quality of appellee's work came into question in August–September of 1996, which ultimately led to appellee's supervisors terminating his employment on October 7, 1996. The parties appeared before the Office of Administrative Hearings ("OAH") where appellee challenged his termination of employment. The administrative law judge ("ALJ") affirmed the termination.

Upon appellee's petition to the Circuit Court for Baltimore County for judicial review, the court, pursuant to our decision in Western Correctional Institution v. Geiger, 130 Md. App. 562 (2000), remanded the case for further factual findings. The ALJ upheld the termination, which was affirmed by the circuit court. Appellee appealed to this Court, Reier v. State Department of Assessments and Taxation, No. 2456, September Term 2001, (filed December 19, 2002), where, pursuant to the Court of Appeals' decision in Western Correctional Institution v. Geiger, 371 Md. 125 (2002), we ordered that the case be remanded to OAH for reconsideration under a different legal standard. On remand, ALJ Spencer rescinded appellee's termination, ordered he be reinstated to his position with full back pay, but did not award restoration of benefits. The court, on judicial review, affirmed appellee's rescission of termination, reinstatement and full back pay, and supplemented appellee's award with restoration of benefits that ALJ Spencer disallowed. Appeal to this Court followed.

HELD: Judgment of Circuit Court for Baltimore County affirmed in part and reversed in part. In light of the Court of Appeals' decision in Geiger, ALJ Spencer was required to review the evidence to determine when SDAT acquired sufficient information to launch an investigation into appellee's work, as opposed to determine when SDAT should have ac-

(continued on page 18)

(continued from page 17)

quired sufficient knowledge to justify the imposition of a disciplinary sanction. In applying the "sufficient information" legal standard, we held that ALJ Spencer did not err in her factual findings or abuse her discretion in not hearing further testimony upon remand from this Court. The circuit court thus acted properly in affirming this part of the decision. The court, however, erred in its interpretation of § 11-110 (d) and in restoring appellee's benefits. The unambiguous statutory language, read in conjunction with legislative history, compels the conclusion that reinstatement of employment under (d)(1)(iii)(3) does not include restoration of employee benefits.

Cert: *David Reier v. Department of Assessments and Taxation*, No. 29, September Term 2006.

ISSUE - STATE PERSONNEL - DOES AN AWARD TO A WRONGFULLY TERMINATED EMPLOYEE OF "FULL BACK PAY" INCLUDE RESTORATION OF LOST BENEFITS UNDER THE RELEVANT STATUTES?

15. *State Bd. of Physicians v. Bernstein*,167 Md. App. 714 (2006) (Eyler, Deborah S., J.)

FACTS: The Maryland Board of Physicians ("Board"), the appellant, brought charges against Steven Bernstein, M.D., the appellee, under §§ 14-104(a)(22) of the Health Occupations Article, for failure to meet the standard of care. Bernstein is a Board-certified anesthesiologist who was working at Union Memorial Hospital in Baltimore when an elderly patient with a history of heart problems and colon cancer was admitted with a fractured hip and scheduled for hip replacement surgery. Prior to the surgery, a certified registered nurse anesthetist ("CRNA") examined the patient. Bernstein, who was the anesthesiologist of record during the surgery, did not examine the patient or review her chart. Immediately before the surgery, he spoke briefly with the CRNA about the patient's anesthesia plan, but he was not present when the CRNA administered the anesthesia. The patient experienced complications, but Bernstein, who had been down the hallway, was not present when the complications arose and did not arrive in the operating room until two hours after the surgery began.

An Administrative Law Judge ("ALJ") held a contested case hearing. The Board's experts testified that Bernstein had breached the standard of care, in part by failing to properly supervise the CRNA. Bernstein's experts disagreed. The ALJ issued a proposed decision recommending a determination in favor of Bernstein. She found the Board's experts not credible because they lacked experience with CRNAs, based their opinions on improper grounds, or were biased.

The Board rejected the ALJ's proposed decision, found that Bernstein did not meet the standard of care, and reprimanded him. It relied on the testimony of the Board's experts and its own medical expertise. It found Bernstein's experts' testimony ambiguous. The Circuit Court for Baltimore County reversed the Board's decision and the Board appealed.

HELD: The Court of Special Appeals reversed the judgment of the circuit court and remanded the case to the Board for further proceedings. It held that, under substantial evidence review, an agency's decision carries a presumption of validity and is given considerable weight. Although an agency ordinarily owes the ALJ no deference, it must give significant weight to the ALJ's demeanor-based credibility findings. The agency may reject those findings only when it states strong reasons for doing so.

In this case, the ALJ's credibility findings were not demeanor-based, but were based on the expert's past experience, their objectivity, and the logic of their opinions. The experts were not testifying about first-level facts that are susceptible of truth or falsity, but were offering opinions based on assumed facts. As the ALJ's findings were based on factors that appear on a cold record, the Board could reweigh the evidence and draw its own credibility conclusions.

The Court held that the case must be remanded to the Board, however. One of the Board's experts had an adequate foundation for opining that Bernstein had breached the standard of care, but the other did not. Because there is substantial doubt as to whether the Board would have reached the same result absent the invalid opinion testimony of one of the Board's experts, the matter must be reconsidered by the Board without that opinion testimony.

16. *J.T.W. v. Centre Ins. Co.*, 168 Md. App. 492 (2006), cert. granted No. 52, September Term 2006 (August 29, 2006) (Kenney, J.)

FACTS: Appellant sustained property damage as a result of a tornado. Appellant entered into a settlement agreement with his insurer, appellee. Appellant filed a complaint with the Maryland Insurance Administration ("MIA"), challenging appellee's compliance with the settlement agreement and the terms of the insurance policy. The MIA determined that no violation had occurred. Appellant requested a hearing, and the matter was referred to the Office of Administrative Hearings.

An Administrative Law Judge upheld appellant's complaint, in part. The order was mailed on October 14, 2004, and received by appellant on October 20, 2004.

On November 19, 2004, appellant filed a petition for judicial review in the Circuit Court for Charles County. Appellee filed a motion to dismiss on the ground that the petition was untimely.

(continued on page 19)

(continued from page 18)

The issue turned on whether the 30 day time period for filing the petition ran from the date of mailing or the date of delivery of the order. The circuit court granted the motion to dismiss.

Maryland Rule 7-203(a) states that a petition for judicial review shall be filed within 30 days after the latest of (1) the date of the order (2) the date the administrative agency sent notice of the order or (3) the date the petitioner received notice.

HELD: Based on the above rule and provisions in the Insurance Article, the Court of Special Appeals held that the 30 day period ran from the date of delivery of the order, and thus, the petition for judicial review was timely.

Appellee also moved to dismiss based on the absence of a necessary party, namely, appellant's spouse, a joint owner of the damaged property.

HELD: The Court of Special Appeals observed that appellant's spouse participated in the administrative proceedings and , thus, was a party to those proceedings. The Court held that the spouse had abandoned that status by failing to join in the petition for judicial review but that she was not a necessary party or, to the extent she was, she could be joined, and dismissal of the petition was not required.

Cert: *Centre Insurance Company - Z.C. Sterling Insurance Agency v. J.T.W.*, Case No. 52, September Term 2006.

ISSUE - ADMINISTRATIVE LAW - WHEN DOES THE PERIOD FOR APPEALING AN ADMINISTRATIVE DECISION TO THE CIRCUIT COURT BEGIN TO RUN?

17. *Department of Human Resources v. Howard*, 168 Md. App. 621 (2006) (Murphy, C.J.)

FACTS: A mother (1) decided to impose corporal punishment on her son in response to his disrespectful behavior (2) intended to strike the back of her son's head with her knuckles and (3) struck her son's face and bruised the area around his eye when he suddenly turned his head. An Administrative Law Judge found "indicated child abuse." The Circuit Court for Anne Arundel County reversed.

HELD: The Court of Special Appeals heard the case en banc, with 15 judges sitting, all 13 active judges and 2 retired judges, specially assigned. The Court produced a majority, concurring, and two dissenting opinions.

The majority affirmed the circuit court's decision, holding that there was no child abuse as a matter of law because (1) the mother did not intend to injure her son (2)the mother did not act with knowledge that the likely result would be injury that would either harm the child's health or welfare or put him at substantial risk of such harm and (3) the mother did not act with reckless indifference to the possibility of injury as described above.

Aside from the obvious significance of the case with respect to the definition of child abuse, it is noteworthy for the discussion of the standard of review. The dissenting opinions emphasized the deference due the administrative findings. The opinions highlight the difficulty of separating fact, law, and mixed questions of fact and law in the context of judicial review of administrative decisions.

18. *Comptroller v. Miller*, 169 Md. App. 321 (2006) (Hollander, J.)

FACTS: Appellee, Janet M. Miller, filed a grievance against the Comptroller of Maryland (the "Comptroller"), appellant, concerning the Comptroller's method of computing compensable work time when an employee travels from home directly to a remote work site, rather than to the regularly assigned office. Appellee claimed she was entitled to compensation for all of her travel time, while the Comptroller concluded that an employee is not entitled to compensation for time the employee would normally spend commuting to work. An Administrative Law Judge ("ALJ") concluded that the Comptroller's policy was arbitrary and unsupported by law, but "denied and dismissed" Miller's grievance because she failed to present evidence as to the remedy she sought. The circuit court affirmed the ALJ's decision rejecting the Comptroller's policy, but remanded the matter to OAH to determine the specific relief to which Miller was entitled. This appeal followed.

HELD: Reversed. The ALJ erred in concluding that an employee is entitled to compensation for all travel time, without any deduction for the time that the employee would have spent in commuting to the regularly assigned office. The employee is entitled to compensation only for travel time that exceeds ordinary commuting time.

Code of Maryland Regulations ("COMAR") 17.04.11.02B(1)(j) defines "work time" as the time during which an employee "[t]ravels between home and a work site other than the assigned office, in accordance with the Standard Travel Regulations under COMAR 23.02.01." The Standard Travel Regulations under COMAR 23.02.01.01(c)(2) provide: "Reimbursement to employees or officials who use State-owned, State-leased or privately owned motor vehicles to conduct official business for the State is within the jurisdiction of the State Fleet Administrator, Department of Budget and Management, and subject to policies issued by the Secretary...." Section 5.01.05 of the "State Vehicle Fleet Policies and Procedures" manual provides that an employee is entitled to payment for mileage that exceeds the mileage for the employee's daily commute. The regulations set out in the

(continued on page 20)

(continued from page 19)

"State Vehicle Fleet Policies and Procedures" are incorporated by reference into COMAR 17.04.11.02B(1)(j). The Secretary of DBM has chosen to apply to travel time the policy applicable for mileage, awarding compensation for travel time minus normal commuting time. Commute time is not work time, and an employee who is on travel status is not entitled to compensation for time that the employee regularly spends to commute.

19. *Armstrong v. Mayor and City Council of Baltimore*, 1704, September Term 2004, filed September 1, 2006 (Eyler, James R., J.)

FACTS: Douglas M. Armstrong, an appellant, and several other owners of residential properties in Baltimore City filed in the Circuit Court for Baltimore City a petition for judicial review of an ordinance(Ordinance 04-659) enacted by the M & CC, appellee. Ordinance 04-659 granted permission for the establishment, maintenance, and operation of a parking lot to be used in connection with a proposed apartment building at 2807 Cresmont Avenue. The petition for judicial review was filed pursuant to Md. Code, Art. 66B, section 2.09 and Title 7, Chapter 200 of the Maryland Rules. Section 2.09 provides for judicial review of "zoning action" by the City Council of Baltimore.

Appellants challenged Ordinance 04-659 on the grounds that (1)the City Council violated various provisions in the zoning code and in the subdivision regulations and (2) Ordinance 04-659 constituted an unlawful taking of appellants' property. Appellee filed a motion to dismiss, asserting that there was no statutory right of judicial review. The circuit court granted the motion.

HELD: Reversed. The Court of Special Appeals held that the City Council, in enacting Ordinance 04-659, acted in a quasi-judicial or administrative capacity rather than in a legislative capacity and that it was subject to statutory review, governed by Title 7. Specifically, the Court held that "zoning action" includes an action by the City Council granting a conditional use utilizing an administrative type process, applicable to a specific property, when the attack is directed at the use granted for the specific property.

20. *Board of Physicians v. Elliott*, No. 1137, September Term, 2005, filed September 13, 2006 (Moylan, J.)

FACTS: Dr. Robert Michael Elliott, a dermatologist, appellee, was licensed to practice medicine in Maryland in 1991, but the license expired in 1992. In December 1999, appellee submitted an application for reinstatement of his license with the Maryland Board of Physician Quality Assurance, now the Maryland Board of Physicians.

On September 13, 2000, the Board denied appellee's request, for reasons that would constitute grounds for disciplinary action of a licensee. The denial informed appellee that he had a right to a hearing before an Administrative Law Judge ("ALJ") and, if the findings were adverse to him, a right to file exceptions and present argument to the Board.

Appellee requested a hearing, and one was held by an ALJ. The ALJ issued a decision that was adverse to appellee. Appellee filed exceptions, and the Board held a hearing. On September 30, 2003, the Board denied appellee's application.

Appellee filed a petition for judicial review in the Circuit Court for Baltimore County. The court reversed the Board's decision and remanded for further proceedings.

HELD: The Court of Special Appeals reversed the circuit court, thereby affirming the decision of the Board. The Court held that the Board's decision was supported by substantial evidence.

This opinion is notable for its substantial review of an agency's authority to delegate the hearing process to the Office of Administrative Hearings and the degree of deference owed by the agency to the Administrative Law Judge's decision.