UNREPORTED

IN THE COURT

OF SPECIAL APPEALS

OF MARYLAND

No. 1481

September Term, 1997

MARYLAND DEPARTMENT
OF THE ENVIRONMENT

v.

A. HUGO DECESARIS
LIMITED PARTNERSHIP

Hollander,
Byrnes,
Adkins,
JJ.

Opinion by Adkins, J.

Filed: September 28, 1998

#CAL9620461

This case arises out of a decision by the Maryland Department of the Environment (MDE), appellant, to assess a civil penalty in the amount of $30,000.00 against A. Hugo DeCesaris Limited Partnership (DeCesaris), appellee, for alleged sediment pollution and sediment control violations. The decision was challenged, and after a hearing before an Administrative Law Judge (ALJ), upheld by the Final Decision Maker for the MDE. DeCesaris thereafter petitioned for judicial review by the Circuit Court for Prince George's County, which affirmed the findings of violations; however, the court ruled that the fine was arbitrary and capricious and remanded the matter to the agency for reconsideration of the penalty. The MDE appeals from that judgment and presents the following question for our review:

> Was the trial court legally correct in modifying the agency's final decision to assess a $30,000.00 civil penalty and remanding it back to the MDE for reassessment of the penalty?

For the reasons that follow, we hold that the circuit court's decision to remand the matter to the MDE for reassessment of the penalty was improper.

FACTS

DeCesaris is the owner and developer of the "Boatel California," a marine sales and boat storage facility located in St. Mary's County along the Town Creek. The Town Creek is a small

tributary of the Patuxent River that empties into the Chesapeake Bay.

Prior to constructing the facility, DeCesaris hired an engineering firm to prepare a Sediment Erosion Control Plan for the Boatel California site. A modified Sediment Control Plan was approved by the St. Mary's County Soil Conservation District. The certification on the plan, signed by the design engineer who was delegated such authority by DeCesaris, attested that the work at the job site would be done according to the approved plan. Construction of the project began in May 1989 and was inspected frequently by MDE personnel until its completion in July 1990.

After giving DeCesaris notification that failure to comply with the plan and State laws and regulations would subject it to a civil penalty, the MDE issued a Notice of Violation and filed an Administrative Complaint against DeCesaris and J. Calvin Wood & Son, Inc. for alleged sediment pollution and sediment control violations stemming from the Boatel California construction site on November 27, 1990. The MDE sought a civil penalty in the amount of $30,000.00.

DeCesaris and J. Calvin Wood & Son, Inc.,[1] through counsel, requested a hearing on the civil penalty assessment. An ALJ of the

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[1]J. Calvin Wood & Son, Inc. was dismissed from the case without prejudice on May 1, 1991.

Office of Administrative Hearings presided over the hearing and issued a Proposed Decision and Order in which he concluded that DeCesaris had violated MD. CODE ANN., ENVIR. §§ 4-105 and 4-413 (1987, 1996 Repl. Vol.). The ALJ proposed that the fine imposed by the MDE pursuant to ENVIR. § 4-417(d) in the amount of $10,000.00 and the fine imposed pursuant to § 4-116(e)(2) in the amount of $20,000.00 be adopted. Subsequent to a filing of exceptions and oral argument before the Final Decision Maker of the MDE, the Proposed Decision and Order was adopted, and a Final Decision and Order was issued on August 28, 1996, affirming the ALJ's proposed decision.

In his Petition to the circuit court, DeCesaris argued that: 1) J. Calvin Wood & Son, Inc. was an independent contractor,[2] 2) DeCesaris did not violate ENVIR. §§ 4-105 and 4-413, and 3) the assessment of a civil penalty in the amount of $30,000.00 under ENVIR. §§ 4-116(e)(2) and 4-417(d) was unsupported by evidence.

The circuit court found no basis to overturn the Final Decision of the MDE that J. Calvin Wood & Son, Inc. was not an independent contractor. The court also refused to question the MDE's expertise in finding specific environmental violations, and

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[2]The status of J. Calvin Wood & Son, Inc. was the issue of a cross appeal in the instant case which was explicitly abandoned by the cross appellant in the appellee/cross appellant's brief. Therefore, we will not address the issue.

affirmed the MDE's finding that DeCesaris was responsible for the violations. The court did, however, conclude that the MDE's assessment of the $30,000.00 fine was arbitrary and capricious. The court remanded the case to the MDE for the purpose of reassessing a civil penalty. This appeal followed.

DISCUSSION

Appellant argues that the remand by the circuit court of the MDE decision was improper in that the court substituted its judgment for that of the MDE.

To resolve this case properly, we must address two issues. First, we must determine whether the factors required in MD. CODE ANN., ENVIR. §§ 4-116(e)(2) and 4-417(d) used to assess a civil penalty were properly considered. Second, we must determine whether the agency was required to give a reasoned analysis of the calculation of the penalty imposed, including distinguishing between violations that merited a $1,000.00 per day penalty and those penalized at an amended $10,000.00 per day amount.[3] Appellee also asks us to consider whether appellee's procedural due process rights were violated when the MDE sought to enforce the amended

[3]1990 Md. Laws, Ch. 66 amended ENVIR. § 4-417(d) from $1,000.00 per day to $10,000.00 per day. Violations occurring after April 24, 1990, are subject to a $10,000.00 per day fine, while violations occurring prior to April 24, 1990, are subject to a $1,000.00 per day fine.

ENVIR. § 4-417(d) by increasing the penalty amount to $10,000.00 per day when DeCesaris alleged it was only on direct notice of a $1,000.00 per day penalty. We shall not address that issue because it was not raised below.

REVIEW OF AGENCY'S FACTUAL FINDINGS AND ITS CONSIDERATION OF STATUTORY FACTORS

The statutory authority for judicial review of an administrative agency's decisions is set forth in the Maryland Administrative Procedure Act, MD. CODE ANN., STATE GOV'T. § 10-222 (1984, 1995 Repl. Vol.), which provides in pertinent part:

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

Our review of the agency's decision entails only an appraisal and evaluation of the agency's fact-finding and not an independent decision on the evidence. *See Anderson v. Department of Pub. Safety & Correctional Servs.*, 330 Md. 187, 212 (1993). When the agency is acting in a fact-finding

capacity, we review its decision to determine "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 224 (1975).

Our Court of Appeals has determined that the test for reviewing factual findings of administrative agencies is the substantial evidence test. *See Baltimore Lutheran High Sch. Ass'n, Inc. v. Employment Sec. Admin.*, 302 Md. 649, 662 (1985). The test is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512 (1978) (quoting *Snowden v. Mayor & C.C. of Balto.*, 224 Md. 443, 448 (1961)). Thus, "[t]he scope of review is limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Baltimore Lutheran*, 302 Md. at 662. The conclusion may be reached by either "direct proof or by permissible inference from the facts and the record before the agency." *Commission on Human Relations v. Washington County Community Action Council, Inc.*, 59 Md. App. 451, 455 (1984).

Moreover, when applying the substantial evidence test, the circuit court "should not substitute its judgment for the *expertise* of those persons who constitute the administrative agency from

which the appeal is taken" and should "review the agency's decision in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity." *Baltimore Lutheran*, 302 Md. at 662-63 (emphasis in original). Thus, the circuit court may not reverse or modify the decision simply because it may have reached another conclusion. *See id.* at 663-64.

Our review of an administrative agency decision differs markedly from our review of the decision of a trial court. As the Court of Appeals explained in *United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665 (1984):

> In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

Id. at 679. In the posture of this case, "the role of this Court is essentially to repeat the task of the circuit court" to determine whether the circuit court was correct in its review. *Mortimer v. Howard Research and Dev. Corp.*, 83 Md. App. 432, 442 (1990).

THE CIRCUIT COURT DECISION

The circuit court decided to modify and remand because it concluded that the ALJ had not properly considered the factors of actual harm as required by ENVIR. §§ 4-116(e)(2)(ii)(2) and 4-417(d), and cost of clean-up as required by ENVIR. §§ 4-116(e)(2)(ii)(3) and 4-417(d). We disagree and shall hold that these factors were properly considered in assessing the civil penalty.

ENVIR. § 4-116(e)(2)(ii)(2) requires that, in assessing a civil penalty, consideration be given to "[a]ny actual harm to the environment or to human health, including injury to or impairment of the use of the waters of this State or the natural resources of this State[.]" Similarly, ENVIR. § 4-417(d) requires that consideration be given to "the damage or injury to the waters of the State or the impairment of its uses[.]"

We do not believe that in enacting these provisions the legislature intended to require that actual harm be established before a fine can be imposed. The Maryland General Assembly set forth its goal to "protect the natural resources of the State" in ENVIR. § 4-101. In addition, ENVIR. § 4-402 states that "[i]t is State public policy to improve, conserve, and manage the quality of the waters of the State and protect, maintain, and improve the quality of water." "For a civil penalty assessment to be effective

in preventing pollution, the agency cannot wait until the pollution occurs to assess the penalty." *American Recovery Co., Inc. v. Department of Health and Mental Hygiene*, 306 Md. 12, 19 (1986). The imposition of the penalty is grounded upon the violation itself, not upon the resulting harm caused by the violation. *See id.* at 18. Applying the statutory construction principles and the *American Recovery* decision, we conclude that a requirement that actual harm be demonstrated prior to the imposition of a penalty is counterproductive to the above goal and policy announced by the legislature. To require such would require looking beyond the words of the statute. Our Court of Appeals stated in *D & Y, Inc. v. Winston*, 320 Md. 534 (1990), that "construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense should be avoided." *Id.* at 538. Furthermore, where the statutory language is plain and not ambiguous, and expresses a definite and simple meaning, courts do not normally look beyond the words of the statute itself. *See Giant of Md., Inc. v. State's Attorney for Prince George's County*, 267 Md. 501, 512, *appeal dismissed*, 412 U.S. 915 (1973). Accordingly, we find that actual harm is merely a consideration to be used in fashioning an appropriate penalty, not a condition precedent.

To determine whether the ALJ properly considered the actual harm factor, we must examine the record. The ALJ concluded that

the appellee "placed sediment in a position where it would likely pollute the waters of the State" on June 30, 1989, July 24, 1989, August 7, 1989, April 5, 1990, April 20, 1990, May 10, 1990, May 11, 1990, May 16, 1990, May 22, 1990, May 30, 1990, and June 18, 1990. As such, he concluded that the MDE demonstrated that DeCesaris violated ENVIR. § 4-413 on eleven occasions. The ALJ further stated that "[a]ctual pollution and plumes of sediment were visible in Town Creek on July 24, 1989, April 5, May 10 and 16, and June 18, 1990" and "[p]lumes of sediment and actual pollution were visible in Town Creek on at least five (5) occasions."[4]

Next, when analyzing the statutory factor of "actual harm," the ALJ indicated that "introduction of sediment pollution into the waters of the state impact biota, the habitat, and the quality of the water." There was expert testimony that sediment does, in fact, negatively impact the biota, habitat, and water quality. That evidence, in conjunction with testimony that sediment pollution is cumulative and "[i]f it doesn't have an impact at that particular site right away, it might, and probably will, have an

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[4]The circuit court grappled with whether the term "occasion" as used by the ALJ was synonymous with "violation" as used in the statutes. An examination and comparison of the dates listed in one section of the ALJ's Order where he characterizes the pollution as "occasions" and those dates listed in another section of his Order where he characterizes the pollution as "violations," causes us to conclude that the ALJ understood the terms to be synonymous and applied them interchangeably.

impact at that site possibly later," leads us to the determination that the ALJ had substantial evidence to properly consider the actual harm factor and a reasoning mind reasonably could have reached the same factual conclusion. *See Baltimore Lutheran*, 302 Md. at 662. Accordingly, we find that his analysis of the actual harm factor was not arbitrary and capricious.

The circuit court also based its remand on the failure to properly consider the cost of cleanup factor as required by ENVIR. §§ 4-116(e)(2)(ii)(3) and 4-417(d). ENVIR. § 4-417(d) requires that consideration be given to "the cost of clean-up[.]" Similarly, ENVIR. § 4-116(e)(2)(ii)(3) requires that consideration be given to "[t]he cost of clean-up and the cost of restoration of natural resources[.]"

The ALJ determined that "[t]he cost of cleanup is inapplicable to the instant case because sediment deposition has already occurred and any cleanup is impossible." The ALJ relied on the *Standards and Specifications for Soil Erosion and Sediment Control*, incorporated in COMAR 26.17.01.11, which recognizes that sediment deposited into a waterway "may be resuspended by runoff . . . and transported further downslope." *See id.* A biologist, testifying as an expert witness, explained that sediment pollution is cumulative in that many construction sites contribute to the pollution. Thus, we find substantial evidence to allow a

reasonable inference that the extended passage of time after a violation allowed the particles of sediment, deposited in the waterway, to be transported from the site by resuspension. Further, there is evidence that allows the inference that particles may become commingled with sediment pollution from other sites so that estimating clean-up cost is no longer feasible. These specific findings indicate that the ALJ properly considered the factor of cost of clean-up and concluded that the cost of clean-up was "inapplicable to the instant case because sediment deposition has already occurred and any cleanup is impossible." We find that this conclusion is supported by the evidence, is not arbitrary and capricious, and therefore we will not disturb his decision.

REVIEW OF ADMINISTRATIVE SANCTION

The second issue to address is the appellee's contention that the administrative agency must specify the underlying basis for the amount of the fine, in addition to considering the factors mandated by statute.

Our review of a sanction differs from our review of a factual finding. In *Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975) (en banc), the Court of Appeals for the Fourth Circuit held that "the scope of review of a sanction is not as broad as the scope of review of the fact of violation." *Id.* at 1218. The Court went on

to explain that "only in those instances in which it may be fairly said . . . [the agency] has abused [its] discretion by acting arbitrarily or capriciously, would the [reviewing] court be warranted in exercising its authority to modify the penalty." *Id.* In *Cross*, the Court construed the standard of review under the Food Stamp Act and enunciated the general principle that a regulatory agency's determination regarding the amount of a civil penalty must be sustained absent an abuse of discretion. *See id.* at 1218.

Other federal courts have also addressed the severe limitations upon the scope of review of an administratively imposed sanction. The scope of review has been said to be "very narrow." *Panhandle Cooperative Ass'n v. EPA*, 771 F.2d 1149, 1151 (8th Cir. 1985). "The assessment of a penalty is particularly delegated to the administrative agency," *Panhandle*, 771 F.2d at 1152. Therefore the agency must be given broad latitude in fashioning sanctions within legislatively designated limits. *See Butz v. Glover Livestock Comm'n, Co.*, 411 U.S. 182, 189, 93 S. Ct. 1455, 1459 (1973). In other words, where the agency has been entrusted "with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *Butz*, 411 U.S. at 185, 93 S. Ct. at 1458 (quoting *American Power Co., v. SEC*, 329 U.S. 90, 112, 67 S. Ct. 133, 146 (1946)). "Its choice of sanction is not to

be overturned unless 'it is unwarranted in law' or 'without justification in fact.'" *Panhandle*, 771 F.2d at 1152 (quoting *Butz*, 411 U.S. at 185-86, 93 S. Ct. at 1458 (1973)). As a result, "[b]ecause assessing penalties is not a factual finding but the exercise of a discretionary grant of power, our review is limited to deciding whether, under the applicable statute and facts of the case, the agency made an allowable judgment." *Cox v. U.S.D.A.*, 925 F.2d 1102, 1107 (8th Cir. 1991) (citations omitted); *see Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612, 66 S. Ct. 758, 760 (1946). "It is the [agency's] job, not ours, to fashion a remedy for violations." *Cox*, 925 F.2d at 1107.

In the instant case, the agency action is the act of imposing a fine of some amount. Neither the circuit court nor appellee has pointed to any authority, nor can we find a reported case which would afford the appellee a procedural right to an explanation as to the amount of the fine as long as the amount imposed is within the authority of the agency and justified by the facts. Given the scope of review of an administratively imposed sanction, as discussed previously, we conclude that the requirement that there be a statement of reasons and rationale is solely applicable to the determination of whether or not to impose a fine. Thus, once that agency action has been decided, it is within the agency's discretion to determine what sanction is appropriate, as long as

the chosen sanction is within the authority of the agency. *See Panhandle*, 771 F.2d at 1152.

A total fine in the amount of $30,000.00 is not unwarranted in law. The $10,000.00 portion of the total fine falls within the authority of the MDE. As appellant contends, even if the statute had not been amended, the fine imposed was still within the MDE's authority and was justified by the facts. The ALJ found eleven violations of ENVIR. § 4-413. These violations are not contested. Thus, had the statute not been amended, the ALJ could have imposed a penalty of $11,000.00 under ENVIR. § 4-417. Accordingly, the actual sanction of $10,000.00 was within the authority granted to the agency and was not unwarranted in law.

As for the $20,000.00 fine, it is undisputed that DeCesaris committed 226 violations of ENVIR. § 4-105. Under the applicable penalty provision, the instances of violations found numbered nearly seven times the amount of violations required to impose such a penalty.

Nor do we find that the combined sanction amount of $30,000.00 is without justification in fact. As discussed previously, the ALJ reviewed the evidence and made factual findings that DeCesaris had violated ENVIR. §§ 4-105 and 4-413. Next, the ALJ carefully laid out the factors that are required to be considered by the statutes and properly considered them in deciding that the penalty was

reasonable and appropriate. The Final Decision Maker for the MDE agreed. We find that the MDE had authority to impose the $30,000.00 amount and it was not an abuse of discretion to do so. Thus, we will not disturb the decision.

DUE PROCESS VIOLATION

The final claim of the appellee is that its due process rights were violated when the MDE sought to enforce the amended ENVIR. § 4-417(d) by increasing the penalty amount to $10,000.00 per day when DeCesaris alleged it was only on direct notice of a $1,000.00 per day penalty.

Review of points or arguments that the parties fail to raise in proceedings before an agency or trial court will not be considered by a court reviewing an agency order. *See* MD. R. 8-131; *Cicala v. Disability Review Bd.*, 288 Md. 254, 261-62 (1980). We examined the record below and cannot find where the issue of due process was raised prior to this review. Accordingly, as conceded at oral argument by appellee, the issue was not preserved for our review.

CONCLUSION

In summary, in our review of the MDE decision, we find that there was substantial evidence for the ALJ's factual findings

concerning actual harm and cost of clean-up. We also find that there was proper consideration of the statutorily mandated factors so that the decision of the MDE is not arbitrary and capricious. Further, we find no authority requiring statement of a specific rationale for the amount of the penalty and will sustain such penalty absent an abuse of the agency's discretion. We find no abuse of discretion by the MDE. Accordingly, we reverse the judgment of the Circuit Court for Prince George's County and affirm the decision of the MDE.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE DECISION OF THE MARYLAND DEPARTMENT OF ENVIRONMENT.

COSTS TO BE PAID BY APPELLEE.

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