UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0534

September Term, 2015

JAVIER FERREIRA ET UX.

v.

FREDERICK COUNTY
DEPARTMENT OF SOCIAL SERVICES

Kehoe,
Nazarian,
Serrette, Cathy H.
(Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 21, 2016

Javier and Brenda Ferreira wanted to serve as foster or adoptive parents in Frederick County, and they applied to the county's Department of Social Services (the "Department") to become "resource parents" for children in need. In the course of vetting their application, the Department learned that Mr. Ferreira had been convicted of a federal crime, and it denied their application for that reason. The Ferreiras exhausted their administrative remedies, without success, and the Circuit Court for Frederick County upheld the Department's decision. We affirm as well.

I . BACKGROUND

The Ferreiras applied to become resource parents in 2013, and completed the necessary training. In the course of reviewing their application, it became apparent to the Department that Mr. Ferreira had a past criminal conviction. And he did: in September 2001, the United States Department of Justice charged Mr. Ferreira with deprivation of civil rights under color of law, and he was convicted after a jury trial. The United States alleged, and the jury apparently found, that Mr. Ferreira, who was working as a guard in a California jail, had turned off security cameras to allow one inmate to assault another inmate. He was sentenced to fifty-seven months in federal prison and served fifty-two. He also appealed the conviction, but the United States Court of Appeals for the Ninth Circuit affirmed it. *United States v. Ferreira*, 105 Fed. Appx. 198 (9th Cir. 2004).

Jennifer Long, the Department's Resource Home Recruiter and Trainer, asked Mr. Ferreira to submit further information about the conviction. On April 30, 2013, she called Mr. Ferreira and got his version of events, and she followed up with a letter that afternoon in which she explained that the applicable regulation, COMAR 07.02.25.04, required the

Department's director, Diane Gordy, to review the case and determine whether the application could move forward. She asked Mr. Ferreira to provide the following information in his response:

> **Detailed information about the charges; court case; sentence; etc. (providing documentation as available).
>
> **What type of formal support/help have you received since the time of the charges (therapy, etc.)?
>
> **How have you changed as a person since the charges, and what information helps to support your statements?
>
> **What types of activities and/or organizations have you been involved with in the community?
>
> **Provide the names & contact information of non-family members who can provide personal references for you?

In response, Mr. Ferreira submitted a document in which he answered the questions and gave a detailed version of the events that gave rise to the conviction as he saw them, the support he received from his family after his incarceration, how the event "changed [his] life," and his involvement with church and community. He also submitted numerous reference letters that spoke in positive terms about his life since the incident. (We will refer to these documents collectively as "the Response.") He disputed that he had allowed one inmate to assault the other—his version was that he allowed one inmate to speak to the other, and in the course of their encounter one inmate unexpectedly punched the other, in an encounter that happened "in a flash."

Ms. Long forwarded the Response to Ms. Gordy, along with a memorandum detailing the couple's involvement in the application process up to that point. She also

included what she referred to as a "21-page Appellate Court decision detailing the allegations and conviction for further information." Unfortunately, Ms. Long characterized the document incorrectly: it actually was the brief the United States filed in the United States Court of Appeals for the Ninth Circuit on February 24, 2004 in response to Mr. Ferreira's appeal of his conviction. The twenty-plus page brief discusses in detail (with citations to the trial transcript) the trial testimony supporting Mr. Ferreira's conviction.

On January 24, 2014, Ms. Long notified the Ferreiras that the Department was denying their request to serve as resource parents. She cited and quoted from the regulations that govern review of any application where an applicant has been the subject of criminal charges. *See* COMAR 07.02.25.04E. She also highlighted Mr. Ferreira's conviction, and explained that "[a]fter reviewing the details and nature of these charges as well as the supporting documentation [that Mr. Ferreira] submitted, our Director has determined that we will not move forward with the home study and licensure process."

On February 18, 2014, the Ferreiras appealed the decision. An ALJ conducted a hearing on April 29, 2014, and she rendered a written decision on May 16, 2014. She proposed upholding Ms. Gordy's decision, reasoning that the Department's first priority is to protect the interests of children, and that the statutes and regulations governing the application process for resource parents gave the Department wide latitude when it came to reviewing the application of someone with a criminal history. The Secretary of Human Resources, through his designee, rendered a final agency decision (the "Final Decision") on August 17, 2014 that adopted the ALJ's findings of fact and affirmed the ALJ's decision, again citing the overarching concern of the best interests of the children whose

futures would be in the hands of resource parents. After the Ferreiras petitioned for judicial review, the circuit court affirmed the Final Decision on May 11, 2015. The Ferreiras filed a timely notice of appeal.

II. DISCUSSION

The Ferreiras raise eleven questions on appeal,[1] all of which are subsumed in the core question of whether the Department erred in denying their application to serve as

[1] We will address all the issues raised in the course of our discussion, but reorder and consolidate them. The Ferreiras phrased the questions as follows:

> Question 1: Did the agency fail to comply with COMAR 07.02.25.04 E (4)(a)(i)-(iii)?
>
> Question 2: Did the agency violate the *Accardi* doctrine by not complying with COMAR 07.02.25.04 E(4)(a)(i)-(iii)?
>
> Question 3: Were Appellants prejudiced by the agency's failure to comply with COMAR 07.02.25.04 E (4)(a)(i)-(iii)?
>
> Question 4: Was FAD arbitrary or capricious by not complying with COMAR 07.02.25.04 E(4)(a)(i)-(iii)?
>
> Questions 5: Was FAD an abuse of discretion by not complying with COMAR 07.02.25.04 E(4)(a)(i)-(iii)?
>
> Question 6: Did the agency violate the Administrative Procedure Act ("A.P.A.") by its failure to rule on the "Proposed Findings of Fact and Conclusions of Law" submitted by Appellants?
>
> Question 7: Did the agency violate the "findings requirement" of the A.P.A. (Md. Code Ann., State Gov't §10-221(b)(3))?
>
> Question 8 : Does the FAD fail under a "substantial evidence" review?

(continued…)

resource parents based on Mr. Ferreira's conviction. Ultimately, the answer is no, and that answer finds support in the statutes and regulations that govern the application process. We agree with those who have reviewed this case before us that the single most important basis for the denial remains the best interests of the children whose needs are served by resource parents, and that the Department acted within its discretion when it denied the Ferreiras' application.

A. The Statutory Scheme And Standard Of Review.

Three different bodies of law matter to this case: *first*, the provisions in the Code of Maryland Regulations that govern application for resource home approval, *see* COMAR 07.02.25 (LDSS Resource Home Requirements); *second*, the Administrative Procedure Act, which governs the administrative law process for an agency such as the Department, *see* Md. Code (1984, 2014 Repl. Vol.), § 10-201 *et seq*. of the State Government Article ("SG"); and *third*, the family law statute that expresses the legislative findings and policy of the State, as *parens patria*, with regard to caring for children, *see* Md. Code (1984, 2006 Repl.Vol.), § 5-502 of the Family Law Article ("FL").

> Question 9: Did Appellants present a prima facie case of qualifying as RPs, and thus meet their burden of proof under COMAR 07.01.04.12B(1)(a)?
>
> Question 10: Did the FAD erroneously rely upon inapplicable law, *to wit*, Md. Code Ann., Family Law §5-502 and COMAR 07.02.25.03?
>
> Question 11: Did the agency err in its consideration and improper reliance upon certain unauthenticated and prejudicial legal briefs from a collateral proceeding?

1. The applicable COMAR provisions.

Although there is an enormous need for resource parents, the standards are (and should be) high. The applicable regulations require home inspections, medical examinations, and criminal and protective services background checks. *See* COMAR 07.02.25. The regulations serve the important purpose, among others, of "[p]rotect[ing] children from the special risk associated with living outside their own homes by maintaining high quality resource homes that will provide supportive, short-term care for the children." COMAR 07.02.25.01(B)(1).

The technical requirements for resource home approval include criminal and protective services background checks, and the regulations specifically prohibit a department from approving "any home in which an adult in the household [h]as a felony conviction" of certain types, including child abuse or neglect. COMAR 07.02.25.04(E)(3)(a)(i). It also prohibits approval of anyone who has a felony conviction involving physical assault, battery, or a drug-related offense in the five years preceding the application. COMAR 07.02.25.04(E)(3)(b).

But the next provision creates at least a potential opening for those who have been convicted of other crimes:

> (4) The local director:
>
> (a) Shall review charges, investigations, convictions, or findings related to any other crimes of any household member, to determine:
>
> (i) The possible effect on the applicant's ability to execute the

> responsibilities of a resource parent;
>
> (ii) The ability of the local department to achieve its goals in providing services to children in care; and
>
> (iii) The possible effect on or the safety of children in out-of-home care.
>
> (b) has the authority to deny, suspend, or revoke resource home approval, based on this review.

COMAR 07.02.25.04(E)(4). As we will discuss, the Department examined Mr. Ferreira's conduct in the context of this provision, which gives the local director some discretion to allow an applicant to serve as a resource parent in spite of a prior conviction.

2. The Administrative Procedure Act.

The APA governs administrative proceedings relating to the Department, as a State agency, *see* SG § 10-101, and lays out the procedures for an administrative hearing and an ALJ's recommendation. *See generally id.* § 10-201 *et seq.* An ALJ is required to render a final decision that states the findings of fact and conclusions of law, *id.* § 10-221(b), and a party may appeal the decision to the circuit court in the applicable jurisdiction. *Id.* § 10-222(c). Following a hearing, the circuit court can remand, affirm, or reverse the decision. *Id.* § 10-222(h).

3. The best interests of the child.

"Pursuant to the doctrine of *parens patriae*, the State of Maryland has an interest in caring for those, such as minors, who cannot care for themselves." *In re Mark M.*, 365 Md.

687, 705 (2001). The Family Law Article includes a declaration of legislative findings under the umbrella of the Child Care and Foster Care Subtitle:

> (a) The General Assembly declares that:
>
> > (1) minor children are not capable of protecting themselves; and
> >
> > (2) when a parent has relinquished the care of the parent's minor child to others, there is a possibility of certain risks to the child that require compensating measures.
>
> (b) It is the policy of this State:
>
> > (1) to protect minor children whose care has been relinquished to others by the children's parent;
> >
> > (2) to resolve doubts in favor of the child when there is a conflict between the interests of a minor child and the interests of an adult; and
> >
> > (3) to encourage the development of child care services for minor children in a safe, healthy, and homelike environment.

FL § 5-502.

4. Judicial review of agency decisions.

As the Court of Appeals has explained, "[j]udicial review of administrative decision-making is constrained," *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 14 (2010), and our role in reviewing an agency decision is limited to determining whether substantial evidence in the record supports the agency's decision. In applying the substantial evidence test, a reviewing court decides "whether a reasoning mind reasonably could have reached

the factual conclusion the agency reached." *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512 (1978) (internal citations and quotations omitted).

This deference flows in large measure from the agency's expertise:

> A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence. . . . Despite some unfortunate language that has crept into a few of our opinions, a court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Furthermore, *the expertise of the agency in its own field should be respected*.

Md. Aviation Admin. v. Noland, 386 Md. 556, 571-72 (2005) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-69 (1999) (citations, footnotes, and quotations omitted) (emphasis added)).

B. The Department Complied With COMAR.

Before arriving here, the Ferreiras have had four levels of review and disposition: Ms. Gordy, who notified the Ferreiras of her decision by letter; an ALJ, who submitted an eleven-page written memorandum after a hearing that included testimony from the Ferreiras; the Secretary, through the eight-page Final Decision; and the circuit court, following another hearing by way of a nine-page decision. At every level, the reviewing body has considered the evidence and reached the same conclusion: that it is up to the

agency to determine whether someone with a conviction like Mr. Ferreira's is suitable to foster a child. Whether we agree with that decision or not, it was entirely within the agency's discretion to reach that decision on this record.

The Ferreiras complain *first* that the Department did not "engage in the determination of the mandatory factors" that they claim are laid out in COMAR 07.02.25.04(E)(4)(a). We disagree. The relevant section simply requires that a local director review any information "related to any other crimes" of an applicant to determine the effect on the applicant's ability to serve as a resource parent, the local department's abilities to achieve its goals in serving the children who needed its services, and the "possible effect on or the safety of" children in the program. *Id.* The section does not prescribe precisely how a local director such as Ms. Gordy must go about that review or exercise her authority on behalf of the Department, or what specific form the agency's decision must take.

Moreover, Ms. Gordy *did* articulate the bases for her decision. She laid out her understanding of the charges against Mr. Ferreira and explained in the January 24, 2014 letter why the Department had decided to deny their application:

> As you are aware, during the course of your background check, this agency obtained information about Mr. Ferreira's prior charge, and conviction, for "Deprivation of Civil Rights Under the Color of the Law," for which he served 52 months in the Federal Corrections system.
>
> *After reviewing the details and nature of these charges as well as the supporting documentation you submitted*, our Director

> has determined that we will not move forward with the home study and licensure process.

(Emphasis added.)

Ms. Gordy's letter advised the Ferreiras that Mr. Ferreira's version of events and supporting materials did not overcome the Department's concerns about their suitability in light of his conviction for a crime that, although not among those automatically disqualifying them, nevertheless involved violence and a breach of the public trust. COMAR did not require anything more of the Department.

It follows from this conclusion as well that the Department did not violate the *Accardi* doctrine, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), which the Maryland Court of Appeals discussed in *Pollock v. Patuxent Inst. Bd. of Rev.*, 374 Md. 463 (2003). It's true that, as a general rule, government agencies must comply with their own rules and regulations, *id.* at 467, but here the Ferreiras can't point to any part of a statute with which the agency failed to comply. As the circuit court correctly pointed out, there is no procedure, in COMAR or elsewhere, that the agency failed to follow, so we need not examine the second part of the analysis under *Pollock*, which is whether prejudice flowed from any *Accardi* violation. We understand the Ferreiras' frustration, and we acknowledge that the Department's decision may be a bitter pill for them to swallow.[2] But COMAR vests the local director with broad discretion, and the January 24, 2014 letter stated an adequate basis, supported by the record, for her decision.

[2] The Ferreiras argue that they met their burden of proof under COMAR and did all that they had to in order to qualify as resource parents, and that they would have been approved if Ms. Gordy had granted them the override. But again, this doesn't (continued…)

C. The Final Decision Was Not Arbitrary And Capricious, An Abuse Of Discretion Or Unsupported By Substantial Evidence.

The Ferreiras *next* attack the Final Decision as arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence. Again, these arguments effectively claim that the Department failed to make the necessary findings. We conclude that the Department made findings, just not the findings the Ferreiras desired.

An agency decision is arbitrary and capricious under SG § 10-222(h)(3)(vi) when it is "made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms." *Harvey v. Marshall*, 389 Md. 243, 299 (2005) (internal quotations and citations omitted); *see also Bd. of Physician Quality Assurance v. Mullan*, 381 Md. 157, 171 (2004) ("The arbitrary or capricious standard, as we have stated before, sets a high bar for judicial intervention, meaning the agency action must be 'extreme and egregious' to warrant judicial reversal under that standard." (internal quotations and citations omitted)). Nothing about the Final Decision was arbitrary and capricious. It spelled out the policies that protect children in the foster care system, both under the legislative declarations of FL § 5-502 and under the COMAR provisions (citing COMAR 07.02.25.03, which states that "[w]hen there is a conflict between the interests of a foster child and those of an adult, the conflict shall be resolved in favor of the foster child"). And it explained the importance of the selection process, which necessarily

matter in the final analysis, because even *assuming* they met that burden, the Department acted properly within the regulation when it opted to deny them the opportunity. That is, even if they could qualify, meeting that burden did not override COMAR 07.02.25.04(E)(4)(a). The ultimate decision still rested in the discretion of the local director.

"requires a degree of weighing what is in the best interests of the children who are being cared for by the State."[3]

The Ferreiras' argument that the Secretary abused her discretion is really an extension of the argument that the decision was arbitrary and capricious. But the Department need not justify the "exercise of discretion by findings of fact or reasons articulating why the agency decided upon the particular" course so long as the decision is "lawful and authorized." *Noland*, 386 Md. at 581. And again, although the Ferreiras don't see it this way, Ms. Gordy's letter *and* the Final Decision (the latter more thoroughly) *did* connect the dots as to why the Ferreiras' application was denied. As the Final Decision explained, Ms. Gordy did what the regulation told her to do, and factored in Mr. Ferreira's conviction and the circumstances surrounding it. And so the Department properly exercised its discretion under COMAR, in a decision that was well supported by substantial evidence.

We disagree as well that the presence of an appellate brief in Mr. Ferreira's case file renders the supporting evidence insubstantial. The Ferreiras claim that this brief, submitted by the United States in the course of his appeal of his conviction to the Ninth Circuit

[3] We disagree with the Ferreiras that the Final Decision (or the ALJ's decision before it) improperly referred to provisions of the Family Law Article and COMAR that elevate the interests of a child above those of a foster parent. They argue that these provisions "contemplate a particular factual scenario between an actual, individual child, and an actual individual adult," but we disagree that the stated goal to protect the best interest of a child is one that should be ignored here. The very purpose of the foster parent system is to look out for, and protect, children whose parents cannot do so, and it would be short-sighted indeed to ignore that purpose when looking at the individuals who seek to care for vulnerable children.

(which, after all, affirmed his conviction in a publicly available opinion), contained information advocating on behalf of the United States that was a "litigation document submitted in an adversarial proceeding to advocate against Mr. Ferreira." And they're right that Ms. Gordy, in her decision to deny the Ferreiras' request for an override, improperly characterized the brief as an "Appellate Court decision." But the ALJ acted within her discretion to admit it, *see* SG § 10-213(b) (permitting an ALJ to "admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence"), and the fact remained that Mr. Ferreira *did* have the criminal conviction on his record, and that he *did* serve a prison sentence for what qualified as an "other crime" under the COMAR regulations. Moreover, Mr. Ferreira has not suggested that the brief actually contained any inaccurate recitation of the events that transpired in any event, and the United States's characterization of the facts in that brief tracks the recitation of facts contained in the Ninth Circuit's opinion affirming the conviction.

D. The Final Decision Did Not Violate The APA.

The Ferreiras contend *last* that the Final Decision failed to make required "findings of fact" under the APA, *see* SG § 10-221(b)(4). They maintain that they are entitled to a decision that "contain[s] factual findings on all the material issues of a case, and a clear, explicit statement of the agency's rationale." (quoting *Fowler v. Motor Vehicle Admin.*, 394 Md. 331, 342 (2006)).[4]

[4] They also claim that the ALJ failed to follow the APA because she appears not to have considered their proposed findings of fact, which they submitted (continued…)

Again, a "clear explicit statement" of rationale is what the Ferreiras got. To the extent that the path of Ms. Gordy's analysis wasn't clear (and we believe it was), the Final Decision spelled it out further:

> Director Gordy followed the instruction of the regulation—to review the charges, investigations, and conviction of Mr. Ferreira and determine [the ramifications under COMAR]. Director Gordy had to give serious consider[ation] to Mr. Ferreira's conviction and the circumstances surrounding the conviction. She also had to consider that: a jury found Mr. Ferreira responsible for a prisoner being beaten by another prisoner; a federal court sentenced him to serve 57 months in a federal prison for the crime; and Mr. Ferreira served 52 months of that sentence.

after the hearing. They claim that these "Proposed Findings of Fact and Conclusions of Law" suggested that the Department had "adopted a pattern and practice of denying applicants without complying with COMAR," and that it had an "apparent working policy of either prejudging and/or categorical denial of applicants with felony convictions," and that the ALJ violated the APA when she failed to address this argument. They have pointed to *no* part of the APA that required the ALJ to consider these findings (even if timely submitted, which they weren't)—SG § 10-221(b)(4) only requires a final decision to rule on each proposed finding of fact if those proposed findings were submitted "in accordance with regulations," and there is no such regulation in play here. Under the general rules of procedure governing administrative hearings, an ALJ may "[r]equest parties to submit legal memoranda, proposed findings of fact, and proposed conclusions of law." COMAR 28.02.01.11(B)(9). The parties have not made us aware of any more specific regulations relating to the resource parent application process that would have governed this hearing, and so this discretionary authority kicks in. Other agencies might be governed by particular regulations that *require* that the parties submit proposed findings of fact, or specifically give a particular agency discretion to do so. *Compare* COMAR 02.02.06.25 (detailing procedures for administrative hearings in a contested case before the Securities Division of the Attorney General's Office, and stating that "[t]he record of a contested case *shall include* . . . (5) *[t]he findings of fact* and conclusions of law *proposed by each party*" (emphasis added)) *with* COMAR 13B.04.01.08 (governing a hearing before the Maryland Higher Education Commission, and stating that "[t]he Secretary or the Commission . . . *may* . . . (14) *[r]equire parties to submit* legal memoranda, *proposed findings of fact*, and conclusions of law" (emphasis added)), but not so here.

We disagree that the Final Decision doesn't make express findings of fact. Although the Ferreiras claim that the Final Decision "makes a wholesale adoption of the factual findings of the ALJ in the OAH's Proposed Decision," they concede that "[n]one of these facts are disputed, nor have they ever been." In fact, the Final Decision reiterates that the uncontested facts that formed the basis of Ms. Gordy's conclusion served as a legally appropriate basis for her decision, and we agree that the Final Decision properly reiterated those facts and the legal conclusion vesting Ms. Gordy with that discretion.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.