

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2234

September Term, 2015

LORNA J. RHINEHART

v.

MONTGOMERY COUNTY MERIT SYSTEM
PROTECTION BOARD

Eyler, Deborah S.,
Wright,
Beachley,
JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 16, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

Lorna J. Rhinehart, the appellant, filed an administrative appeal with the Montgomery County Merit System Protection Board (“the Board”), the appellee, after the Chief Administrative Officer (“CAO”) of the Montgomery County Employee Retirement System (“ERS”) determined that she had been overpaid her retirement benefits by mistake, that the County was authorized to recoup a portion of overpayments made to her, and that she was not entitled to a waiver of recoupment due to financial hardship. The Board issued a decision upholding the CAO’s decision. On judicial review in the Circuit Court for Montgomery County, the court affirmed the final decision of the Board.

Rhinehart appeals, presenting seven questions,¹ which we have combined and rephrased as one: Was the final decision of the Board legally correct and supported by

¹ The questions as posed by Rhinehart are:

1. Whether, in affirming the Board’s Final Decision and Order in Case No. 14-46 (Rhinehart 2), the Circuit Court improperly reversed the Board’s previous rulings in Case No. 14-06 (Rhinehart 1), which action was precluded by collateral estoppel?
2. Whether the CAO’s statutory responsibility under the Montgomery County Code for administration of the retirement system authorized him to withhold Appellant’s pension payments?
3. Whether the informal guidelines created by the County to cure its lack of authority under the Board’s ruling in Rhinehart 1 complied with the requirements for adopting effective regulations mandated by the Montgomery County Code?
4. Whether, assuming *arguendo* that the County’s guidelines were legally effective regulations, they could be applied retroactively to authorize withholding of vested retirement benefits?
5. Whether the Board’s affirmance of the County’s second attempt at withholding from Appellant’s pension payments is simply an impermissible change of mind by the Board?

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substantial evidence in the record? For the following reasons, we shall affirm the Board's decision.

FACTS AND PROCEEDINGS

Rhinehart was hired by Montgomery County (“the County”) as a benefits specialist with the Office of Human Resources in 1981 and became a member of the ERS. Seventeen years later, she retired from that position and began receiving pension benefits on March 1, 1998. Her benefits included a yearly cost of living adjustment (“COLA”).

In 2013, an audit performed by the Montgomery County Employees Retirement Plans Office (“MCERP”) revealed that the ERS erroneously had applied an incorrect COLA to Rhinehart's benefits. She had been allowed a 100% annual COLA with no cap, a benefit that did not apply to employees hired after July 1, 1978.² As a result, she had been overpaid \$7,636.62 in retirement benefits between March 1, 1998, and December 1, 2012.

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6. Whether the waiver guidelines that the County attempted to apply were unconstitutionally vague?
7. Whether the Board's decision upholding that County's application of waiver guidelines constituted disparate treatment of [Appellant] in . . . violation of Article 24 of the Maryland Declaration of Rights?

² Pursuant to section 33-44(c)(3)(A) of the Montgomery County Code (“MCC”), retirees who were hired by the County prior to July 1, 1978 were entitled to an annual COLA equal to 100% of any change in the consumer price index (“CPI”) for the month preceding the end of the prior fiscal year. Retirees hired after that date, like Rhinehart, were entitled to a COLA of 60% of the change in the CPI greater than 3%, with an annual cap of 5% for retirees younger than 65.

By letter dated March 18, 2013, the MCERP notified Rhinehart of the error; recalculated her retirement benefit with the correct COLA; and informed Rhinehart that she must repay the last three years' of overpayments (\$3,077.76). Rhinehart was given the option to pay by lump sum or by a reduction of \$51.30 in her monthly benefit over 60 months.

Rhinehart responded by advising MCERP that the repayment request was unreasonable and that it would cause her financial hardship. She requested a waiver of repayment. Her request was denied by MCERP and, on appeal from that decision, by the CAO. She filed an appeal with the Board, which was designated Case No. 14-06. While her appeal was pending, the County began deducting \$51.30 per month from Rhinehart's pension checks to recoup the overpaid benefits.

Case No. 14-06

The Board framed the issue before it in Case No. 14-06 as whether the County erred by “denying [Rhinehart’s] request to waive reimbursement of the overpayment of [her] pension payments due to an administrative error made by the County in 1998?” Rhinehart took the position that she was an innocent victim of a mistake by the County and that it was unreasonable for the County to seek to recoup the overpayment. She asserted that the CAO’s denial of her request to waive repayment was arbitrary and capricious.

The County took the position that it was authorized by MCC section 33-53 to recoup benefits paid to a retiree in error. That section, captioned, “Protection against fraud,” provides:

Any person who shall knowingly make any false statement or shall falsify or permit to be falsified any record or records of this retirement system in any attempt to defraud such system as a result of such act, shall be charged with a misdemeanor, and may be punishable under the laws of the county and the state. Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will be paid. Any member or beneficiary who has received payment from the retirement system of any monies to which not entitled under the provisions of this act, shall be required to refund such monies to the system.

(Emphasis supplied.) According to the County, it had an internal policy to seek recoupment of overpayment caused by an administrative error for the most recent three years, rather than to require recoupment of the entire amount.³ The County maintained that pursuant to MCC section 33-53 and the County’s policy, Rhinehart was obligated to repay the overpaid benefits for the prior three years because she was not entitled to receive them.

The Board issued its final decision on November 12, 2013. It concluded that MCC section 33-53 only authorized the County to recoup overpaid benefits in cases of

³ The County submitted into evidence a document entitled “Correction Procedures for Administrative Errors.” That document stated that the County only could recoup two years’ of overpayments. The attorney for the County represented to the Board that the County’s policy had since changed, but that the document had not been updated.

fraud. It reasoned that the caption of section 33-53, coupled with the fact that it required repayment in full, supported that construction because the County Council could not have intended for “an innocent victim of a County clerical error” to be required to reimburse the County in full for that overpayment.

The Board did not rule that the County had no authority to seek reimbursement of overpaid benefits resulting from an administrative error, however. It reasoned that the County could seek reimbursement if it had a system in place to assess whether reimbursement would cause the retiree financial hardship. The Board opined:

[Rhinehart] bears the burden of proving by substantial evidence that she is eligible for a waiver of collection of the overpayment. Here, the County admits that [she] is without fault. She has notified the County that the repayment of the overpayment would create a financial hardship. However, merely stating that there will be a hardship is not enough. [Rhinehart] must provide “substantial evidence^[7]” that she is eligible for a waiver of collection of overpayment. Accordingly, having reviewed the record evidence in this case, *the Board concludes that [Rhinehart] may be eligible for a waiver of an overpayment.* Further, the Board finds that the CAO erred in denying [Rhinehart]’s request for a waiver.

(Emphasis supplied.) (Citations and footnotes omitted.) In a series of footnotes, the Board explained that the County was required to “establish guidelines to permit waivers in cases where the overpayment was generated by County error”; that Rhinehart must be permitted the “opportunity to provide evidence to determine if a waiver is appropriate in this matter after the guidelines are established,” and that, “[i]n the future, the County must consider allowing hardship waivers on a case-by-case basis . . . [based upon] individual circumstances.”

The Board’s “Order” “grant[ed]” Rhinehart’s appeal from the CAO’s determination that “she was not eligible for a waiver of overpayment pension benefits that was caused by County error” and ordered the County to immediately reimburse Rhinehart for any monies deducted from her benefits to recoup the overpayment “until such time as the County has developed waiver guidelines to determine if [Rhinehart] is entitled to an adjustment or complete waiver of overpayment of her pension benefits.”

Neither party petitioned for judicial review of the decision in Case No. 14-06.

ERS Waiver Guidelines

Less than a month after the Board’s decision, on December 2, 2013, the MCERP notified Rhinehart that it had developed guidelines for correction of administrative errors causing an overpayment of benefits, including a process by which retirees could seek a waiver of repayment for financial hardship.⁴ Pursuant to those guidelines, ERS would consider waiving or adjusting repayment of benefits paid in error if the employee received the overpayment by mistake; “could not reasonably have been expected to detect the error”; and “request[ed] a waiver of repayment, in writing within 30 days of notification, based on a financial hardship.”⁵ A retiree seeking a waiver was required to provide “copies of tax returns and other details and supporting documents of income and

⁴ Rhinehart received a pension check on December 1, 2013. It continued to include a recoupment deduction of \$51.30.

⁵ The guidelines relied upon MCC section 33-53 as statutory authority for the County to “correct errors and collect any overpayment.”

expenses demonstrating a financial hardship.” Absent such documentation, the waiver would be denied. If supporting documentation was provided and showed the existence of an “[o]ngoing substantial illness or accident expenses not reimbursed by insurance,” “[o]ngoing medical expenses not covered by insurance,” or a “[h]ousehold income . . . at or below 300% of the federal poverty guidelines,” those circumstances “generally w[ould] be considered a financial hardship.” The CAO would make the ultimate determination whether the retiree had proved the existence of a financial hardship and, if so, whether the retiree was entitled to a full or partial waiver of repayment.

In response, Rhinehart called MCERP and spoke to its executive director, Linda Herman, to request an extension of time to submit her supporting documentation for her financial hardship waiver request. Rhinehart was granted an extension until January 6, 2014.

In a letter to Herman dated January 2, 2014, Rhinehart explained that she was seeking a waiver of repayment “due to financial and personal hardships.” Her gross monthly pension benefit was \$271.65.⁶ After taxes and the \$51.30 recoupment deduction, Rhinehart netted \$201.68. She asserted that her only other income was social security and that she did not earn enough to require her to file a federal income tax return. Rhinehart also had two health conditions—irritable bowel syndrome and degenerative disc disease—that required her to take medications that were not covered by her health

⁶ Rhinehart had taken early retirement to be a daytime caregiver for her grandchildren.

insurance. Finally, she asserted that she was the primary caregiver for her elderly aunt. Rhinehart attached to her letter a copy of her January 2014 pension statement; a copy of her social security benefit projection for 2014 showing that she would receive \$704.70 per month, less Medicare and taxes; copies of prescription labels showing the costs she paid; and a spreadsheet she created listing 62 visits to a chiropractor in 2013, the amount she was charged, the amount covered by Medicare, the amount covered by her other insurance, and the amount she paid out of pocket.

By letter dated January 13, 2014, Herman advised Rhinehart that the documentation she provided was insufficient, reiterated the ERS policy, and directed her to provide MCERP with a summary of the medical costs she paid from 2011-2013 that were not reimbursed by Medicare or her private health insurance; a summary of costs paid by her to care for her aunt; and a copy of her 2012 federal income tax return.

By letter dated January 24, 2014, Rhinehart stated that she thought that MCERP's requests were "somewhat unreasonable" because she already had documented her financial hardship adequately. She also complained that the Board recently had decided another appeal by a similarly situated retiree and granted her a waiver of repayment without her being subject to the new waiver guidelines. She attached documents she had prepared showing that she had paid nearly \$4,000 in unreimbursed prescription expenses and more than \$2,800 in unreimbursed chiropractic expenses between 2011 and 2013. She did not have any documentation of costs incurred caring for her aunt. She did not attach a copy of her 2012 federal tax return.

After receiving this letter, Herman called and spoke to Rhinehart. She asked Rhinehart why her prescriptions were not fully covered by her health insurance, which was the County's plan. Rhinehart responded that the prescriptions were compounded, making them wholly or partially not covered. Herman asked Rhinehart to submit a copy of her 2012 federal tax return. Rhinehart replied that she did not file a tax return, but that she had "signed" her husband's tax return. Herman asked Rhinehart if she and her husband filed a joint return. Rhinehart declined to answer. Within an hour of that telephone conversation, Rhinehart's husband called Herman and informed her that he and his wife did file a joint tax return, but that they would not be submitting it.

By letter dated February 21, 2014, the CAO denied Rhinehart's waiver request on the basis that she had failed to submit her most recent federal tax return as required by the ERS waiver policy. On March 7, 2014, Rhinehart appealed that decision to the Board. Her appeal was designated Case No. 14-46.

Case No. 14-46

The parties filed memoranda with the Board. The County maintained that it had "followed the Board's decision [in Case No. 14-06] [by] developing waiver guidelines and allowing [Rhinehart] to request a waiver from repaying the overpayment due to financial hardship." The County argued that because Rhinehart had refused to provide her most recent tax return, as required by the County's new policy, she had failed to make a showing that she was entitled to the waiver and the Board should uphold the CAO's determination to that effect. The County attached to its memoranda copies of all the

written correspondence between MCERP and Rhinehart and the attachments thereto, and an affidavit by Herman attesting to the substance of the telephone conversations.

Rhinehart responded that the Board's decision in Case No. 14-06 that, in the absence of fraud, the County lacked statutory authority to seek reimbursement of overpaid pension benefits was binding and precluded the County from continuing to recoup the overpaid benefits from her. Moreover, the County was in direct violation of the Board's prior decision because it never ceased making deductions to recoup the benefits and failed to reimburse Rhinehart for the monies already deducted. Rhinehart maintained that retroactive application of the waiver guidelines was unconstitutional because it abrogated her vested property right in her pension benefits.

In a supplementary memorandum, Rhinehart explained that she recently had learned that the Board had "decided another case involving identical erroneous County overpayments a week after the decision in [Case No. 14-06]." She attached a copy of that decision. In that case, designated Case. No. 14-05, the Board had ruled that the retiree was entitled to a complete waiver of recoupment of overpayment for financial hardship.⁷ Rhinehart urged that this amounted to unconstitutional unequal treatment under the law.

⁷ Case 14-05 was decided just a week after Case 14-06 and involved very similar facts. The retiree in Case No. 14-05 had been hired after July 1, 1978, as a benefits specialist in the County Office of Human Resources; had retired in 1999; and had been overpaid \$20,002.12 as a result of the application of the wrong COLA. The County had sought repayment of \$7,368.40, the amount of overpaid benefits in the prior three years. Like Rhinehart, the retiree sought a waiver of repayment and appealed to the Board after her request was denied by the CAO. The Board decided, for the same reasons as in Rhinehart's case, that the County was not authorized by MCC section 33-53 to recoup the
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The Board issued its final decision on January 15, 2015. It framed the issues before it as whether it should reconsider its decision in Case No. 14-06; whether the County was “justified in not ceasing to collect for overpayments” as directed in the decision in Case No. 14-06; and whether the CAO was justified in denying Rhinehart’s request for a waiver because she had refused to furnish a copy of her tax return.

On the first issue, the Board explained that Rhinehart’s argument that she had been denied equal protection under the law, because she was treated differently than a similarly situated retiree in Case No. 14-05, amounted to an untimely motion for reconsideration of its decision in Case No. 14-06. It declined to consider the argument for that reason.⁸ The Board determined, moreover, that Rhinehart had not made a showing of fraud, mistake, or irregularity justifying vacation of the final decision in Case No. 14-06. Finally, the Board noted that even if this issue had been properly raised, it lacked merit because the “evidentiary record differed markedly” in Case No. 14-05, justifying the differing treatment accorded to the retiree in that case.

On the second issue, the Board found that the County had failed to comply with the order in Case No. 14-06 that it refund Rhinehart monies already deducted to recoup

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overpaid benefits. Unlike in Rhinehart’s case, however, the Board ruled that the retiree had presented substantial evidence proving her entitlement to a waiver of recoupment because she was solely responsible for the care of a disabled relative. For that reason, the Board ordered the County to reimburse her for those amounts deducted from her pension benefits for recoupment and to cease future recoupment deductions.

⁸ Pursuant to MCC section 2A-10(f), a motion for reconsideration of a decision of the Board must be filed within ten days.

the overpayment and that it cease making recoupment deductions until it had developed waiver guidelines and determined if Rhinehart was eligible. The issue was moot, however, because the County ultimately determined that Rhinehart was ineligible for a waiver, a decision the Board would affirm.

Finally, on the third issue, the propriety of the CAO's decision to deny the waiver, the Board found that Rhinehart had refused to provide MCERP with any information about her "total household income" and that she had "initially declined to admit that she file[d] a joint Federal income tax return with her husband." The Board rejected Rhinehart's argument that by requesting a copy of her tax return, the County illegally invaded her privacy. It concluded that the County's requests were reasonable and in keeping with similar repayment waiver policies of state and federal agencies. In light of her refusal to provide full financial information to the County, the Board ruled that Rhinehart had failed to meet her burden of proof to justify a waiver and affirmed the CAO's decision to deny her request.

Rhinehart filed a petition for judicial review of the Board's decision in the circuit court. On November 19, 2015, the circuit court affirmed the Board's decision. This timely appeal followed. We shall include additional facts as relevant to the issues on appeal.

STANDARD OF REVIEW

The scope of our review in an administrative appeal is narrow. It "is limited to determining if there is substantial evidence in the record as a whole to support the

agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *United Parcel Serv., Inc. v. People’s Counsel*, 336 Md. 569, 577 (1994). “In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68 (1999) (internal quotations omitted). In doing so, we “defer to the agency’s fact-finding and drawing of inferences if they are supported by the record.” *Id.* “While ‘an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts,’ . . . *Banks*, 354 Md. [at] 69. . . , ‘we owe no deference to agency conclusions based upon errors of law.’” *Coleman v. Anne Arundel County Police Dep’t*, 369 Md. 108, 121 (2002) (quoting *State Ethics v. Antonetti*, 365 Md. 428, 447 (2001)).

DISCUSSION

A.

As a threshold matter, the parties dispute which issues are properly before this Court. Rhinehart contends the Board’s decision in Case No. 14-06, that the County lacked statutory authority to recoup overpaid pension benefits absent fraud by the retiree, had preclusive effect in Case No. 14-46. She maintains that that ruling, which the County did not challenge on judicial review, prohibited the County from attempting to recoup the overpaid benefits from her and that the Board’s decision in Case No. 14-46 amounted to an impermissible change of mind.

The County responds that these contentions are waived because Rhinehart did not seek judicial review or reconsideration of the decision in Case No. 14-06. In any event, it asserts that the Board did not rule in Case No. 14-06 that the County lacked authority to collect overpaid benefits, only that it could not rely on MCC section 33-53 as authority. According to the County, it was implicit in the Board’s order directing the County to develop waiver guidelines and to apply them to Rhinehart that the County had authority to collect overpaid benefits.

MCC section 33-15(a) provides that “[a]ny aggrieved merit system employee . . . may obtain judicial review of a [Board] order or decision from the circuit court for the county in the manner prescribed [in the Rules pertaining to judicial review of administrative decisions].” It is well established that “not every administrative order which determines rights and liabilities, or from which legal consequences flow, is final and thus subject to judicial review. Generally, to be final, an administrative order must also ‘leave nothing further for the agency to do.’” *Holiday Spas v. Montgomery Cty. Human Relations Comm’n*, 315 Md. 390, 396 (1989) (quoting *Md. Comm’n on Human Relations v. Balt. Gas and Elec.*, 296 Md. 46, 56 (1983)).

The only issue before the Board in Case No. 14-06 was whether the CAO erred by denying Rhinehart’s request for a waiver of repayment. In ruling on that issue, the Board made a legal determination that MCC section 33-53 did not authorize the County to seek reimbursement of benefits it overpaid due to administrative error, as opposed to fraud. It ruled implicitly, however, that the County had authority to seek reimbursement of any

overpaid benefits that emanated from other common law or statutory sources. The Board’s decision plainly did not ‘leave nothing further for the agency to do,’ because it directed the County to develop generally applicable policies to permit a retiree to seek a waiver of repayment in cases where overpayment resulted from administrative error and repayment would cause financial hardship and to apply those guidelines to Rhinehart. The County complied with the Board’s directive and ultimately denied Rhinehart’s request for a waiver.

The decision in Case No. 14-06 did not finally determine Rhinehart’s rights and liabilities because it left open the issue of whether she was entitled to a waiver of repayment. Thus, while the Board made a ruling that could potentially be adverse to Rhinehart at some future point, she nevertheless was in a position to potentially prevail completely if the County were to find she was entitled to a financial hardship waiver. Rhinehart was not aggrieved by any decision of the Board until, on January 15, 2015, the Board affirmed the decision of the CAO to finally deny her financial hardship waiver request in Case No. 14-46, pursuant to the newly developed guidelines. For these reasons, we agree with Rhinehart that she was not “aggrieved” by the decision of the Board in Case No. 14-06 and was not obligated to seek judicial review of that decision in order to challenge the underlying rulings in that decision in the instant appeal. Similarly, while the County was aggrieved by the Board’s ruling that it was required to reimburse Rhinehart for monies it had deducted from her pension payments and to assess whether she was entitled to a financial hardship waiver, it still was in a position where it could

ultimately collect full reimbursement from Rhinehart were it to determine that she was ineligible for a waiver.

Rhinehart's appeal in Case No.14-46 challenged the County's legal authority to continue its efforts to collect repayment of the overpaid benefits and to deny her a financial waiver pursuant to its financial waiver guidelines. In deciding Case No. 14-46, the Board finally decided that the guidelines were properly developed, were reasonable, and that the CAO did not err in denying Rhinehart's request for a waiver under the guidelines. In this procedural posture, the Board's underlying legal rulings in Case No. 14-06, that MCC section 33-53 did not authorize the County's recoupment of benefits, but that it was otherwise authorized to seek repayment so long as it permitted a member to seek a waiver of repayment, are properly before this Court in the instant appeal.

B.

We now turn to the County's authority to collect overpaid pension benefits. The County maintained before the Board in Case No. 14-06 that that authority was derived from MCC section 33-53, which provides, in pertinent part, that if there is an

error in the [ERS] records [that] result[s] in any member or beneficiary receiving from the retirement system more or less than entitled to receive had the records been correct, the error shall be corrected and as far as practicable the payment shall be adjusted in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled will be paid. Any member or beneficiary who had received payment from the retirement system of any monies to which not entitled under the provisions of this act, shall be required to refund such monies to the system.

The Board ruled as a matter of law that section 33-53 only applied in cases of fraud. This was a legal conclusion based on an error of law. Accordingly, we owe it no deference. *See Coleman*, 369 Md. at 121 (quoting *Antonetti*, 365 Md. at 447).

The Board reasoned that the caption of section 33-53, entitled “Protection against fraud,” evidenced that the County Council had not intended for it to apply to overpayments occasioned by administrative error. MCC section 1-301(h), however, provides that the titles and captions in the MCC are “not part of the . . . Code.” The Board erred by looking to the caption to discern legislative intent.

The Board further reasoned that the County Council could not have intended for section 33-53 to apply to administrative errors because that section mandated that the County collect *all* overpaid benefits, a result that would be too harsh when the overpayment occurred over many years. MCC section 33-53 unambiguously authorizes the County to correct errors in the ERS “records” that cause a retiree to be paid more (or less) than he or she was entitled to receive and directs the County to recoup (or refund) those monies. This language plainly applies to administrative mistakes, not only to fraud, and is authority for the County to recoup those losses.⁹

⁹ The Board suggested in its decision in Case No. 14-06 that the County’s internal practice of only seeking recoupment for the prior three years’ overpayment was in conflict with MCC section 33-53’s mandate that a retiree who was overpaid “shall be required to refund such monies to the system.” The propriety of that internal policy is not before us in this appeal, however, and we decline to consider it. In any event, the language authorizing the County to correct errors and “as far as practicable,” adjust payments to ensure that the member receives “the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled” is authority for the County to

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We also agree with the County that principles of trust law empower it to recoup losses caused by administrative errors. MCC section 33-58 establishes that the monies the ERS holds are held in trust for “the benefit of the members of the retirement system.” *See also* 26 U.S.C. § 401 (establishing the requirements for tax qualified pension plans under the Internal Revenue Code). The CAO is charged with administering the ERS. MCC § 33-47(a). The CAO owes fiduciary duties to the members of the ERS and must discharge those duties only “in the best interest of the participants and their beneficiaries.” MCC § 33-61C(a). If a member is overpaid benefits due to an administrative error, the member is personally liable to the trust in that amount under principles of unjust enrichment. *See Restatement (Third) of Trusts* § 104 (2012), Comment g(3) (“if a beneficiary receives trust property to which the beneficiary is not entitled (. . . without regard to whether the beneficiary knew the distribution was improper), the beneficiary is liable to the trust for the improper distribution, except to the extent that a defense to restitution applies”). Thus, the CAO has a fiduciary duty to seek restitution where it makes an improper distribution of trust property, as was the case here.

C.

Rhinehart makes several related arguments as to why the waiver guidelines may not be applied to her. First, she asserts that they are unconstitutionally vague and were

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develop internal policies that take into account hardship caused by correction of an administrative error, even if that error redounds to a member or beneficiary’s benefit.

not adopted in compliance with the MCC and the Administrative Procedure Act. We agree with the County that Rhinehart waived these contentions of error by failing to raise them before the Board. *Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 3-4 (2001) (“in an action for judicial review of an adjudicatory decision by an administrative agency, a reviewing court ordinarily ‘may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency’”) (citation omitted).

Rhinehart next contends that the County may not retroactively apply the waiver guidelines to her because to do so would deprive her of a vested property right. She relies upon *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 623 (2002). In that case, the Court of Appeals held that “[n]o matter how ‘rational’ under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one person’s property and giving it to someone else.” Rhinehart’s argument lacks merit for two reasons. First, she does not have a vested property right in monies paid to her by mistake in excess of the benefits she was entitled to receive by law. Second, the waiver guidelines developed by the County are a means by which it can determine if requiring a member to repay monies belonging to the ERS, but paid to a retiree or (or beneficiary) in error, may be recouped without causing the retiree (or beneficiary) undue financial hardship. These guidelines only can inure to the potential benefit of retirees who otherwise could be required to repay all of the overpaid benefits

pursuant to MCC 33-53. Thus, the retroactive application of the waiver guidelines to Rhinehart was not an unconstitutional taking.

Finally, Rhinehart argues that the County deprived her of the equal protection of the law when it granted the retiree in Case No. 14-05 a financial hardship waiver, but denied her a waiver until such time as the waiver guidelines were developed. As the Board noted, the retiree in Case No. 14-05 presented evidence to the Board that she would in fact suffer a financial hardship if forced to reimburse the County for her overpaid benefits. In contrast, the Board found in Case No. 14-06 that Rhinehart failed to present any evidence that she would suffer a financial hardship if forced to reimburse the County, but nevertheless ordered the County to permit her to make such a showing after it developed generally applicable waiver guidelines. The Board clearly had a legitimate basis upon which to treat Rhinehart and the retiree in Case No. 14-05 differently.

D.

The CAO's denial of Rhinehart's request for a waiver was premised on her refusal to provide a copy of her 2012 federal tax return, as required by the County's waiver guidelines. The Board made non-clearly erroneous factual findings that Rhinehart refused to provide MCERP with any evidence bearing on the amount of her "total household income"; initially denied that she had filed a 2012 tax return; and later admitted that she and her husband had filed a joint federal tax return, but refused to provide a copy of it to MCERP. These findings were substantial evidence supporting the Board's ultimate decision to uphold the denial of Rhinehart's waiver request.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY THE APPELLANT.**