UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2417

September Term, 2013

STEPHEN P. PLATT

v.

BOARD OF APPEALS, MARYLAND DEPARTMENT OF LABOR, LICENSING, AND REGULATION

Zarnoch,
Wright,
Nazarian,

JJ.

Opinion by Zarnoch, J.

Filed: February 10, 2015

Appellant Stephen Platt is a deaf man who was fired from his job for allegedly signing obscenities in American Sign Language (ASL). Platt sought unemployment compensation, but was denied benefits by a Claims Specialist because he had engaged in gross misconduct. He appealed this decision to Appellee Board of Appeals (the Board) of the Department of Labor, Licensing and Regulation (DLLR). A Hearing Examiner conducted a hearing in which Platt was provided an interpreter who "transliterated" for Platt. At no time during this hearing did Platt complain about the quality of the interpreter services; nor did he ask for a different interpreter. When the Board denied his appeal of the Hearing Examiner's decision, Platt sought judicial review in the Circuit Court for Baltimore City, which upheld the Board's decision. Platt now appeals this ruling, arguing that the Board violated Maryland regulations (COMAR), the federal Americans with Disabilities Act (ADA), and international human rights treaties, because he was not provided a certified ASL translator at the proceeding before the Hearing Examiner. Because Platt did not advance this argument until after the hearing, we hold that this issue was not properly preserved for judicial review by the circuit court. In any event, Platt has failed to demonstrate any violation of law or abuse of discretion. Accordingly, we affirm.

FACTS AND PROCEEDINGS

Platt began working for Community Support Services for the Deaf, Inc. (CSSD) as a Direct Care Staff Member on September 13, 2011. In January 2012, according to his employer, Platt became, "disruptive," and was warned that if he made another outburst, he would be fired. On October 4, he once again became upset, and began to repeatedly sign the word "fuck" in ASL. His supervisor asked him to stop using this language, but he

continued to sign profanities for an additional two to three minutes. On October 8, he met with his supervisor to discuss these actions. During this meeting, Platt signed a form confirming his supervisor's version of events and acknowledging that he had violated rules set forth in the employee handbook. He was then fired.

Platt filed an initial claim for unemployment benefits in January 2013, which was denied by a Claims Specialist on the basis of the employee's "gross misconduct." He appealed. On February 26, 2013, he participated an initial telephonic hearing before a DLLR Hearing Examiner. DLLR was not able to proceed with the hearing on that date because, as reflected in the examiner's notes, the sign language interpreter was unable take an oath. On March 21, 2013, a DLLR examiner conducted an evidentiary hearing. DLLR retained Meg Klein to serve as an interpreter for Platt. Klein is an employee of the Hearing and Speech Agency.[1] Klein held a "Certificate in Transliteration" from the Registry of Interpreters of the Deaf (RID), a national organization which, among other things, provides various levels of certification for translators and interpreters. According to RID, holders of a Certificate of Translation:

> are recognized as *fully certified in transliteration* and have demonstrated the ability to transliterate between English-based sign language and spoken English for both sign-to-voice and voice-to-sign tasks. The transliterator's ability to interpret is not considered in this certification. Holders of the CT are recommended for a broad range of transliteration assignments.

[1] *See* http://www.hasa.org/about (accessed January 28, 2015) [http://perma.cc/6KUW-CSMF] ("The Hearing and Speech Agency (HASA) is a private, non-profit organization that provides hearing and speech services, offers an information resource center and advocates for people of all ages with communication disorders/disabilities").

> **This exam was offered from 1988 to 2008. This exam is NO LONGER AVAILABLE**."[2]

See Registry of Interpreters for the Deaf, *RID Generalist Certifications*, *available* at http://www.rid.org/education/edu_certification/index.cfm/AID/45 (last accessed January 28, 2015) [http://perma.cc/GPG2-EPMM][3] (Italics added). Throughout the hearing, Klein

[2] There is no explanation in the record that tells us why the exam for this certificate is no longer offered.

[3] For internet resources cited by the parties in this opinion, we have provided both the hyperlink text provided in their briefs as well as a "permanent" hyperlink. Legal commentators have voiced concerns that many hyperlinks provided in opinions are no longer active. *See, e.g.*, Raizel Liebler, June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of A United States Supreme Court Citation Containing an Internet Link (1996-2010)*, 15 Yale J. L. & Tech. 273, 276 (2013) ("[O]ur field's present method of citing websites in judicial cases, including within U.S. Supreme Court cases, allows such citations to disappear, becoming inaccessible to future scholars. Without significant change, the information in citations within judicial opinions will be known solely from those citations.") According to one study, "49.9% of the links cited in the Supreme Court opinions no longer had the cited material." Jonathan Zittrain, Kendra Albert, Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 Harv. L. Rev. F. 176, 186 (2014).

Cognizant of this problem, a consortium of legal libraries and nonprofit entities has developed "Perma," a "platform that will allow authors and editors to automatically generate, store, and reference--in a freely and publicly accessible manner—archived data representing the relevant information of a cited online resource." *Id.* at 191. When an author cites an internet material,

> the author can provide a link to Perma, and the Perma server will save a copy of the information relevant to the citation—at that address at that particular time—thereby capturing what the author determined was a source requiring the citation. Perma will then return to the author a new link, and a formal citation, which is designed to last as long as the Perma system survives. That link can then be used in the work, either in addition to the original citation, or instead of the original citation.

Id. at 191-92. Perma is accessible at http://perma.cc; through this service, all links are initially valid for at least two years, until they are "vested" by someone affiliated with a

transliterated Platt's testimony.[4] It does not appear from the record that Platt was represented by counsel before or during the hearing.

During this hearing, Platt's former supervisor testified about three incidents of alleged misconduct where Platt became angry and used profanity. Platt, through Klein,

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law library, law journal, or court system. *See* https://perma.cc/docs/perma-link-vesting (accessed January 28, 2015) [http://perma.cc/768E-N7M4].

Although the Rules do not require litigants to provide permanent links to web materials, we note that parties who rely on internet sources should be aware of the temporary nature of those citations and consider a citation method that will be retrievable by future readers.

[4] In his Brief, Platt does not discuss the distinction between "translation" and "transliteration," but does cite the following law review article that provides some explanation:

> Transliteration is the means by which spoken English is converted word for word into visual English. Within the interpreting field, transliteration is acknowledged as a skill separate from interpreting.
>
> Transliteration conveys the words being spoken. It does not decode the spoken English—that is, it does not get to the meaning. Rather, it recodes the English, making the spoken word visible, either in signed form or orally. Oral transliteration is a type of interpretation in which the interpreter repeats the words of the speaker verbatim. Signed transliteration utilizes manually coded English and reproduces the words via hand signs and finger-spelling.
>
> The signing method used in transliteration is, in essence, a combination of ASL signs used to represent English words. The signs are chosen for their relation to the words rather than for their meaning. Very often, sign choice is a function of the sound and the spelling of a word. "Run as in a run in the park and run as in a run on the bank are both signed the same way, because the English spelling and pronunciation are the same." Home run, run for office, a run in your nylons, running water, and a runny nose would be included under that same sign.

Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 Wis. L. Rev. 843, 871 (2003) (Citations omitted).

made opening and closing statements and cross-examined the supervisor at the end of her testimony. Platt denied using profanity, but acknowledged that he had signed a form that agreed with his supervisor's version of the events leading to his termination. The hearing examiner asked Platt to explain this contradiction:

> Q: Okay. If, if you did not do anything wrong, again why would you state or sign you agree with the supervisor? And why did you not write I did not do this or supervisor is incorrect?
>
> A: Because it's just politics, you know, the way they fired me and I was just like you what – politics it's just kind of politics, it's just a go around the way it was handled (indiscernible) . . .
>
> Q: So by signing this form you agreed to your termination based on the Employer's –
>
> A: Yeah, fine because I just wanted to, you know what, I wanted to end the arguing and escalating.

His supervisor then cross-examined Platt:

> Q: I just want to ask is it true that the last incident that you did use extreme profanity signing "fuck," "fuck," "fuck" while you were on duty in front of the individuals and employees?
>
> A: No, no, no. . . . I was quite, I didn't, I didn't say anything. It was just like them against me but until the gossip went around I was like "F" you, you know, it was her it wasn't me. It was definitely not me, never, never in my dreams would I, you know, never would (indiscernible) do that. . . .
>
> Q: I have another question. Is it true that you did in fact act or behave inappropriately, inappropriately, inappropriately and (indiscernible) and not calm down when the supervisor asked you to calm down?
>
> A: Shaking his head no.

In closing, Platt stated that his former co-workers could support his claim that he had not acted inappropriately, but that he had not taken written statements from them or asked them to testify.

A: I just explained to them I didn't get anything in writing but then they had nothing to say as to my complaint with – I just didn't think it was worth it.

Q: Okay. And did you read your notice of this hearing of your right to subpoena witnesses?

A: Hold on one second. No, no I didn't this is the first time – no.

Q: Okay, all right, you can proceed with your closing statement.

A: Shaking his head no. That's it.

On April 1, 2013, the Hearing Examiner upheld the Claims Specialist's denial of benefits and Platt appealed to the DLLR Board of Appeals. The Board affirmed the Hearing Examiner on June 14, 2013, finding that Platt had engaged in "gross misconduct" under Md. Code (1991, Repl. Vol. 2011), Labor and Employment Article ("LE") § 8-1002(a)(1)(i). The Board found that Platt deliberately disregarded his employer's warning that "a similar outburst would result in his termination" and that he "repeatedly used profanity even after repeatedly being asked not to use said language." Additionally, the Board noted that Platt had signed a disciplinary form "wherein he did not dispute the allegations made against him." The Board thus found that Platt was properly denied unemployment benefits.

The Board never discussed the issue of interpreter services because Platt did not raise them until he filed a Petition for Judicial Review on October 3, 2013. In the Circuit Court, Platt claimed he was denied a fair hearing because his interpreter in the proceedings was not a qualified interpreter within the meaning of Code of Md. Regs. ("COMAR") 09.32.11.02 H, DLLR's Unemployment Insurance Regulations governing Hearings before

the Hearing Examiner. Platt requested that the Circuit Court remand the case for a new hearing using an ASL Certified Interpreter.

Platt stated in an affidavit dated September 25, 2013, that he is "profoundly deaf and has been so since birth." In his brief, he explains that he is "prelingually deaf."[5] He communicates orally by use of American Sign Language (ASL) and considers this his first language; English is his second language. He communicates over the telephone by use of Sorenson Relay Services.[6] He also stated that he does not lip read well enough to use this process in formal proceedings.

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[5] *See* Michele LaVigne & McCay Vernon, *supra*, at 853 (Citations omitted) ("When a child's hearing loss is prelingual (born deaf or hard-of-hearing, or the onset of hearing loss occurs before two to five years of age), his deafness has a profound and lifelong effect on his ability to acquire and understand English or any other oral language.")

[6] The Tenth Circuit explained relay services and Sorenson's role in providing this service:

> Title IV of the Americans with Disabilities Act mandates that individuals with hearing and speech disabilities have access to telecommunications relay services ("TRS"). TRS enables these individuals to access a telephone system that is "functionally equivalent" to the voice telephone services used by the general population. . . . Video Relay Service ("VRS") is a type of TRS, "which enables a person with a hearing disability to remotely communicate with a hearing person by means of a video link and a communications assistant." Using a broadband internet connection and the video link, the VRS user is able to use sign language with a communications assistant ("CA") who places an outgoing telephone call to a hearing person. "During the call, the CA communicates in American Sign Language . . . with the deaf person and by voice with the hearing person. As a result, the conversation between the deaf and hearing end users flows in near real time." . . . *Sorenson provides the largest percent of VRS minutes*[.]

Sorenson Commc'ns, Inc. v. F.C.C., 659 F.3d 1035, 1039-40 (10th Cir. 2011) (citing 47 U.S.C. § 225(a)(3)) (Other citations omitted) (Emphasis added).

In his petition in the circuit court, Platt stated that the interpreter in the March 21 hearing made errors in the interpretation of testimony and that DLLR did not hire a qualified interpreter. In a letter dated August 15, 2013, Platt identified what he claimed were misinterpretations of what he had said. The Legal Aid Bureau subsequently filed another memorandum on behalf of Platt, contending that DLLR did not provide him with a fair hearing and requested a new hearing with an ASL interpreter. In this memorandum, Platt stated that he only became aware of the incorrectly translated testimony when he received the transcript of the administrative hearing, and therefore, that "his first opportunity to make an objection to the qualification of the interpreter [was the] Circuit Court proceeding."

In an attached affidavit, he said that prior to the hearing, he confirmed with the interpreter that she would be using ASL, and that during the hearing, "the interpreter consistently awkwardly signed and had a quizzical look on her face." The State notes that the record does not reflect that Platt asked DLLR to provide him with an ASL interpreter.

During argument before the circuit court, Platt stated that he is "entitled to meaningful access and wishes a verbatim, not translation, interpretation of what he conveyed in American Sign Language." He also argued that because the interpretation was not verbatim, he was denied his rights under the Americans with Disabilities Act and a fair hearing.

QUESTIONS PRESENTED[7]

1. Did Platt waive his right to challenge the Board's provision of interpreter services by not raising this issue until he sought judicial review in the circuit court?

2. Did the Board violate the Americans with Disabilities Act or Maryland law by providing a transliterator, rather than a translator, at the Examiner Hearing?

3. Did the Board violate international human rights standards?

DISCUSSION

STANDARD OF REVIEW

When considering the appeal of a circuit court's decision regarding review of an administrative agency, we review that agency's decision directly. *Comptroller of the Treasury v. Science Applications International Corp.*, 405 Md. 185, 192 (2008) (Citations omitted). We apply the identical standard of review as that employed by the circuit court. *See Motor Vehicle Admin. v. Shea*, 415 Md. 1, 15 (2010) (An appellate court "looks through" the circuit court's decision while applying the same standards of review) (Citations omitted).

[7] We have rephrased and renumbered the questions raised by the parties. Platt initially asked:

1. Whether the agency violated Title II of the Americans with Disabilities Act by failing to provide a qualified interpreter?
2. Whether international human rights standards apply to this unemployment insurance appeal?
3. Whether the agency violated international human rights standards?
4. Whether the agency violated the Appellant's constitutional right to due process by denying him a fair hearing?

I. Waiver

Platt argues he was denied his right to a "qualified interpreter." This issue, he admits, was not raised until he sought judicial review of the Board's decision in the circuit court. The issue of interpreter services was not, therefore, ever presented to the Board or the Hearing Examiner.

Judicial review of state administrative agency decisions is typically governed by the Maryland Administrative Procedure Act (APA). *See* Maryland Code (1984, 2009 Repl. Vol.) State Government Article § 10–222(a) ("[A] party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision"). However, unemployment insurance decisions are specifically exempted from the APA. SG § 10-203(a)(5) ("This subtitle does not apply to . . . unemployment insurance claim determinations, tax determinations, and appeals in the Department of Labor, Licensing, and Regulation except as specifically provided in Subtitle 5A of Title 8 of the Labor and Employment Article); *Dep't of Labor, Licensing & Regulation v. Woodie*, 128 Md. App. 398, 410 (1999) ("Under the plain meaning of the Administrative Procedure Act, the statute generally does not apply in U[nemployment] I[nsurance] proceedings").

Rather, judicial review of unemployment cases is controlled by LE § 8-5A-12:

> (a)(1) A final decision of the Board of Appeals may be appealed to a circuit court by any party aggrieved by the decision, the Secretary, or both.
>
> . . .
>
> (d) In a judicial proceeding under this section, findings of fact of the Board of Appeals are conclusive and the jurisdiction of the court is confined to questions of law if:

> (1) findings of fact are supported by evidence that is competent, material, and substantial in view of the entire record; and
>
> (2) there is no fraud.

The Court of Appeals explained the standard of review for Unemployment Insurance decisions in *Dep't of Labor, Licensing & Regulation v. Hider*, 349 Md. 71, 77-78 (1998): "Under this statute, the reviewing court shall determine only: (1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision." (Quotation omitted). "The reviewing court may not reject a decision of the Board supported by substantial evidence unless that decision is wrong as a matter of law." *Id.* (Citation omitted). "The test for determining whether the Board's findings of fact are supported by substantial evidence is whether reasoning minds could reach the same conclusion from the facts relied upon by the Board." *Id.* (Citation omitted); *see also Mastandrea v. North*, 361 Md. 107, 133 (2000) (Quotation omitted) ("Substantial evidence" means "such evidence as a reasonable mind might accept as adequate to support a conclusion" and "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached").

The circuit court applied this standard and in an order dated December 21, 2013, found that the record contained substantial evidence to support the administrative agency's findings of fact, that it had applied the correct standard of law, and that it saw no evidence of fraud. The Court also noted that the "alleged errors in the transcript, when considered

in light of the totality of the transcript, fail to rise to the level of fraud, mistake or irregularity sufficient to warrant a remand for a new hearing."[8]

Platt has not alleged fraud. He has also not contested the Board's decision that he had committed gross misconduct. *See* LE § 8-1002 (defining gross misconduct as, among other things, "(i) deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit; or (ii) repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations"). Nor has Platt alleged that there was a lack of substantial evidence to support denial of his unemployment benefits.

Instead, Platt argues, as he did for the first time when he sought judicial review in the circuit court, that he was denied an effective interpreter. At its core, Platt's argument consists of two claims: 1) that his interpreter was ineffective because she was not certified in ASL translation, and 2) that the deficient interpreter services denied him a chance to present his argument. Platt admits that he did not raise these issues before the Board. The threshold question we must first determine is whether Platt can proceed on these issues.

The Unemployment Insurance statute does not directly address the issue of waiver. However, in all other administrative agency proceedings, we have repeatedly held that

[8] Although we do not take issue with this statement, it misstates the standard of review, because "mistake" and "irregularity" are not factors to be considered under LE § 8-5A-12. However, Platt was not prejudiced by these "additional" findings and does not challenge the court's ruling on this ground.

failure to preserve an issue in the administrative forum forecloses argument on judicial review by a circuit court.

In those cases, an argument must be raised before the agency for it to be considered on appeal. *Dep't of Econ. & Employment Dev. v. Owens*, 75 Md. App. 472, 477 (1988) ("When an argument is not raised during the administrative process, it is foreclosed for appellate review"). "Thus, it is the final decision of the final decision maker at the administrative level, not that of the reviewing court, that is subject to judicial review." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001).

It is clear that under the APA, the circuit court is restricted to the record before the administrative agency. Although unemployment benefit determinations are exempted from the APA, judicial review of agency adjudications is not based entirely on interpretation of the language of the APA (or here, LE § 8-5A-12), but rather on broader principles of judicial review developed on a case by case basis. For that reason, we hold that the same common law principles of waiver that control review under the APA govern judicial consideration of unemployment benefit decisions.

The Court of Appeals has "long and consistently made clear that, 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." *Pub. Serv. Comm'n of Maryland v. Panda-Brandywine, L.P.*, 375 Md. 185, 207-08 (2003) (Quotation omitted).

In *Panda-Brandywine*, we decided a case based on a "public policy question" that had not been raised in a hearing before the PSC. *Id.* In doing so, we exercised our discretion under Maryland Rule 8-131(a) to consider an issue even if it were not raised below. The Court of Appeals, however, held that it was "improper for the appellate court to address [a] public policy question, especially as it raises serious issues under provisions in both the U.S. and Maryland Constitutions that prohibit the impairment of contract rights." *Id.* We note Platt's allegations of illegality fail to present the same "serious issues" that would present constitutional questions.

Thus, we will not consider an issue that is raised for the first time before the circuit court on judicial review of an administrative agency. *See, e.g.*, *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123-24 (2001) ("Because the issue of the attorneys' fees were presented to the Circuit Court for the first time and never raised in, or decided by the Administrative Law Judges, that court erred in awarding them").

The circuit court confines its review to the administrative record, which "consists of all transcripts, documents, information, and materials that were before the final decision maker *at the time of his or her decision*." *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 60 (2002) (Emphasis added) (Footnote omitted). Although an administrative agency has discretion to "consider evidence submitted after the close of an evidentiary hearing as long as there is compliance with procedural due process." *Id.* Yet in this case, Platt did not offer any evidence of his dissatisfaction with his interpreter until after the Board issued its final decision.

By this logic, we hold that Platt waived the issue of Klein's qualifications by not objecting at the hearing. Platt either knew his interpreter was not an ASL translator, or could have known by asking, prior to or at any time during the proceedings before the Hearing Examiner. Platt argues in his brief that "it is undisputed that [Platt] requested an interpreter to communicate with him in ASL during the unemployment hearing." The Board denies this, noting that "the record does not reflect him making that request at any time. Indeed, the only document suggesting that he made that specific request is his own affidavit, submitted to the circuit court on judicial review. By contrast, the Hearing Examiner's contemporaneous notes from the initial hearing at which Mr. Platt requested assistance "do not mention ASL." After reviewing the transcript of the hearing, we see no evidence that Platt specifically requested an RID-certified ASL translator. Although the Hearing Examiner was aware Platt needed interpreter services, and provided them to him, there was no way to know that these services were insufficient. Moreover, Platt proceeded to testify without objecting to the provision of those services. He cannot, after the hearing, and after the decision of the Hearing Examiner and the Board, contest that his interpreter was unqualified.

Platt's second point is that he was unable to know of the errors in hearing until he had read the transcript, which was made available to him only after the final decision by the Board that he sought to judicially review. He claims that this was the first time he could determine whether his translation had been effective.

The Board responds that if Platt had, as stated in his affidavit, observed the interpreter consistently signing awkwardly and having a quizzical look on her face, he was

in a position to contest the quality of the translation then and was certainly on notice. In fact, the Board notes, "at no time during this testimony did Mr. Platt indicate that he could not understand Ms. Klein's interpretation of the testimony, that Ms. Klein was incapable of communicating adequately with him (in ASL or otherwise), or that Ms. Klein looked puzzled and awkward while signing."

The circuit court, after reviewing the passages of the transcript where Platt cited errors, found that the statements were substantially the same and that there was no indication of fraud. To this date, Platt has not shown how any mistranslation of what he stated affected him negatively when the Board determined that he had committed gross misconduct under LE § 8-1002. So, even crediting Platt's claim that he was mistranslated, we conclude that these errors (which would exist in any use of a language interpreter) have not been shown to be anything but harmless.

Moreover, the record indicates that Platt was able to present his argument at the hearing. He denied using profanity in any form and alleged that clients had been rude with him. In addition, he claimed that another employee advocated on his behalf despite the fact that his supervisors were "ganging up" against him. The Board was aware of Platt's statements, but apparently chose to credit his supervisors' version of events.

Therefore, we hold that the court did not commit error in accepting the translation offered to it, where Platt has failed to demonstrate that it was inaccurately, fraudulently, or prejudicially translated. Because Platt had ample opportunity to contest the provision of interpreter services before and during the hearing, he has waived this issue and could not raise it before the circuit court or here.

Platt argues that the Board should have determined, on the record, Klein's qualifications as an interpreter. He notes that Md. Rule 16-819 provides that once a court determines an interpreter is needed, it is required to make a diligent effort to obtain the services of a "certified interpreter." Rule 16-819(d). For these purposes, a "certified interpreter" is, among other things, one who is certified by the Maryland Administrative Office of the Courts. Rule 16-819(a). Platt further argues that Rule 16-819 requires that the court inquire into the interpreter's credentials on the record. This rule does not apply to administrative adjudications and does not require that the interpreter be certified in ASL Translation, rather than in Transliteration.

II. Right to an interpreter

Even if Platt had effectively preserved his arguments for appeal, we nevertheless conclude that the Board complied with the ADA. In addition, the Board complied with Maryland regulations regarding interpreter services, which we find encompass a similar level of protection as does the ADA.

a. Interpreters under federal law

Platt claims that the Board violated the federal Americans with Disabilities Act.[9] The ADA was enacted in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and "to provide clear, strong, consistent, enforceable standards addressing

[9] Alleged violations of the ADA may be heard in both state and federal courts. *In re Application of Kimmer*, 392 Md. 251, 272-73 (2006) (citing *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990)).

discrimination against individuals with disabilities." *Id.* § 12101(b)(2); *see Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 369 (D. Md. 2011). Title II of the ADA, which is at issue here, applies to public entities, including "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *id.* § 12131(1). Such entities may not exclude a "qualified individual with a disability," "from participating in or being denied the benefits of the services, programs, or activities." 42 U.S.C. §§ 12131 and 12132.[10]

For purposes of Title II, a "qualified individual with a disability" is defined as an individual with a disability "who, with or without reasonable modifications to rules, policies, or practices, . . . , or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 369 (D. Md. 2011).

The remaining issue is whether Platt received appropriate modifications or "auxiliary aids and services" to satisfy Title II.

Federal regulations interpreting the ADA provide that:

> With regard to communication-related disabilities, the regulations require public entities to "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others," and to "furnish appropriate auxiliary aids and services where necessary to afford an individual with a

[10] The parties acknowledge that the Board is a public entity, and that Platt is a qualified individual with a disability.

> disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity."

Paulone v. City of Frederick, 787 F. Supp. 2d 360, 372 (D. Md. 2011) (citing 28 C.F.R § 35.130).

> "Auxiliary aids and services includes—
>
> (1) Qualified interpreters, notetakers, transcription services, written materials, . . . or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
>
> (2) Qualified readers, taped texts . . . or other effective methods of making visually delivered materials available to individuals with visual impairments;
>
> (3) Acquisition or modification of equipment or devices; and
>
> (4) Other similar services and actions.

28 C.F.R. § 35.104.

> The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a *public entity shall give primary consideration to the requests of individuals with disabilities*.

Id. § 35.160(b)(2) (Emphasis added).

The record does not reflect that Platt specifically requested an ASL translator. Moreover, there is no explicit requirement that an interpreter be certified in ASL translation to satisfy the ADA. Instead, "[q]ualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary." *See Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996) (interpreting 28 C.F.R. § 35.104); *see also Clarkson v. Coughlin,* 145 F.R.D. 339,

341 (S.D.N.Y. 1993) ("A qualified sign language interpreter is one who has obtained certification from the National Registry of Interpreters for the Deaf. . . ."); *DeLong v. Brumbaugh,* 703 F. Supp. 399, 403 (W.D. Pa. 1989) ("Qualified interpreters are available from the Registry of Interpreters for the Deaf, Inc., . . ."); *Pyles v. Kamka,* 491 F. Supp. 204, 205 (D. Md. 1980) (approving consent decree in which prison officials agreed that "an interpreter shall be deemed qualified if he/she is certified by the National Registry of Interpreters for the Deaf").

However, the Ninth Circuit has specifically noted that formal certification, although sufficient, is not necessary to satisfy the ADA. "[W]e cannot agree that, as a matter of law, the ADA regulations require an interpreter to be certified by the RID." *Duffy v. Riveland* 98 F.3d 447, 456 (9th Cir. 1996). The Ninth Circuit did, however, find that Duffy's interpreter was not qualified, given that she "had no formal training in sign language and is not a professional interpreter. Instead, she is a correctional mental health counselor, employed by the Washington State Department of Corrections, who learned how to sign through her relationship with her parents." *Id.* at 456.

In this case, Klein is certified by RID. Federal courts in New York, Maryland and Pennsylvania have indicated that RID certification establishes one as a qualified interpreter. *See Clarkson,* 145 F.R.D. at 341; *DeLong*, 703 F. Supp. at 403; *Pyles*, 491 F. Supp. at 205. Although these cases did not distinguish between transliterators and translators, we see no reason to draw a distinction in this case, where Klein is clearly more qualified than the interpreter in *Duffy*.

Platt relies on the Department of Justice Technical Assistance Manual, which states that:

> When an interpreter is required, the public accommodation should provide a qualified interpreter, that is, an interpreter who is able to sign to the individual who is deaf what is being said by the hearing person and who can voice to the hearing person what is being signed by the individual who is deaf. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.

See The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services, § II – 7.1200, *available* at http://www.ada.gov/taman2.html (last accessed January 28, 2015) [http://perma.cc/69GM-TPEQ]. Platt does not explain why Klein's services failed to satisfy this standard.

He argues that transliteration is an inherently inferior method of interpreting testimony. The law review article he cites explains that the

> problem with transliteration is that most prelingually deaf defendants cannot understand it well enough to afford them adequate comprehension of legal proceedings. Admittedly, legal English is not known for its accessibility to anybody--deaf or hearing. But for deaf people, their inability to comprehend word-for-word English in the courtroom extends far beyond the obtuse jargon."

LaVigne & Vernon, *supra* at 872. Platt also cites comments from RID indicating that transliteration is not appropriate for courtroom proceedings. See *Jointly Filed Comments of the Registry of Interpreters for the Deaf, Inc. and the Michigan Registry of Interpreters for the Deaf (MiRID) DODHH*, Public Comment, March 18, 2013, *available at* http://rid.org/userfiles/File/pdfs/Government_Affairs_Program/RID%20-%20MiRID%20Comments%20-%20DODHH%20Proposed%20Rules%20-%20Submitted%203-18-13%20%281%29.pdf (last accessed January 28, 2015) [http://perma.cc/ZP73-H35E]. In that

comment, RID stated, "[a] generalist certificate, even an NAD-RID generalist certificate, is not adequate to prepare an interpreter for the complex nature of communications in the courtroom, police stations, and prisons." *Id.* Moreover, the comment warns that the "notion that a generalist certification, even if quasi-legal scenarios are used in the testing process, is sufficient to test an interpreter's ability to effectively communicate is simply inaccurate and is harmful to both interpreters and the Deaf community." *Id.*

Despite this comment, the law review article Platt cites provides at least one reason for allowing transliteration:

> Transliteration is attractive to the legal system. It is efficient in that it requires less lag time (the period between the start of the spoken words to the start of the interpretation) than would be required if the language were undergoing structural or syntactical changes. An interpreter can begin transliterating almost simultaneously with the spoken words because she is making no judgments about meanings. A good transliterator is essentially a court reporter, transforming the words while asking little of the hearing participants, other than to speak one at a time.
>
> Transliteration also appeals to the legal system because it lets judges and lawyers believe that they have control over what the deaf person is told, and therefore, understands. It also fits prevailing notions about what an interpreter is doing. Indeed, judges and lawyers are often suspicious of the interpreter who cannot, or will not, match courtroom dialogue word for word.

See LaVigne & Vernon, *supra*, at 871.

So, although we observe that at least some within the deaf community believe transliteration is not the ideal means of conveying the truest meaning of what a deaf individual states in testimony, it is not an ineffective one. Considering that federal regulations have not rejected transliteration, we see no reason to do so here.

We hold that because an RID-certified transliterator is acceptable in Maryland and even in some federal criminal proceedings, the Board complied with the ADA.

b. Maryland's Interpreter Statutes and Regulations

Platt also argues that the Board violated COMAR 09.32.11.02 H by failing to appoint a "qualified interpreter." Although he acknowledges that this term is not defined, he urges us to look to the ADA. As discussed above, however, an interpreter holding RID certification would be considered sufficient under federal law, and a translation that is not word-for-word the same is not necessarily a violation.

Platt claimed that he asked Klein before the hearing if she spoke ASL, and she replied that she did. The employee claims, however, that "it was clear throughout the hearing that Ms. Klein did not speak or understand ASL." Platt includes the following section of the transcript in his brief, claiming it illustrates Klein's awkwardness in interpreting his testimony:

> Q: But at this point do you have questions for the Employer?
>
> A: (indiscernible) three incidents? One was in November, then the second and the third, the final on in October, yeah but I'm kind of (indiscernible) about the middle one.
>
> A: Hold on. Okay. Ask one question at a time. So if you have a question for Ms. Paige please ask one question at a time...

Platt described the incidents in detail.

> Q: So would you or do you have any questions for [the supervisor] if not you can tell me -
>
> A: Really? I don't know I just feel like it's fully the wrong information but-
>
> Q: If you have no questions you can tell me your side.

Platt claims that this shows he "could not understand the explanation offered to convey to him that he had a right to ask his accuser questions."

In addition, Platt claims: "[t]here are numerous instances throughout the transcript where it appears Ms. Klein is testifying." For instance, Klein, in describing the incident leading to Platt's termination, answered.

> A: And I don't know what triggered the anger that – where he was upset I don't have that information, but he was upset and he was using profanity specifically and again this was all on duty and in front of employees, in front of the individuals and he used the "fuck" word several times. And the supervisor said this is not appropriate . . .

Platt argues that in this exchange, Klein was not providing a true translation because she apparently used the pronoun "he" when interpreting Platt's testimony. Platt argues that this violates Maryland law. However, we find nothing in Maryland regulations that supports Platt's position.

COMAR 09.32.11.02 H provides:

> (1) If a party or witness is hearing-impaired or mute, and because of this impediment cannot readily understand or communicate the spoken language, or if the party or witness is unable to communicate in the English language, the party or witness may apply to the Chief Hearing Examiner for the appointment of a *qualified interpreter* to assist that person.
>
> (2) Upon application of the party or witness, the Chief Hearing Examiner shall appoint a qualified interpreter to assist that person. The Chief Hearing Examiner may also appoint an interpreter on his or her own motion.
>
> (3) *In selecting a qualified interpreter for appointment, the Chief Hearing Examiner may consult any directory of interpreters maintained by any court in this State*.

> (4) An interpreter, appointed pursuant to this section, shall be allowed reasonable compensation subject to approval of the Chief Hearing Examiner.

Md. Code Regs. 09.32.11.02 (Emphasis added). The Court Registry of Interpreters is maintained by the Administrative Office of the Courts. Md. Rule § 6-819; *see also* http://www.mva.maryland.gov/Resources/Interpreter_List.pdf.

COMAR provides that the agency *may* "consult any directory or interpreters maintained by any court in this state," so long as that person is a "qualified interpreter." Klein holds a "Certificate of Translation" from RID. The regulations do not provide further guidance as to what method of translation is sufficient.

An agency's interpretation of a regulation is a conclusion of law. *Crofton Convalescent Ctr., Inc. v. Dep't of Health & Mental Hygiene, Nursing Home Appeal Bd.*, 413 Md. 201, 215-16 (2010). "[A]n administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Maryland Aviation v. Noland,* 386 Md. 556, 572 (2005) (Internal quotation marks and citations omitted). "Despite the deference, 'it is always within our prerogative to determine whether an agency's conclusions of law are correct.'" *Adventist Health Care Inc. v. Maryland Health Care Comm'n*, 392 Md. 103, 121 (2006) (Quotation omitted).

To determine the validity of the Board's interpretation of "qualified interpreter," we must rely on principles of statutory and regulatory interpretation to determine the meaning of the term "qualified interpreter" under COMAR. The plain meaning of "interpret" and "translate" do not support Platt's argument that the agency was require to provide him with

an interpreter certified in ASL translation. An "interpreter" is "one who translates orally from one language into another." The American Heritage Dictionary of the English Language (4th ed. 2006). To "translate" means "(1) To render into another language; (2) a. To put into different terms; explain or interpret. b. To express in different words." *Id.*; *see also* Black's Law Dictionary (10th ed. 2014) (defining "translate" as "[t]he transformation of language from one form to another; esp., the systematic rendering of the language of a book, document, or speech into another language.") (citing *Rasmussen v. Baker*, 50 P. 819, 826 (Wyo. 1897) ("Generally speaking, a translation need not consist of transferring from one language into another; it may apply to the expression of the same thoughts in other words of the same language.")). The plain meaning of interpreter and translation do not denote a specific method of transferring meaning from one language to another, but appear to allow for multiple methods so long as they convey the same meaning.

We do not see any indication that the plain meaning of "qualified interpreter" required that Klein be RID-certified in ASL translation, rather than in transliteration. Although as noted above there may be disadvantages in having a transliterator, we hold that as a matter of law, the above cited COMAR provision does not require an interpreter to be certified in ASL translation.

c. International Standards

Platt also claims that the Board violated international human rights standards, which he claims mandate "a fair hearing and non-discrimination on the basis of disability." Even if we were to accept that these treaties were binding upon the Board, Platt still has not shown that providing Klein as a transliterator would have violated these standards.

Platt cites two sources of international law to support his argument, yet neither advances his position. *See* International Covenant on Civil and Political Rights (ICCPR) http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last accessed January 28, 2015) [http://perma.cc/VJ6W-SCVT];U.N. Convention on the Rights of Persons with Disabilities (CRPD) available at http://www.un.org/disabilities/convention/conventionfull.shtml (last accessed January 28, 2015) [http://perma.cc/AB77-5XLJ]. Although these documents prohibit discrimination against persons with disabilities, Platt has still failed to explain why the interpreter services he received were inadequate. The sources he cites merely state the general proposition that persons with disabilities must be treated equally before the courts, and the States. Platt claims the CRPD requires States to "take all appropriate measures, including procedural accommodations, to ensure that persons with disabilities have the right to impart information on an equal basis with others through a mode of communication of their choice for all official transactions, including legal proceedings." Although the CRPD does require, among other things, governments to Provide forms of live assistance and intermediaries, . . . to facilitate accessibility to buildings and other facilities open to the public," CRPD art. 9(2)(e), nowhere does it specifically require governments to accommodate the choice of litigants, as Platt claims.

Platt is correct insofar as he claims that Maryland courts sometimes look to international standards to clarify the scope of legal relationships and duties. *See, e.g.*, *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 98-99 (2001) (citing "Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10", Vol. 2, pp. 181-182. Washington, D.C.: U.S. Government Printing Office, 1949, ("The

Nuremberg Code") available at http://www.hhs.gov/ohrp/archive/nurcode.html (last accessed January 28, 2015) [http://perma.cc/KRK5-US2S]) ("Additionally, the Nuremberg Code, intended to be applied internationally, and never expressly rejected in this country, inherently and implicitly, speaks strongly to the existence of special relationships imposing ethical duties on researchers who conduct nontherapeutic experiments on human subjects.")

Yet unlike in *Grimes*, where the Nuremberg Code specifically outlined the duties owed to plaintiffs, *see* Nuremberg Code ("the person involved [in a research study] should have legal capacity to give consent"), Platt has not specifically identified how the Board violated his rights under international law.

For all of these reasons we affirm the judgment of the circuit court upholding the decision of the Board.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLEE.