

**BEFORE THE MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
Case Review Panel**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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Ignatius Cobb

Complainant

v.

Fairland Acres Homeowners Association, Inc.

Respondent

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CCOC Case No. 16-17
OZAH Referral No. CCOC 18-01

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Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

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As the Hearing Examiner has previously advised the Complainant in this case, Section 2A-8(j) of the MCAPA vests in the hearing authority the ability to impose a variety of sanctions in certain circumstances: 43

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I. STATEMENT OF THE CASE

On May 3, 2018, the Montgomery County Commission on Common Ownership Communities (CCOC) referred a complaint and amendment to the complaint filed by Ignatius Cobb (Mr. Cobb or Complainant). Dkt. 2. The referral directed the Hearing Examiner to “conduct hearings” in the case. *Id.* Generally, Mr. Cobb’s complaint and first amendment allege that the Fairland Acres Homeowners Association (Respondent or FAHA) failed to comply with its By-Laws requiring regular meetings, election of officers, timely requiring annual audits of FAHA’s finances, and that Board members took actions outside of meetings (including by e-mail) that were required to be taken at meetings. The complaint also alleges that FAHA Board members failed to take the training required by Montgomery County law. Mr. Cobb filed a second amendment to his complaint on July 10, 2017, alleging the FAHA failed to offer him the opportunity to inspect its books and records as required by the Maryland Homeowners Association Act (MHAA). *See, Md. Real Property Code Ann.*, §11B-112(a).¹ After extensive discovery disputes, the parties are currently operating under a Scheduling Order issued on June 4, 2019 (Scheduling Order). However, the Complainant has since failed to meet several of the deadlines contained in the Scheduling Order and failed to attend scheduled inspections of FAHA’s books and records agreed to at a discovery hearing. As a result, FAHA filed two motions that remain pending: A Motion

¹ MHAA requires homeowners associations to make its “books and records” available to members of a homeowners association as follows:

- (i) Subject to the provisions of paragraph (2) of this subsection, all books and records kept by or on behalf of the homeowners association shall be made available for examination or copying, or both, by a lot owner, a lot owner's mortgagee, or their respective duly authorized agents or attorneys, during normal business hours, and after reasonable notice.
- (ii) Books and records required to be made available under subparagraph (i) of this paragraph shall first be made available to a lot owner no later than 15 business days after a lot is conveyed by the declarant and the lot owner requests to examine or copy the books and records.

for Summary Judgment and a Motion for Sanctions. Mr. Cobb has not filed a response to either. Dkt. 267, 274.

The grant of either would result in dismissal of all or a portion of the Complaint. As the Hearing Examiner has no authority to dismiss the complaint, she forwards a recommended decision on each to the CCOC.² The Hearing Examiner recommends that FAHA's Motion for Summary Judgment be granted. While she agrees with FAHA the Complainant's actions may be sanctionable, there is no need to impose the sanctions requested because she also agrees with FAHA that the complaint is moot.

Should the CCOC disagree with this recommendation, the Hearing Examiner alternatively recommends granting the sanctions recommended in this Report, although she does not recommend all of the sanctions requested by FAHA. As grant of the sanctions recommended herein dismisses outright the Second Amended Complaint and supports the grant of FAHA's Motion for Summary Judgment, she forwards her recommended decision on FAHA's Motion for Sanctions as well. She does not recommend the award of the attorney's fees and costs as requested by FAHA.

II. PROCEDURAL HISTORY

The procedural history of this case is long, complicated in large part by the use of e-mails to communicate with the Hearing Examiner.³ The Hearing Examiner details it here because of the

² The Code permits the Hearing Examiner under certain circumstances to issue a decision. *Montgomery County Code*, §10B-12(f). However, the CCOC referred the case to the Hearing Examiner only to "conduct hearings" in the case. Dkt. 2. Thus, the Hearing Examiner's authority falls under Section 10B-12(e) of the Code, authorizing the CCOC to refer a case to the Hearing Examiner to "conduct the hearing" when it deems appropriate.

³ On February 8, 2019, the Hearing Examiner issued an Order Governing Communications with OZAH requiring the parties to place requests for her to take action in the form of a motion. She did so to enable parties a clear deadline for responding and to clarify the issues in dispute. Dkt. 215. The Hearing Examiner ordered that (*Id.* at 2):

1. E-mails must relate only to procedural matters (*i.e.*, forwarding electronic copies of pleadings, logistics related to scheduling hearings, etc. Questions related to OZAH procedures should first be directed to OZAH staff.

possibility that claims arising from these proceedings may be raised in later proceedings in this case.

**A. Complaint, Discovery Requests, and Complainant's Request to
Inspect FAHA's Books and Records under the MHAA**

Ignatius Cobb's initial complaint is dated April 22, 2017. Dkt. 4(a). He alleged that: (1) FAHA's Board of Directors failed "to properly conduct an election" for the Board of Directors, (2) give adequate notice of a meeting, (3) properly conduct a meeting, (4) maintain or audit books and records, and (5) exercise its discretion in good faith. Dkt. 4(a). Complainant explained the details of his complaint as follows (*Id.*):

1. Board failing to have a meeting to elect officers. Instead, the Board and the management company said officers are decided upon based [sic] "Natural Progression" which is inconsistent with Bylaws [Art. XI, Section 2].⁴
2. Audits are 2 years late. Financial statements audits paid for by my members are extremely [sic]. Both 2014 and 2015 audits were presented for review in 2017. The mgmt. company and the Board must take responsibility for this.

Under the "Desired Actions" portion of the Complaint, Complainant asked for the following:

1. I would like the Board to abide by our Bylaws
2. Improve financial urgent [indiscernable] annual financial statements and its audits are done timely
3. The Board is not in compliance with Montgomery County training requirements. Mgmt. Company notified the Board of this requirement 30 days after the deadline—It took the mgmt. company over 120 days to notify the Board.

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2. All requests for the Hearing Examiner to take some action in the case must be placed in a motion. If the circumstances require a shorter response time than ten days, the parties should file a Motion to Shorten the Time to Respond.
 3. Before asking the Hearing Examiner to take any action in the case, including filing motions, the parties must first attempt to reach agreement with the opposing party. Parties must certify on their motion that they have made the attempt to agree with opposing parties, giving the time, date, and description of the attempt or attaching an e-mail.
 4. Substantive arguments on the merits of the case, or on legal interpretations of either procedural or substantive matters are not permitted in e-mails.

⁴ Article XI, Section 2 of the By-Laws attached to the Complaint states, "The election of officers shall take place at the first meeting of the Board of Directors after the annual meeting of the members." Dkt. 4.

4. Making decisions without including all the Directors [Bylaws Art XI, Section 4].⁵

Attached to the Original Complaint is a series of e-mails apparently marked to correspond to the four items listed under the Desired Actions. The first, marked “Complaint [sic] #1”, is a series of e-mails between Complainant and April Day (an employee of FAHA’s management company), Murray Sheldon, and Louise Casa (members of FAHA’s Board of Directors), on October 26, 2016, responding to a question from Mr. Cobb asking why officers had been decided before the scheduled meeting without considering his input. Complainant underlined a portion of Ms. Day’s response, which stated:

The Board absolutely did NOT meet; however, what Lu says is very typical of the natural progression of moving forward with simple board roles. In the past, there has never been a separate meeting. The VP has become President and former members at large moved into the VP position and the newer board member(s) simply take a first time ‘at large’ seat.

Another e-mail string (marked “Complaint #2”), includes an e-mail chain between Complainant and April Day occurring between November 3, 2016, and February 24, 2017. These e-mails discuss whether to retain a different auditing firm and whether to address repeated comments in the 2012 to 2014 audits. On December 12, 2016, Mr. Cobb asked Ms. Day whether she has been able to locate the final 2014 audit. He also asks when the 2015 audit will be completed. In a February 24, 2017, e-mail Mr. Cobb asks about the status of the audit that he’s “[b]een asking you about since November 2016.” *Id.*, Dkt. 4(a), marked “Complaint #2.”

E-mails titled “Complaint #3” relate to the failure of the Board of Directors to take training mandated by the Montgomery County Code. In one of the e-mails, dated March 6, 2017, Ms. Day

⁵ This section provides: “Special Appointments. The Board may elect such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and have such authority, and perform such duties as the Board may, from time to time, require.” *Id.* Mr. Cobb’s citation to this may relate to his proposed relief to add additional Board members.

mentions that Montgomery County had enacted a new law requiring Directors to take training within 90 days after being elected. She states, “This is something I planned to go over more at our next meeting.” *Id.* Complainant has circled the date of the e-mail and handwritten “over 120 days over 30 days late. Directors were nominated/elected in mid-October 2016.” *Id.*

Another e-mail, dated March 2, 2017, with the notation “Complaint #4,” is from Complainant to Louise Casa asserting that other Board members had already met and “decided without me” to schedule a meeting for March 22nd. The e-mail includes the electronic notice of the meeting. *Id.*

The final attachment, entitled “Complaints #'s 1 and 4” includes a February 27, 2017, e-mail from Mr. Cobb to April Day, requesting that the Board add two more officers to ensure equitable voting process. In it, Complainant asserts again that the Board is not in compliance with the By-Laws, that actions should not be taken without the presence of Directors or the written approval of all directors in accordance with Article 5, Section 5 of the By-Laws, the President and Vice President were already decided upon before the 1st meeting without his input in violation of Article XI, Section 2 of the By-Laws, and the notice of the next meeting was sent without inquiring as to his availability. *Id.* He also suggested that the monthly meetings required by the By-Laws should be changed to quarterly meetings. Article XI, Section 2 of the By-Laws attached to the Complaint provides (Dkt. 4):

Election by Officers. The election of officers shall take place at the first meeting of the Board of Directors following each annual meeting of the members.

Article 5, Section 5 of the By-Laws states (Dkt. 4):

Actions Taken Without a Meeting. The directors shall have the right to take any actions without a meeting which they could take at a meeting by obtaining the written approval of all of the directors. Any action so approved shall have the same effect as though taken at a meeting of the directors.

On September 28, 2017, the CCOC accepted jurisdiction of the Original Complaint. Shortly afterwards (on November 20, 2017), Mr. Cobb filed an amendment to his Original Complaint (First Amended Complaint.) Dkt. 4(b). The First Amended Complaint contains the handwritten notation, “Amended to include failure to have meetings per the Bylaws” (Emphasis in original). The Complaint charged that the Board of Directors failed to “properly conduct a meeting.” Dkt. 4(b). Under “Details of the Complaint,” Complainant states:

Board failed to have monthly meetings as stated in Article [sic] VI Section 1 of the Bylaws. However, they made Board decisions without including all the Directors. The latter is not in compliance with Article XI, Section 4 of the Bylaws.

Under “Desired Actions,” Complainant requested that:

The Board is not in compliance with the Association’s Bylaws. The Board should abide with the Bylaws of the Association. The association should remove the old Board Members who are not complying [sic] with the Bylaws. They should be replaced with new Directors who are committed to following the Bylaws.

Article VI, Section I of the By-Laws states:

Regular Meetings. Regular meetings of the Board of Directors shall be held monthly without notice, at such place and hour as may be fixed from time to time by resolution of the Board. Should said meeting fall on a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday.

On January 2, 2018, the CCOC Panel Chair ordered the case to be sent to mediation. Dkt.

1. Apparently, it was not successful because, on May 3, 2018, the CCOC referred the case to the Hearing Examiner to conduct hearings on the matter. Dkt. 2.

The Hearing Examiner issued a Preliminary Pre-Hearing Order on May 7, 2018, calling for a pre-hearing conference. Dkt. 5. Both parties appeared *pro se* at a pre-hearing conference, held on May 22, 2018, and agreed to the following schedule, which was incorporated into a Pre-Hearing Order dated May 24, 2019 (Dkt. 6):

1. June 28, 2018: All discovery requests must be submitted to opposing parties.

2. July 20, 2018: All responses to discovery must be submitted to the parties requesting discovery.
3. August 20, 2018: Submission of Preliminary Motions.
4. September 7, 2018: Submission of Complainant's (Complainant's) pre-hearing statement.
5. September 21, 2018: Submission of Respondent's (Fairland Acres') pre-hearing statement.
6. October 15, 2018: Public hearing.

Shortly after the pre-hearing conference (on May 24, 2018), Complainant sent an e-mail to Kimberly Hanger (an employee of the FAHA's management company, Community Association Services, Inc. or CAS, Inc.) and two FAHA Directors, Dave Leeger and Murray Sheldon (Dkt. 7):

To Fairland Acres Board and Management,
Pursuant to Montgomery County HOA regulations, I am requesting all e-mail communications from September 2016 through May 24, 2018. This includes all e-mails to and from any board member, the management company, and external or third parties pertaining to HOA matters.

On the same day, Complainant sent a second e-mail to the same parties, this time requesting (Dkt. 8):

Pursuant to Section 11B-112, part (a), subparagraph (ii), please provide the requested e-mail communications within 15 days.

(ii) books and records required to be made available under subparagraph (i) of this paragraph shall first be made available to a lot owner no later than 15 business days after a lot is conveyed by the declarant and the lot owner requests to examine or copy the books and records. (Emphasis in original.)

After receiving the above, Mr. Sheldon e-mailed the Hearing Examiner to clarify "what document is being referenced by "section 11B-112" because "it appears that this e-mail is referencing the Maryland Homeowner's Act and a deadline of 14 days. However, it was submitted

as a discovery request.”⁶ Dkt. 9. The Hearing Examiner instructed Mr. Sheldon to direct his question to Complainant, as she did not know his intent. Dkt. 10. At the same time, Complainant, by e-mail, objected to the potential assessment of fees for copies of books and records. Dkt. 10. The Hearing Examiner provided Complainant with the section of the Maryland Homeowners’ Association Act (MHAA) authorizing fees for copies.⁷ Dkt. 12; *Md. Real Prop. Code Ann.*, §11B-112(b).

On June 5, 2018, Complainant sent an e-mail to FAHA Directors and management, as follows, without a copy to OZAH:⁸

In the interest of time and as a homeowner, I am requesting access to all Fairland Homeowners Association records and books.

I will go to the management company’s business office to review the records and books.

This is a separate and different request from the OZAH case. Please do not confuse the two. This is a private matter and has to do with my rights as a homeowner.

Pursuant to Section 11B-112, part (a), Subparagraph (ii), please provide the requested e-mail communications within 15 days.

Books and records required to be made available under subparagraph (i) of this paragraph shall first be made available to a lot owner no later than 15 business days after a lot is conveyed by the declarant and the lot owner requests to examine or copy the books and records. (Emphasis in original.)

According to Mr. Cobb, the June 5, 2018, request to inspect books and records was (Dkt. 16):

...a separate matter that is not requested for this OZAH. With respect to OZAH, I specifically requested e-mail communications.

⁶ Mr. Sheldon, who had not appeared at the pre-hearing conference, failed to include Complainant on his communication. The Hearing Examiner placed the e-mail in the record of this case, and informed Mr. Sheldon that he must copy Complainant on all communication with OZAH. Dkt. 9.

⁷ After receiving this e-mail from the Hearing Examiner, Complainant called OZAH staff to state that he disagreed with the Hearing Examiner’s position. The Hearing Examiner warned Complainant that communications to the Hearing Examiner through OZAH staff could also be considered *ex parte* contacts. Dkt. 11.

⁸ The Hearing Examiner was unaware of the June 5, 2018, e-mail until Complainant provided it in association with a copy of a second amendment to his original complaint, provided to OZAH July 20, 2019. Dkt. 42.

On July 20, 2018, Complainant forwarded to the Hearing Examiner a copy of his Second Amended Complaint, which he had filed with the CCOC on July 10, 2018. Dkt. 42. The Second Amended Complaint contains a handwritten notation at the top: “Amended to include failure to provide Books and Records within 15 days—as required by the Maryland Homeowners Act.” It alleges that FAHA had failed to “allow inspection of books and records.” *Id.* The “Details of the Complaint” are as follows (*Id.*):

On July 6, 2018, I requested access to review the Books and Records of the Association. The Association failed to provide the said access within 15 days. Response regarding limited access, excluding email communications, was received from the Association.

Complainant’s desired actions were (*Id.*):

- (1) Association allow me to review all allowed Books and Records including e-mail communications pursuant to the Maryland Homeowners Act.
- (2) Association should provide notice 5 business day before the materials are available for review.

B. Discovery Proceedings

On July 10, 2018, Mr. Cobb notified that Hearing Examiner that he had not received FAHA’s responses to his discovery request (Cobb’s May 24th e-mail) and that FAHA had retained counsel. Dkt. 12. The Hearing Examiner advised Mr. Sheldon and Ms. Hanger that counsel should enter their appearance. Dkt. 13.

The following day, OZAH received an e-mail from former counsel indicating that she represented FAHA and had mailed her entry of appearance. She also requesting assistance on a discovery dispute with Mr. Cobb, asserting that Mr. Cobb was limited only to 20 requests. She contended that that e-mails were not encompassed in the term “books and records” as used in the MHAA. Dkt. 15. The parties continued to trade e-mails about whether Mr. Cobb’s request under

the MHAA was considered “discovery” in this case. Dkts. 18-20. To end the e-mail exchanges, the Hearing Examiner requested counsel for FAHA to place her requests in the form of a motion. Dkt. 20. The following day, FAHA’s counsel requested, again via e-mail, that the discovery deadline be delayed, a proposition with which Mr. Cobb, via e-mail, disagreed. Dkt. 23. The Hearing Examiner instructed former counsel to file her request in the form of a motion, which prompted additional complaints (by e-mail) from Mr. Cobb about the potential for extending the deadline. Dkt. 24.

A little less than one week later (on July 17, 2018), the Hearing Examiner advised FAHA’s former counsel that OZAH had not received either an entry of appearance or a motion to quash Mr. Cobb’s discovery requests. The Hearing Examiner asked counsel when she anticipated filing these, as the discovery deadline of July 20, 2018, was approaching. Dkt. 27. Former counsel responded that her staff incorrectly sent the motions to the CCOC. FAHA’s counsel e-mailed its Motion to Quash Discovery, Motion to Extend Prehearing Deadlines, and counsel’s Entry of Appearance to OZAH the next day (*i.e.*, July 18, 2018). Dkt. 30, 35, 36. Mr. Cobb, by e-mail, asserted that the FAHA’s Motion to Extend Pre-Hearing Deadlines was already late and requested that the Hearing Examiner compel production of the documents he’d requested. Dkt. 32.

Fairland’s Motion to Quash Discovery alleged that Cobb’s request for all e-mails between the dates stated was overly broad because it could include “former board members, board members that have moved away, vendors who perform maintenance and services for the HOA, and any and all emails sent to anyone regard any little issue.” Dkt. 40, ¶6. FAHA characterized this as an “excessive request for a matter regarding voting in board members.” *Id.* FAHA estimated that there could be 1,000 such e-mails, which would take approximately 40 hours to produce. Dkt. 40, ¶6. FAHA argued that “books and records” as used in the MHAA did not include e-mails. Rather,

it argued, “books and records are governing documents, meeting minutes, audits, and vendor contracts; not every email ever sent between every single resident, vendor, and property manager in the HOA.” The Motion to Quash also alleged that Mr. Cobb had been provided an opportunity to review the books and records, but had not responded. Finally, FAHA argued that the CCOC Dispute Resolution Procedures (CCOC DPR) permitted only 20 “requests” for documents, interpreting that provision (apparently) to mean that it was limited to *producing* 20 documents. *Id.* The motion attached an e-mail from Mr. Cobb (dated July 10, 2018) to FAHA’s counsel asking about dates to review the books and records. In a return e-mail, counsel for FAHA asserted that e-mails were not books and records. Dkt. 40, Exhibit C.

In its Motion to Extend Prehearing Deadlines, FAHA argued that counsel needed additional time to comply with the deadlines in the Pre-Hearing Order, some of which had already passed. FAHA proposed a series of new dates that did not change the date for the public hearing previously scheduled. Dkt. 46.

On July 20, 2018, Cobb forwarded to the Hearing Examiner a copy of his Second Amended Complaint. Shortly thereafter (on July 23, 2018), Mr. Cobb submitted a photograph of the postmark of the FAHA’s Motion to Quash, asserting that he had not physically received the Motion until July 21, 2018, one day after the discovery deadline. Dkt. 44.

The Hearing Examiner attempted to set up a conference call with the parties to resolve some of the issues contributing to the persistent e-mails. Dkt. 45. Counsel for FAHA responded with potential dates; Cobb responded only that he was not available that week. Dkt. 45.

On July 24, 2018, after receiving no further response from Mr. Cobb on whether he was available for a conference call, the Hearing Examiner advised both parties that she would proceed

to rule on the FAHA's pending motions by order. The Hearing Examiner extended Mr. Cobb's time to respond to both motions because they had been incorrectly filed with the CCOC. Dkt. 47.

Mr. Cobb attempted to hand-deliver his responses to FAHA's motions at the law office of its former counsel. He notified the Hearing Examiner, by e-mail, that when he arrived, he found the office empty. Upon inquiry from the Hearing Examiner, former counsel for FAHA advised that her office had moved to a new location. Dkt. 49. In response to additional e-mailed complaints from Mr. Cobb (because of the time he'd spent traveling to the office), FAHA's counsel noted that hand-delivery was not required. Dkt. 51. The Hearing Examiner asked FAHA's counsel to confirm her address and informed Cobb that she would accept an e-mailed version of his response to FAHA's pending motions. Dkt. 50.

Mr. Cobb opposed FAHA's Motion to Quash because it was incorrectly filed and received by OZAH only two days before the discovery deadline, which had been set in May of 2019. It alleged that this was "the same level of tardiness and failure to adhere to stipulated procedures that the Respondent has exhibited over the years." Dkt. 53(a), ¶1. He also asserted that the reference to "voting in board members" did not encompass all of the allegations in his Complaint. He characterized the Complaint allegations as FAHA's failure to (1) properly conduct an election, (2) give adequate notice of a meeting or other action, (3) properly conduct a meeting, (4) maintain or audit books and records, and (5) exercise its discretion in good faith concerning the enforcement of governing rules and laws. *Id.*, ¶2.

Mr. Cobb's "Response to Respondent's Motion to Extend Pre-Hearing Order Deadlines" argued that the deadlines had already been set at the pre-hearing conference on May 22, 2018, and that "[a]nother change to previously agreed-upon deadlines will disrupt my business and personal commitments that were already change to accommodate the revised pre-hearing order deadlines

which were...agreed to on May 22, 2018.” Dkt. 53(b), ¶2. He also asserted that the motion had been filed late because he did not receive it by mail until July 23, 2018. *Id.*, ¶3.

The Hearing Examiner denied in part and granted in part FAHA’s Motion to Quash Mr. Cobb’s discovery requests and his request to review e-mails under the MHAA. Dkt. 55. She disagreed with FAHA’s argument that the request exceeded the number permitted under CCOC Rules because, other than the single request to review e-mails, FAHA had not informed the Hearing Examiner of the number of requests propounded by Mr. Cobb. *Id.*, at 4. She denied FAHA’s Motion to Quash discovery of e-mails because e-mails are recoverable through discovery. The Hearing Examiner agreed, however, that Mr. Cobb’s request was overbroad because it included all e-mails generated by the management company and the Board members regardless of whether they related to the Complaint. *Id.* at 5. In a footnote, the Hearing Examiner wrote (Dkt. 55, Ftn. 5):

The Hearing Examiner does not necessarily agree that e-mails are not “records” of an association simply because they are e-mails. Certainly, some of the association records that are exempt from disclosure (*i.e.*, legal advice) may be contained in e-mail. For the hearing on the merits, both parties should address the Court of Special Appeals decision in *100 Harborview Drive Condo, Council of Unit Owners v. Clark*, 224 Md. App. 13 (2015)(“phrase ‘books and records,’ in provision of Maryland Condominium Act (MCA) governing the keeping and inspection of condominium records, includes written advice of counsel and detailed billing reports...”).

In the same Order, the Hearing Examiner granted Fairland’s Motion to Extend the Pre-Hearing Order Deadlines, holding that, “[w]hile some of Fairland’s recent filings created some confusion, it is evident that they were retained in the case well after the pre-hearing conference.” *Id.* She also mentioned that counsel was brought in almost one month after the conference. *Id.* She ordered Mr. Cobb to narrow his discovery requests and required FAHA to respond to those

requests by September 3, 2018. She then moved the deadlines for preliminary motions and filing of pre-hearing statements closer to the date of the public hearing, which remained the same. *Id.*

After issuing the order granting FAHA's request to extend the pre-hearing deadlines in the case, Mr. Cobb complained to Martin Grossman, Director of OZAH, that the undersigned was failing to enforce deadlines and delivery of messages, and by this, was exhibiting bias favoring FAHA. Dkt. 58. Mr. Grossman responded that Cobb must raise his concerns formally with the Hearing Examiner and referred Mr. Cobb to the Montgomery County Lawyer Referral Service. Exhibit 59. Cobb e-mailed that he had brought this to the Hearing Examiner's attention; however, Mr. Grossman responded that he could not intervene in the case and suggested that disagreement with Mr. Cobb's position did not necessarily reflect bias. Dkt. 61. Cobb again went to Mr. Grossman, via e-mail, asking for the person in the County that he could complain to. Dkt. 62. Mr. Grossman again informed Mr. Cobb that he could not intervene. Dkt. 63.

On August 7, 2018, in response to e-mailed questions from Mr. Cobb, the Hearing Examiner clarified Mr. Cobb's deadlines under the recent order. Dkt. 66. She wrote:

I will try to clarify procedural issues and my orders to the extent I am able, but I strongly suggest that you consider conferring with an attorney regarding the legal matters in this case to further your understanding and provide you with legal options.

1. With regard to your "request to clear up discovery issues" in your e-mail of 8/8/18 at 6:25 a.m.:

a. My order applied to your discovery request of May 24, 2018. You have a number of concerns raised in your complaint relating to governance of the association (these are listed in Paragraph 2 of your Response to Motion to Quash.) If you wish e-mails relating to those claims, you must narrow your request to apply to those claims by August 10, 2018.

b. Narrowing your discovery request of May 24, 2018, does not affect your substantive claim that the Association is required to provide all the e-mails in your June 6, 2018, request, which was submitted under State law.

c. When you amended your CCOC complaint on July 10, 2018, the question of whether the e-mails you requested on June 6, 2018, became part of this case and will be an issue for the public hearing. If you wish to submit additional discovery related to this claim, you should do so by August 10, 2018.

Mr. Cobb subsequently e-mailed the Hearing Examiner again complaining that he did not agree with her order extending the deadline for discovery. Dkt. 68. The Hearing Examiner advised that he may file a motion to reconsider the order stating why he is prejudiced by the new deadlines. Dkt. 69.

FAHA then filed a Motion to Dismiss Amended Complaint (referred to as the Second Amended Complaint in this Report), on August 9, 2018. Dkt. 71(a), 80. FAHA's counsel attached e-mails from FAHA's management company to Mr. Cobb dated June 27, 2018, and July 11, 2018, offering to arrange a time to review FAHA's books and records. FAHA argued that Mr. Cobb's claims were moot because he had never responded to those requests. *Id.* Mr. Cobb opposed FAHA's Motion to Dismiss the Amended Complaint (on August 21, 2018). Dkt. 91. He argued that he had submitted the request to review FAHA's books and records on June 5, 2018, and FAHA, by e-mail, had responded acknowledging the request and saying that they would get back to him in "a day or two." Dkt. 93. He stated that they didn't e-mail him until June 27, 2018, 21 days after the request, rather than the 15 days required by State law. He also argued that he did not agree with Respondent's position that e-mails could not be part of the books and records referenced in the MHAA, alleging e-mails were (Dkt. 93, ¶1):

...a substantial as part of the HOA's records. This was necessary because association was meeting only once or twice a year despite the requirement in the Bylaws for monthly meetings. He reviewed and finalized our audits, budgets, financial reports, and reports, made board decisions, edited and implemented new policies, proposed amendments to our bylaws, received, reviewed and approved homeowner's architectural submissions and HOA recommendations via e-mail.

As ordered, Mr. Cobb e-mailed a revised discovery request to FAHA on August 10, 2018. Dkt. 76. That same day, he revised that request as follows (revisions bolded and underlined in original) (Dkt. 77):

...e-mail communications about elections, voting, board meetings, minutes (compiling and editing), governance/enforcement of governing rules and laws, matters submitted/reported to the board (includes members/homeowners inquiries/submission seeking approval for architectural changes, **disputes and conflicts and board resolution**) recommendations and feedback submitted by community members, board decisions and audit. This includes e-mails to and from the board members (Murray Sheldon, Louise Casa, Dave Leeger, Vern Kermerer (the management company (Amy Winegar, April Day, Kimberly Hanger, etc.), and external or third parties.”

The period covered by this request is September 2016 through August 10, 2018.

Dkt. 76.

The same day, Cobb filed “Complainant’s Response to Order Granting Fairland’s Motion to Extend Pre-Hearing Order Deadlines,” which the Hearing Examiner characterizes as a motion to reconsider her order extending the deadlines in the pre-hearing order. Dkt. 78(a). The motion argued that the new deadlines were burdensome to Mr. Cobb because there was a shorter gap between the due dates of pleadings. *Id.*, ¶2. According to him, the revised deadlines allowed him only one or 2 weeks to prepare and submit the items required. He argued that he could not meet the compressed deadlines because August through October is very busy due to tax deadlines. He again argued that the original deadlines (which by this time had already passed) should be maintained, blaming the Respondent’s disregard for timeliness and adherence to rules. *Id.* at ¶5.

FAHA opposed Mr. Cobb’s request for the Hearing Examiner to reconsider her decision extending the pre-hearing deadlines. FAHA objected because the motion failed to state any specific hardship occasioned by the deadlines nor did it clearly explain why the deadlines were a problem. Dkt. 90. On August 21, 2018, the Hearing Examiner suggested to Mr. Cobb that he

could extend the time for his deadlines in the case (*e.g.*, pre-hearing submission, preliminary motions) if the hearing date was moved to later in the fall. Dkt. 98.

On August 20, 2018, FAHA filed a Motion to Quash Mr. Cobb's revised discovery request, this time arguing that it had received nothing clearly marked as a discovery request, the requests sought information from persons that weren't a party to the action and over which FAHA had no power or control, such as the management company, that the request was vague because it used the term "etc." when listing the recipients/senders of the e-mails requested, that the management company could only produce e-mails from active board members that are in their possession, and that actions of the architectural review committee were not listed in the complaint. Dkt. 91.

For several weeks after the Hearing Examiner's Order extending FAHA's pre-hearing deadlines, Mr. Cobb continued to express his displeasure via e-mail with the Hearing Examiner's Order extending FAHA's discovery deadlines. Dkt. 101-106, 122. In response to his concern regarding compressed response times, FAHA represented (by e-mail) that it would not be filing discovery requests. Dkt. 102. In another e-mail, Mr. Cobb disagreed with the Hearing Examiner's statement that FAHA's counsel had been retained almost one month after the pre-hearing conference "because the Law Offices of Anthony D Dwyer [FAHA's former counsel] has been the counsel for Fairland." Dkt. 122. This prompted a response from FAHA's counsel contradicting Mr. Cobb's assertion, stating "we are not usual counsel for Fairland Acres...My law firm was brought in when Fairland Acres made a claim under their D&O policy with CNA Insurance." *Id.* Mr. Cobb then asked counsel to identify the date that Fairland made the claim under their insurance. *Id.* Counsel responded that her firm had been retained in June, 2018. Dkt. 124.

OZAH received Mr. Cobb's opposition to FAHA's motion to quash his revised discovery request on August 28, 2018. He argued that he had already served discovery on FAHA (*i.e.*, the May 24th e-mail (Dkt. 7)) in the same manner without objection, that the management company was an appropriate party to receive the request because it has "continuously documented and advised Fairland Acres on decision-making matters, policies and procedures, and board and member disputes" as well as maintaining all of the FAHA's records. *Id.*, ¶3. Mr. Cobb argued that the Architectural Review Committee decisions were encompassed within the "decision-making and policies and procedures issues that were included in my complaint." *Id.*, ¶5. Finally, he stated the term he used the term "etc." to refer to employees of the management company. *Id.*

The Hearing Examiner denied FAHA's Motion to Quash Mr. Cobb's revised discovery requests. Dkt. 125. She held that discovery addressed both to the FAHA and the management company was acceptable because the management company kept the records on FAHA's behalf and the request was limited to e-mails pertaining to Fairland's management.⁹ She concluded that FAHA should provide e-mails from former members, as the homeowners associations are corporate entities with perpetual existence. She also found that Mr. Cobb's explanation of the term "etc." to include only members of the management company rendered the request identifiable. Finally, she found that the request for records relating to the architectural committee did relate to the gravamen of Mr. Cobb's original complaint. *Id.* pp. 5-7.

On August 22, 2019, the Hearing Examiner denied FAHA's Motion to Dismiss Amended Complaint. She concluded that, at the time, an existing controversy remained between the parties: whether e-mails constituted books and records of the corporation under the MHAA. Given that

⁹ The Hearing Examiner also pointed out that the actions of the management company in the case belied its proposition that FAHA could not compel them to attend, as two employees of the management company appeared at the pre-hearing conference on behalf of FAHA. *Id.* at 5, fn. 3.

the correspondence from FAHA's counsel made clear that they would not be included at the inspection of FAHA's books and records, and (at the time) he had not been provided the e-mails in discovery, the Hearing Examiner found that the controversy was still live. Dkt. 103, p. 3. Finally, the Hearing Examiner ordered the parties to submit a revised schedule for discovery no later than September 10, 2018. This was because FAHA filed its Motion to Quash on August 15, 2018, and "this Order will be issued only two days before the previously set discovery deadline [of September 1, 2018]." *Id.* at 7.

After reviewing Mr. Cobb's opposition to FAHA's Motion to Dismiss Amended the Complaint, the Hearing Examiner reconsidered her decision to defer the question of whether e-mails constituted books and records of a homeowners' association to the public hearing. Dkt. 109. She required Fairland to submit a memorandum supporting its argument by September 3, 2019. *Id.* FAHA filed its memorandum supporting its argument that e-mails did not constitute books and records under the MHAA on September 4, 2018. Dkt. 133.

When notified by counsel that the September 3, 2018, deadline (for submitting a memorandum on whether e-mails could constitute books and records) fell on a legal holiday, the Hearing Examiner replied that under the County Code, it should be filed the following business day. Dkt. 134. This prompted an objection (by e-mail) from Mr. Cobb and a request to have his memorandum filed one day later. Dkt. 136. The Hearing Examiner explained the computation of time deadlines under the County Code (*see, Montgomery County Code*, §1-301(c)), but did permit Mr. Cobb to file his memorandum one day later than originally due. Dkt. 136.

On September 8, 2018, Mr. Cobb forwarded his proposed schedule for the balance of this case. FAHA asked for one adjustment, to which Mr. Cobb agreed. Before the Hearing Examiner could incorporate agreement in a revised scheduling order, Mr. Cobb filed a Motion Compel

FAHA's attorney to provide the date on which her firm was retained. His Motion stated that FAHA's former counsel she had never answered his e-mailed question about when FAHA filed its insurance claim with its insurance company. Dkt. 140. FAHA opposed the motion, asserting that the information was not relevant to Mr. Cobb's Complaint. Agreeing with FAHA, the Hearing Examiner denied Mr. Cobb's motion and revised the schedule for proceeding to the one agreed to by the parties (Dkt. 145):

Friday, September 21, 2018:	Responses to discovery requests.
Friday, October 26, 2018:	Deadline for Preliminary Motions.
Wednesday, November 7, 2018:	Complainant's Pre-Hearing Submission;
Wednesday, November 21, 2018:	Fairland's Pre-Hearing Submission must be filed with OZAH.
Friday, December 14, 2018:	Public Hearing

On September 13, 2018, the Hearing Examiner notified the parties that she proposed to take official notice of the full text of HB 879 (2004 Legislative Session) quoted in the *100 Harborview* case, as well as written testimony submitted during a more recent amendment to Section 11B-112 of the MHAA, and attached the documents referenced. Dkt. 148. FAHA's counsel consented to the request, stating "[i]t's the only way to fully understand the intent of the statute and to see that all e-mails are not intended to be kept as part of public records." Dkt. 150. Mr. Cobb replied, "[i]t's clearly understood that **not all e-mails or All documents** are part of books and records. However, some of them do." (Emphasis in original). Dkt. 151.

Upon consideration of the parties' memoranda regarding books and records, the Hearing Examiner issued an Order Modifying Complainant's Discovery Request on September 28, 2018. She summarized the case status as (Dkt. 152, p. 2):

To date, Fairland has refused to provide Mr. Cobb with the e-mails requested, asserting that the e-mails are not "books and records" under Section 11B-112 of the MHAA and that compliance with the request would be unduly burdensome (Dkt. 30, ¶6). Fairland estimated that it would take over 40 hours to research and produce the e-mails requested and would include e-mails related to "any little issue." *Id.*

The Hearing Examiner initially requested Mr. Cobb to modify his discovery request to target the issues raised in his original complaint, deferring the question whether e-mails could constitute ‘books and records’ of the [Association] until trial. She later amended that order to facilitate discovery, realizing that it would be difficult to determine which, if any, e-mails could constitute ‘books and records’ without seeing any e-mails. To that end, she asked the parties to brief the issue as a preliminary matter. (Citations omitted.)

The Hearing Examiner found that there was a “wide gulf” between the positions presented by the parties, as Mr. Cobb recognized that not every e-mail constituted a “book and record” under the MHAA, but submitted e-mails discussing substantive matters such as architectural approvals to support his argument. FAHA argued, however, that e-mails relating to “any little thing” should not be considered books and records. Neither party, however, had defined where the line should be drawn. *Id.* In order to flesh out where that line lay, the Hearing Examiner modified Mr. Cobb’s discovery request as follows (*Id.*):

[A]ll e-mail communications from September 2016 through May 24, 2018 to and from any board member or the management company pertaining to the Board of Directors’ participation in their duties required under the governing documents. This does not include communications between the management company and external parties relating to maintenance contracts or matters protected from disclosure under Section 11B-112(a) of the MHAA.

Mr. Cobb then e-mailed the Hearing Examiner a list of the duties he believed were vested in FAHA’s Board of Directors. Despite his earlier assertion, he stated, “[a]ll e-mails are records of the HOA” except those exempted from disclosure under MHAA Section 11B-112(a)(2). The Hearing Examiner responded:

I will not argue about an order via e-mail. The burden is on you to clarify the theory of your case. The order stands as written.

Nor can I continue to answer questions regarding the status of your requests via e-mail. I must abide by regular order. Specific requests to take action in the case must be made by motion.

Mr. Cobb then filed a “Response to Denial of Motion to Compel Discovery,” which the Hearing Examiner characterizes as a Motion to Reconsider her denial of Mr. Cobb’s request to compel FAHA’s attorney to provide the date her firm was retained by FAHA. Filed on September 20, 2018, the motion continued Mr. Cobb’s disagreement with the Hearing Examiner’s statement in the Order Extending FAHA’s Pre-Hearing deadlines that counsel had been retained a month after the pre-hearing conference. The Hearing Examiner issued the order extending FAHA’s pre-hearing deadlines on August 2, 2018, more than a month before.

On the same day, Mr. Cobb filed a “Response to Order Modifying Complainant’s Discovery Request.” This consisted of his earlier communication itemizing what e-mails he believed should be included in discovery and requested “all e-mails” with the exception of those exempt from disclosure under the MHAA. Dkt. 160. On the same day again, he e-mailed the Hearing Examiner asking when FAHA would be required to respond to his June 5, 2018, request for FAHA’s books and records. Dkt. 161. The next day (September 21, 2018), Mr. Cobb requested a continuance of the discovery deadlines until the Hearing Examiner clarified her order to define the term “Participation in their duties” used in her Order Modifying Discovery Request. Dkt. 162. FAHA did not oppose the motion. Dkt.163.

FAHA then filed their opposition to Mr. Cobb’s request to reconsider the order denying discovery of the date that FAHA had retained counsel, contending that it was unrelated to the complaint. Dkt. 164. By order dated September 25, 2018, the Hearing Examiner denied Mr. Cobb’s second request to have FAHA identify the date it retained counsel. Dkt. 166.

On September 24, 2018, FAHA provided the discovery requested by Mr. Cobb electronically, including e-mails. Dkt. 165. This did not end their dispute, as Mr. Cobb still believes that FAHA has not provided all of the e-mails responsive to his request.

As both parties had agreed to a continuance, the Hearing Examiner invited the parties to submit revised deadlines that she could incorporate in a new scheduling order. Dkt. 168. In doing so, she reminded the parties that Mr. Cobb's "Response to Order Modifying Complainant's Discovery Request" was still outstanding. *Id.* Counsel for FAHA responded that Mr. Cobb's response was moot because it had provided all of the discovery requested. When the Hearing Examiner asked whether FAHA utilized Mr. Cobb's definition of the Board of Director's duties, counsel responded, "I did follow Mr. Cobb's criteria from his amended discovery request." Dkt. 175. Mr. Cobb responded, by e-mail, that numerous e-mails were missing, some e-mails were truncated, books and records were not fully provided, and that FAHA had not complied with its agreement to allow access to inspect FAHA's books. Dkt. 177. FAHA's counsel replied (on October 2, 2018) (Dkt. 177):

Only e-mails were requested. I asked my clients to research their e-mails and provide what they had. That's all I can ask them to do. It took weeks to obtain all the e-mails I provided. There is nothing missing.

She objected to Mr. Cobb's contention that that there had been an agreement that FAHA provide the emails in the office and requested a hearing on the outstanding discovery issues. Dkt. 179. On October 3, 2018, Mr. Cobb copied the Hearing Examiner on an e-mail to FAHA's counsel requesting a time to review FAHA's books and records. Dkt. 183. He continued to e-mail the Hearing Examiner asking why she had not yet ruled on his request to clarify his discovery request. Dkt. 186, 188.

On October 4, 2018, the Hearing Examiner scheduled a hearing on the discovery issues for November 5, 2018. Dkt. 184. On October 27, 2018, she received an e-mail from Mr. Cobb asking for a continuance because "I have an urgent matter that requires my attention." Dkt. 188. The Hearing Examiner asked Mr. Cobb to provide a more detailed reason why he could not attend on

November 5, 2018. She also responded informed him that the discovery issues would be resolved at the discovery hearing. Dkt. 188. In response to this e-mail, the Hearing Examiner received an “out of office” reply from FAHA’s counsel. The out of office reply stated that FAHA’s counsel would be out until November 7, 2018, a period of time that included the November 5th date scheduled for the discovery hearing. Dkt. 189. The Hearing Examiner contacted former counsel’s law firm to determine whether FAHA’s counsel would still attend the hearing. Dkt. 189. An attorney from that office consented to Mr. Cobb’s postponement request as he had previous professional commitment. Dkt. 190. On November 2, 2018, another attorney from FAHA’s former counsel’s office entered their appearance on behalf of FAHA. Dkt. 193(a). As this correspondence occurred only five days before the scheduled hearing, the Hearing Examiner convened the discovery hearing on November 5, 2018, solely to postpone it to December 7, 2018, a date agreed to by the parties. Dkt. 195; 11/5/18 T. 4.

The day before the continued hearing date of December 7, the Hearing Examiner received a motion for continuance from Mr. Cobb due to an “urgent medical condition.” Dkt. 198. It stated, “[m]y medical physician has requested that I stay away from all work including mentally engaging tasks at this time.” A doctor’s note was attached to Mr. Cobb’s continuance request. Dkt. 198(b). The Hearing Examiner asked FAHA’s counsel whether they had an objection, and they responded they did not “given the circumstances.” Dkt. 205.

On December 7, 2018, the Hearing Examiner issued an Order Postponing Hearing on Discovery Issues and Postponing a Public Hearing on the Merits of the Case. Dkt. 206. The Hearing Examiner ordered the parties to submit a proposed schedule for further proceedings no later than December 21, 2018. Dkt. 206. On December 20, 2018, the Hearing Examiner received new proposed deadlines for Mr. Cobb. FAHA’s former counsel informed the Hearing Examiner

that expressed surprise that the hearing date proposed was “so far off” in the future, but did not object. Dkt. 209. On February 2, 2019, FAHA’s counsel filed a Notice of Substitution of Counsel with the Hearing Examiner, designating current counsel for FAHA. Dkt. 214.

On February 8, 2019, the Hearing Examiner issued a revised scheduling order incorporated deadlines requested by Complainant and agreed to by the FAHA (Dkt. 215):

1. Friday, May 31, 2019: Hearing on Discovery Issues
2. Friday, June 14, 2019: Deadline for Preliminary Motions
3. Friday, July 5, 2019: Complainant’s Pre-Hearing Statement
4. Friday, August 23, 2019: Hearing on the Merits of the Case

C. Proceedings under Current Scheduling Order

The May 31, 2019, discovery hearing proceeded as scheduled. At the hearing, Complainant chose the remaining deadlines for completion of the case and inspection of FAHA’s books and records, except for one request from FAHA to move Mr. Cobb’s proposed hearing date by one day. 5/31/19, T. 71-74, 77-78. Mr. Cobb asked that FAHA reserve three full days to review the Association’s records—August 2, 2019, August 9, 2019, and August 16, 2019. 5/31/19 T. 85, ll. 3-17. Because Mr. Cobb argued that FAHA’s production of e-mails in discovery might not include all e-mails he considered to be part of FAHA’s books and records, the Hearing Examiner stated:

I think the best way to get to the bottom of this is, you produce what you think are the books and records. And when we get to preliminary motion, if Mr. Cobb thinks there are items that should be included, he can discuss that with -- he can file a motion -- or he can say that in his preliminary motion.

5/31/19 T. 92. As Mr. Cobb still believed that he had not received all e-mails in discovery, the Hearing Examiner incorporated deadlines into the Scheduling Order to address that issue. *Id.*, T. 69. The Hearing Examiner incorporated the agreed upon schedule into an order issued on June 4, 2019 (Dkt. 225):

1. Monday, June 10, 2019: Respondent shall submit hard copies of discovery documents already provided in zip drive format (Exhibit 218).

2. Monday, June 24, 2019: Complainant will provide Respondent, with a copy to the Hearing Examiner, with a list of all items that he believes may be missing from the discovery already submitted by the Respondent.
3. Friday, July 12, 2019: Respondent shall provide to Complainant a description of the actions taken by the Respondent to provide discovery in this case. If Respondent finds any additional documents that should have been provided in its original response to discovery, Respondent must provide these as well.
4. Friday, July 26, 2019: Complainant may file a motion objecting to the Respondent's submittal in Item #3 of this Order.
5. Monday, August 5, 2019: Respondent must file any response to Complainant's Motion objecting to discovery.
6. Friday, August 30, 2019: Close of Discovery.
7. Friday, September 13, 2019: Pre-Hearing Motions must be submitted.
8. Monday, September 27, 2019: Complainant's Pre-Hearing Statement is due.
9. Friday, October 11, 2019: Respondent's Pre-Hearing Statement is due.
10. Thursday, November 7, 2019: Public hearing

Responses to Motions for Summary Decision are due ten (10) calendar days after filing with OZAH. *Montgomery County Administrative Procedures Act*, §2A-7(d).

5/31/19, T. 92, ll. 5-11. Pursuant to the Scheduling Order, FAHA provided hard copies of the documents produced in discovery on June 7, 2019, and Complainant submitted to FAHA the e-mail strings that he contended were incomplete on June 24, 2019. Dkt. 239. FAHA also requested the Complainant to confirm his attendance at the three dates chosen for inspection of FAHA's records. Dkt. 228.

On June 10, 2019, FAHA served a Request for Production of Documents on the Complainant. Dkt. 227. Mr. Cobb filed "Complainant's Response to Respondent's Request for Production of Documents," which the Hearing Examiner characterized as a motion to quash the discovery request. Dkt. 230, 230(a). In his Response, Complainant objected to the discovery

requested because FAHA's former counsel had advised him (in an e-mail) that FAHA would not conduct discovery. Dkt. 102. The parties were unable to resolve this disagreement without intervention by the Hearing Examiner and FAHA filed an opposition to Complainant's motion to quash. Dkt. 232. The Hearing Examiner denied Complainant's motion to quash, reasoning that the trial strategy of a former attorney should not bar FAHA from information needed for the hearing on the merits. Dkt. 243. She ordered Complainant to do one of the following no later than 5:00 pm on August 5, 2019: (1) respond to FAHA's Request for Production of Documents, or (2) confirm that Complainant would rely only on those documents included on OZAH's docket list at the public hearing. Dkt. 243.

On July 1, 2019, FAHA informed Complainant by letter that they were unable to find any truncated e-mails, or e-mails that would have elicited a further response. FAHA requested Mr. Cobb to identify any e-mails he continued to believe were incomplete. On July 12, 2019, pursuant to the Scheduling Order, FAHA followed up with a letter to Complainant stating that he had failed to identify additional allegedly incomplete e-mails and that Ms. Hanger had confirmed that no further e-mails existed. As ordered, FAHA submitted an affidavit from Ms. Hanger explaining the steps taken to search for e-mails responsive to the Mr. Cobb's discovery request. The affidavit mentions that the management company had, "experienced a server failure on September 18, 2018 which caused a loss of e-mail history; accordingly, it is possible that some responsive e-mails were lost as a result of that failure." Dkt. 236(a).

On the same day, Complainant forwarded to the Hearing Examiner an e-mail dated June 24, 2019, that he'd sent to FAHA. This e-mail (sent on July 12, 2019) stated (Dkt. 238):

I need the entire string for the e-mail April Day sent to Aimee Winegar complaining about me and making very unpleasant remarks about my character. The first e-mail from April to Aimee is attached. Please send me all communications related to that matter and the entire e-mail string.

Attached to the Complainant's July 12, 2019, e-mail were e-mail strings between Board members and the management company. In the e-mail referenced, Ms. Day stated to Ms. Winegar (*Id.*):

That 5th sentence below cracks me up! In the final paragraph, I'm not sure what he means by "elevate" the matter if not action is taken today. But he is relentless. He used to email me and if I didn't respond within a few hours, he would email again. He also would send me emails that didn't require a response (just a statement) and days later he says he has been waiting for a response and if I don't have time to do so, then for me to find someone who does...Then, when myself or anyone else emails him he tells us to stop emailing him...Its seriously unbelievable. He is a BULLY!

He has misinterpreted almost every bit of correspondence sent to him over the last few months. He is so full of anger thinking that we are all in cahoots against him that he doesn't even take the time to read things thoroughly or even try to see things from any view point except his own. When you speak to him, he cuts you off at every sentence. How could he possibly hear you or what you are saying.

Sorry if I keep repeating myself. I just can't believe this is happening after 11 years of managing this community very successfully.

Thank [sic] Aimee.

FAHA countered that it believed the e-mail above, on its face, was complete as there was no need for follow-up. Dkt. 238. After receiving FAHA's response, Complainant e-mailed the Hearing Examiner (again on July 12, 2019), stating, "[t]his is going nowhere. I still haven't received the remaining e-mails. I am requesting a hearing on this matter so we can go through the emails." The Hearing Examiner received a second e-mail from the Complainant later that day. In it, he forwarded a chain of e-mails. Dkt. 242. The Hearing Examiner responded (Dkt 241):

I am working from outside the office today. I would like to review the entire file when I return on Monday before I respond. Before I respond, I would appreciate it if Complainant would clarify whether these are the e-mail chains he contends are incomplete.

The Hearing Examiner received no response from Complainant. On July 22, 2019, the Hearing Examiner asked both FAHA and Mr. Cobb to clarify the purpose of the e-mails forwarded

by Mr. Cobb on July 12, 2019. Counsel for FAHA responded on July 22, 2019, stating that Complainant's July 12th e-mail related to Mr. Cobb's argument that portions of e-mail chains were missing. Dkt. 238. The ordered deadline (*i.e.*, July 26, 2019) for Complainant to file a motion explaining why he believed the e-mails were incomplete passed without further communication from Mr. Cobb.

Complainant again e-mailed the Hearing Examiner on August 7, 2019, this time stating that he was still waiting for her to address the issues surrounding the allegedly incomplete e-mails from FAHA that he complained of in his July 12th e-mail to the Hearing Examiner. Dkt. 256. The Hearing Examiner responded as follows on the same date (*Id.*):

... on June 24, 2019, you provided FAHA with a set of e-mails that you contend are incomplete. FAHA responded on 7/12/19 that the e-mails are not [sic] [in]complete. You sent e-mails again to FAHA on July 12, 2019. I repeatedly asked you to clarify whether those e-mails responded to FAHA's Request for Production of Documents or whether they were additional e-mails you felt were incomplete. You never responded, although counsel for FAHA did. I wanted confirmation from you as to the e-mails.

I have no idea whether the July 12, 2019, e-mails were in addition to those you provided on June 24, 2019, and whether FAHA has already addressed these in its July 12, 2019, letter to you.

If the e-mails were included in your June 24, 2019, transmission, I see no need for a hearing, as you already have FAHA's review and response. If the e-mails were not submitted, they should have been submitted on June 24, 2019.

If you disagree with FAHA's determination that the e-mails are [in]complete, you should submit a motion to compel explaining in detail the basis for your position.

In response to another e-mail from Mr. Cobb sent on the same day, the Hearing Examiner again instructed Complainant to memorialize his disagreement with FAHA's position in writing. Dkt. 258. Complainant has not submitted a motion or any other document explaining why he believes that FAHA has not provided all the responsive e-mails in its possession.

On August 6, 2019, FAHA's counsel advised the Hearing Examiner that Complainant failed to show up for the records inspection scheduled for August 2, 2019. Dkt. 244. FAHA asked the Hearing Examiner to sanction the Complainant by assessing the cost of counsel's attendance for the entire day on August 2, 2019. It also asked the Hearing Examiner to have Complainant confirm whether he would attend on the second date scheduled for inspection on August 9, 2019. The Hearing Examiner asked FAHA's counsel whether Complainant complied with a prior order requiring him to respond to FAHA's Request for Production of Documents by August 5, 2019. Dkt. 245. After FAHA informed the Hearing Examiner that Complainant had not responded, Mr. Cobb e-mailed, "I have already communicated to all parties that the documents were already submitted." Dkt. 246.

The Hearing Examiner then sent the following e-mail to Complainant (Dkt 248):

... Montgomery County's Administrative Procedures Act authorizes the Hearing Examiner to impose sanctions for failure to comply with discovery deadlines. Section 2A-8(j) of the Code states:

The hearing authority may impose sanctions against parties and witnesses for failure to abide by the provisions of this article, or for unexcused delays or obstructions to the pre-hearing and hearing process. Such sanctions may include suspension or continuance of scheduled hearings, dismissals of actions, denial of admission of documents and exhibits and admission of matters as adverse to a defaulting party.

In addition to any other sanctions, the hearing authority is authorized to assess any offending party the full cost of verbatim recording and transcription of any hearing delayed or obstructed by such part; and further to assess such party the cost of re-advertisement, if such notification is either required by law or necessary in the discretion of the hearing authority, to give adequate notice to interested or affected parties.

The most recent order in this case required you, by yesterday, either to (1) provide any documents responsive to FAHA's Request for production of Documents, or (2) state that you have already provided all of the documents that respond to FAHA's request.

I am unclear what you intended to say in the e-mail below. Please e-mail Ms. Lake, no later than 5:00 pm tomorrow, with a copy to me, that you have already provided all documents that respond to their request for production of documents if that is what you intended to say.

Also, by 5:00 pm tomorrow, you should advise FAHA's counsel whether you intend to appear on August 9th or 16th to review their records. Please copy me on the e-mail.

Finally, please advise Ms. Lake, with a copy to me, whether there are any e-mails chains that you still contend are incomplete no later than 5:00 pm tomorrow.

I said at the last hearing that I would be reluctant to extend the hearing date in this case, as the case was referred over a year ago. Failure to abide by the current discovery deadlines may result in sanctions.

Ms. Lake, any request for sanctions should be made by motion, which will be considered at that time.

On August 6, 2019, Mr. Cobb sent a second e-mail, stating **“...again, all the documentation substantiating my complaint were provided to the Respondent after submission to CCOC.** (Bold and highlighting in original.) Dkt. 244. The following day, Mr. Cobb e-mailed Ms. Lake, informing her that he intended to inspect FAHA's records on August 9th or 16th “as agreed.” Dkt. 255

The day before the second scheduled inspection, FAHA's counsel e-mailed Complainant to confirm his appearance. He responded that he would not be available because he had to be “at the site from 8am this Friday.” Dkt. 259. On August 15, 2019, (the day before the last scheduled inspection), FAHA asked the Hearing Examiner to request that Complainant confirm whether he would attend the final date for inspection. Dkt. 261. This prompted a response from Complainant stating that he was having difficulty getting time off work and that he did not need attorneys to be present at the inspection. Dkt. 261. The Hearing Examiner informed Complainant that FAHA had a right to have its attorneys present as the matter was in litigation. Dkt. 262. Later that day,

Complainant informed FAHA that he was unable to get time off from his job to attend the inspection. Dkt. 269.

After Complainant did not appear for the schedule inspections, FAHA filed a Motion in Limine and a Motion for Summary Judgment on September 13, 2019. The Complainant did not respond to either.

Because Complainant had never explicitly stated that he would limit the documents relied upon at the hearing to those in OZAH's docket list, FAHA's Motion in Limine requested the Hearing Examiner to do so. The Hearing Examiner granted FAHA's request, finding that failure to identify the documents to be relied upon at the hearing substantially prejudiced FAHA's ability to defend against the Complaint. Dkt. 277.

The basis for FAHA's Motion for Summary Judgment is detailed in the next section of this Order. Mr. Cobb did not respond to FAHA's motion. By e-mail dated September 30, 2019 (well after the deadline to respond), Mr. Cobb wrote (Dkt. 268):

Still waiting on Ms. Robeson's response regarding the concerns I raised about incomplete emails." Ms. Robeson promised to review the emails and provide a response.

The compliance issues raised in my complaint submission were never disputed by the HOA in totality. The HOA admitted to some of the issues by claiming in writing and in person that they have taken corrective actions.

Therefore, this matter is not moot. Violations and noncompliance must be documented and addressed by the county/municipal authorities.

The Scheduling Order required submission of Mr. Cobb's Pre-Hearing Statement on September 27, 2019. To date, Mr. Cobb has not filed his Pre-Hearing Statement. Nor has Mr. Cobb requested a postponement of the public hearing, scheduled for November 7, 2019.

On October 2, 2019, FAHA filed a Motion for Sanctions based on Complainant's failure to attend any of the scheduled inspections of records, to file a motion explaining why FAHA's e-mail

production was incomplete, and to respond to FAHA's Request for Production of Documents.¹⁰ Dkt. 274. Complainant did not file a response to this Motion. Among the sanctions requested, FAHA asked the Hearing Examiner to delay the deadline for filing its pre-hearing statement until two weeks after Mr. Cobb's. The Hearing Examiner did this by Order on October 11, 2019, although she did not impose it as a sanction. Dkt. 281.

On October 3, 2019, Mr. Cobb e-mailed the following to the Hearing Examiner (Dkt. 277):

Something is amiss here. However, I can still take this matter this matter to circuit court, file an appeal or formal complaint.

The Respondent already has the discovery items. I do not agree with your order. I do understand that you're probably frustrated and want to get this over with.

Regarding the site visit, we set aside 3 options - 8/3, 8/9 or 8/16. Never said I will be there for all 3 days. Due to work commitments, I provided adequate notice that I will not be there for the site visit. I didn't fail to show up. Please note, as a homeowner, I have the right to a site visit in order to examine the records. I will request a site visit again. The HOA fee that I pay covers thr [sic] costs for preparing and filling these records.

Mr. Cobb e-mailed an identical message again on October 7, 2019 (Dkt. 280). He did not file a motion opposing FAHA's request for sanctions.

III. FAHA'S MOTION FOR SUMMARY JUDGMENT

A. FAHA's Argument

In its Motion for Summary Judgment, FAHA argues that Complainant's claims regarding the Board of Directors meetings, election of officers, issuing of decisions without meetings, training and audits either did not occur or have been corrected and are therefore moot. Dkt. 267. In support of this, FAHA attached the affidavit of Robert Duncan, currently President of FAHA's Board of Directors, under oath that he has personal knowledge of the statements therein. *Id.*, Exhibit 2. The facts stated are that: (1) Complainant was a member of the Board of Directors

¹⁰ Apparently, FAHA had not yet received the Order Granting FAHA's Motion in Limine.

from October 2016 to June 2017, (2) the By-Laws were amended on December 7, 2017 to require quarterly, rather than monthly Board of Directors meetings, (3) since the amendment, quarterly meetings have been held. *Id.* The affidavit further attests that both during Complainant's tenure on the Board and after, officers were elected at regular meetings of the Board. In support, minutes of the November 1, 2016 and July 26, 2017, meeting are attached to the affidavit. *Id.*, p. 2. Both sets of minutes indicate that officers were decided at a meeting of the Board. Finally, Mr. Duncan states, "[a]s of April 27, 2017, the only member of the FAHA BOD [Board of Director] who had not taken the required training was Complainant. Since that time, all members of the FAHA BOD have completed the required training." *Id.*

FAHA attached a second affidavit from Ms. Hanger, also based on personal knowledge. *Id.*, Exhibit 3. In addition to reaffirming the facts stated in Mr. Duncan's affidavit, Ms. Hanger attests that she coordinated the Association's annual audits and that (*Id.* at 2):

The 2015 and 2016 FAHA audits were not completed until 2017 as a result of the merger of FAHA's accountants; however, those audits were subsequently prepared, and since then, annual audits have been timely submitted.

FAHA argues that the claims made in the Second Amended Complaint (*i.e.*, that FAHA failed to permit inspection of its books and records) are moot because Complainant had four opportunities to inspect its books and records and failed to do so. Ms. Hanger's affidavit states that, in addition to the three inspections agreed to at the discovery hearing, she also set up an appointment for Mr. Cobb to review FAHA's records on October 19, 2018. She attests that Mr. Cobb did not appear at that inspection and did not provide notice that he would not appear.

As requested at the May 31, 2019, hearing, FAHA's Motion for Summary Judgment includes its argument explaining why e-mails do not fall within the term "books and records" of the association as used in the MHAA. Dkt. 267. FAHA argues that the term "electronic

transmission” is separately defined in the MHAA. As that term is not explicitly incorporated into Section 11B-112(a), FAHA argues that electronic transmissions cannot be considered part of the “books and records” that must be made available for inspection. *Id.*, pp. 9-10.

B. Governing Law

Under the MCAPA, the grant of a motion for summary decision is warranted where there is “no genuine issue of material fact to be decided at the hearing” and the movant is “entitled to prevail as a matter of law.” MCAPA, §2A-7(d). Maryland courts have interpreted this standard to permit summary judgment when a case “present[s] no material facts that may reasonably be said to be disputed.” *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 534 (2003). Even if it appears that the relevant facts are undisputed, “if those facts are susceptible to inferences supporting the position of the party opposing summary judgment, then a grant of summary judgment is improper.” *Id.*, at 533.

Maryland courts have held that an issue is moot “if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.” *Falik v. Hornage*, 413 Md. 163, 186 (2010), *quoting*, *Attorney Gen. v. Anne Arundel County School Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979).

C. Opinion

The Hearing Examiner finds nothing in this record, nor has she been directed to any, indicating that FAHA’s Board of Directors currently continues the actions complained of in the Original and First Amended Complaints. Mr. Cobb did not file a pre-hearing statement or respond to FAHA’s Motion for Summary Judgment, which are the vehicles typically used to identify the factual matters in dispute and a party’s theory of the case. While the affidavits attached to FAHA’s

motion reveal that its Board may not have been in compliance with certain aspects of its By-Laws in the past, the only evidence in the record demonstrates that FAHA now complies with the By-Laws that have since been amended. Mr. Cobb seems to recognize this in his September 30, 2019, e-mail to the Hearing Examiner, in which he states (Dkt. 268):

The compliance issues raised in my complaint submission were never disputed by the HOA in totality. The HOA admitted to some of the issues by claiming in writing and in person that they have taken corrective actions.

The Original Complaint first alleges that the Board of Directors failed to elect directors at Board meetings. The e-mails Mr. Cobb attached to the Original Complaint in support of his claim that FAHA's officers were not properly elected at meetings are from 2016. The affidavit of Mr. Duncan, FAHA's current president, attests that officers are currently being elected at regular meetings. No party has pointed to any other evidence in this case that contradicts Mr. Duncan's attestation.¹¹

The second allegation of the Original Complaint asserts that FAHA did not timely perform its audits. While Ms. Hanger's affidavit acknowledges that FAHA's 2015 and 2016 audits were late because the FAHA's accounting firm was undergoing a merger, she attests that FAHA's audits have since been completed on time. Again, no party has directed the Hearing Examiner's attention to *any* evidence showing that audits continue to be late.

Under the "Desired Actions" section of the Original Complaint, Mr. Cobb contends that FAHA's Board of Directors had not taken Montgomery County's mandatory training for board

¹¹ Mr. Cobb and FAHA seem to disagree that FAHA's officers were duly elected at regular meetings at the time he was a Board member. *Compare*, Original Complaint, e-mail attachment #1; Affidavit of Robert Duncan, Dkt. 267, Exhibit 1. Upon review of the e-mails attached to the Complaint and Mr. Duncan's affidavit, the two could be reconciled by interpreting Ms. Day's to mean that the officers were determined by default (the "natural progression" referred to in Ms. Day's e-mail), although actually elected at a meeting. Viewed in that light, April Day's e-mail stating there was no meeting could respond to Mr. Cobb's charge that they were elected outside of the meeting. In any event, nothing in the record contradicts FAHA's position that officers are currently being elected during regular meetings in accordance with the By-Laws.

members of homeowners associations. Mr. Duncan affirms that, as of April 27, 2017, all Board members have taken the mandatory training. Complainant has failed to direct the Hearing Examiner's attention to nor is she aware of anything in the current record to contradict this statement.

The last allegation in the Original Complaint, again listed under "Desired Actions", states that Board members made decisions without consulting all directors. To support this claim, Mr. Cobb attached e-mails, dated from February 2017, from him to other Board members asserting that those Board members decided a date for a meeting without consulting him of the date (although they did inform him of the meeting.) It repeats the allegation that the Board chose officers outside of a meeting without obtaining his approval. Dkt. 4. These allegations are related to those in the First Amended Complaint alleging that the Board failed to conduct regular meetings.

In response, Mr. Duncan attests that the Board has since amended its By-Laws to require quarterly meetings, and the Board has since then held meetings according to the By-Laws. The amendments to the By-Laws are attached to Mr. Duncan's affidavit. The Hearing Examiner is aware of no evidence to refute these facts. As to Mr. Cobb's charge that Board members took actions outside meetings without consulting all directors, there is no evidence in the record that this still occurs. While Mr. Duncan's affidavit addresses only the election of officers outside meetings, there is absolutely nothing in this record to reflect that other actions are currently being taken in a manner inconsistent with the By-Laws.

The Second Amended Complaint alleges that FAHA failed to permit inspections of its books and records under the MHAA. Documents in the case file indicate that FAHA offered Mr. Cobb an opportunity to inspect the books and records on June 27, 2018, on October 19, 2018, and

three dates in August, 2019. Therefore, FAHA *has* met the requirement of State law to allow Mr. Cobb to inspect its books and records.

Thus question is not whether FAHA has offered Mr. Cobb the opportunity to view its records; it is that Mr. Cobb disagrees with FAHA's position that e-mails do not constitute part of FAHA's "books and records." This agreement is also moot, because Mr. Cobb has received the e-mails through discovery. While he continues to dispute broadly that the e-mails are incomplete, he has presented *no* evidence or explanation to the Hearing Examiner why he believes that FAHA has withheld e-mails, particularly as Ms. Hanger has already attested that some e-mails may be lost during a server outage. FAHA's former counsel represented to the Hearing Examiner that it had provided all e-mails in its possession that were responsive to Mr. Cobb's discovery request; Ms. Hanger described the methods taken to retrieve the e-mails requested, and Ms. Hanger also attests that all e-mails have been provided. Mr. Cobb's response is silence, other than to allege they are still incomplete.

Moreover, any factual dispute about what constitutes FAHA's "books and records" is purely speculative at this point. In order to better define what constitutes "books and records," under the MHAA, the Hearing Examiner requested that Mr. Cobb inspect the records provided by FAHA. Mr. Cobb, however, did not appear on any of the scheduled dates. Thus, no one knows at this point what FAHA would have produced.

While the Hearing Examiner asked the parties to brief the issue of whether e-mails can in some circumstances constitute books and records of an association under MHAA, she does not address it here because there is no evidence in the record to refute FAHA's position that the e-mails produced are all that exist, rendering Mr. Cobb's request for e-mails moot.

In light of the absolute lack of any evidence that FAHA continues the practices complained of in the Complaint, the Hearing Examiner recommends that FAHA's Motion for Summary Judgment be granted, and this case be dismissed.

While she believes that the CCOC may grant summary judgment without imposing the sanctions requested by FAHA, in the alternative, she recommends granting FAHA's Motion for Sanctions with the sanctions recommended by the Hearing Examiner. If granted, the sanctions recommended by the Hearing Examiner also dictate that FAHA's Motion for Summary Decision be granted. This is discussed below.

IV. FAHA's MOTION FOR SANCTIONS

A. Argument

FAHA argues that sanctions against the Complainant are appropriate because he failed to comply with several of the deadlines set by the Scheduling Order. Dkt. 275. First, FAHA contends that Complainant failed to file a motion explaining his position why the e-mails produced by FAHA were incomplete by the date required in the Scheduling Order, and failed to do so again after the Hearing Examiner instructed him, on August 7, 2019, that he should do so. *Id.* at 2.

FAHA also seeks sanctions for Complainant's failure to respond to FAHA's Request for Production of Documents by date set in the Scheduling Order for close of discovery, despite a separate order from the Hearing Examiner requiring him to do so by August 5. Dkt. 225. The sanction sought for this failure is the grant of FAHA's Motion in Limine, which the Hearing Examiner has already done. *Id.*

FAHA contends that sanctions are also warranted for Complainant's failure to appear for any of the scheduled or ordered inspections of FAHA's books and record. *Id.* Ms. Hanger attests that Complainant failed to appear at the October, 2018, scheduled inspection and failed to provide

advance notice that he would not attend. After counsel for FAHA offered to schedule a new inspection, Complainant made no further request for a new date to inspect the books and records until the issues was raised at the May 31, 2019, hearing to resolve discovery issues. *Id.* at 4.

FAHA further argues that, while Complainant asked FAHA to reserve three dates for inspection of FAHA's books and records at the May 31, 2019 discovery hearing, he failed to appear on any of those dates. Nor, FAHA continues, did Complainant provide notice that he would not attend at the first scheduled inspection, causing counsel for FAHA and Ms. Hanger to wait the entire day for him to appear.

Finally, FAHA points to Complainant's failure to file a pre-hearing statement in support of its request for sanctions, as required by the Scheduling Order and the CCOC's DPR. COMCOR §10b.06.01.06(b).

FAHA requests the Hearing Examiner to order the following sanctions for the above delinquencies: (1) preclude Complainant from raising any objection to Respondent's e-mail production, (2) preclude Complainant from relying any documents at the public hearing not included in OZAH's docket list, (3) dismiss the Second Amended Complaint (alleging that Complainant was denied inspection of FAHA's books and records), (4) extend FAHA's deadline to file its Pre-Hearing Statement until two weeks after Complainant files his, (5) assess costs and attorney's fees incurred in connection with Complainant's failure to appear at the August 2, 2019, inspection, and costs and attorney's fees incurred for preparation of its Motion for Sanctions. *Id.* at 6.

B. Governing Law

As the Hearing Examiner has previously advised the Complainant in this case, Section 2A-8(j) of the MCAPA vests in the hearing authority the ability to impose a variety of sanctions in certain circumstances:

(j) Sanctions. The hearing authority may impose sanctions against parties and witnesses for failure to abide by the provisions of this article, or for unexcused delays or obstructions to the pre-hearing and hearing process. Such sanctions may include suspension or continuance of scheduled hearings, dismissals of actions, denial of admission of documents and exhibits and admission of matters as adverse to a defaulting party.

In addition to any other sanction, the hearing authority is authorized to assess any offending party the full cost of verbatim recording and transcription of any hearing delayed or obstructed by such party; and further to assess such party the cost of re-advertisement, if such notification is either required by law or necessary in the discretion of the hearing authority, to give adequate notice to interested or affected parties.

Maryland courts have long held that, even if appearing *pro se*, litigants are bound by the tribunal's rules of procedure and by a court's order. *Tretick v. Layman*, 95 Md. App. 62, 68 (1993)("The principle of applying the rules equally to pro se litigants is so accepted that it is almost self-evident.")

Where sanctions result in dismissal of all or part of a claim, the hearing authority's decision to do so is subject to review for "abuse of discretion." *Taliaferro v. State*, 295 Md. 376, *cert. denied*, 461 U.S. 943, 77 L.Ed.2d 1307, 103 S. Ct. 2114 (1983); *Shelton v. Kirson*, 119 Md. App. 325, 331, *cert denied*, 349 Md. 236 (1998)(*Taliaferro* standards apply in civil cases.) When weighing whether summary judgment based in part on sanctions is appropriate, the hearing authority must weigh several factors, including:

... whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties respectively offering and opposing the evidence, whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a

continuance. Frequently these factors overlap. They do not lend themselves to a compartmental analysis.

Taliaferro, 295 Md. at 391.

C. Opinion

The Hearing Examiner must first assess whether the actions complained of and the sanctions requested fall within the authority given by the MCAPA. Therefore, the Hearing Examiner must assess first whether the Complainant has “failed to abide by the provisions of this article, or has engaged in “unexcused delays or obstructions” before sanctions are authorized. Unfortunately, the Hearing Examiner finds that Complainant’s actions or inaction fall within these parameters.

Complainant has not offered any excuse for not attending the August 2, 2019, inspection of FAHA’s books and records. The Hearing Examiner gleans from the e-mails sent to FAHA’s counsel that his failure to appear at the second two inspections related to unspecified work requirements. However, nothing in the record explains exactly why he was unable to appear on dates that he specifically requested at the May 2019 discovery hearing. Nor did Mr. Cobb mention rescheduling other dates until October 3, 2019, after the Hearing Examiner granted FAHA’s Motion in Limine. In an e-mail response that day, Mr. Cobb complained that he’d never promised to attend all three inspections and he had provided adequate notice that he would not attend “due to work commitments.” As set forth in the Statement of the Case, the record of the May 31, 2019, hearing indicates that Mr. Cobb explicitly asked to reserve all three dates for his inspection. The e-mail communications from August 2019 also demonstrate that he repeatedly failed to respond to FAHA’s request to confirm his attendance at the inspections, necessitating the involvement of the Hearing Examiner.

Similarly, Mr. Cobb has provided virtually no excuse for his failure to submit a motion or any other document explaining why he believes that FAHA’s e-mail production is incomplete. In a September 30, 2019 e-mail (well after the deadline in the Scheduling Order), he relies on a single

e-mail from the Hearing Examiner, responding to an e-mail from him on July 12, 2019. The July 12th e-mail from Mr. Cobb (summarized under the Statement of the Case), alleged that FAHA had not produced all of the e-mails responsive to his discovery request. On the same day, the Hearing Examiner responded that she would review the file when she returned to the office on Monday. Complainant's reliance on this single e-mail taken out of context to (apparently) argue that his request is still pending is tenuous at best. It ignores the fact that the Hearing Examiner has instructed the Complainant on multiple occasions that she will not entertain requests to take actions by e-mail. This instruction was incorporated into an Order (Dkt. 215) issued in this case. Respondent has complied with this Order on many occasions by filing "Responses" to various actions taken by the Hearing Examiner or FAHA. It also ignores the several communications from the Hearing Examiner after July 12, 2019, informing him that she would not convene a hearing and instructing him to file a motion or other written document explaining his position that FAHA had not produced all responsive e-mails. The Hearing Examiner finds implausible Mr. Cobb's continued reliance on a single e-mail from the Hearing Examiner (that she would review the file on Monday) to excuse his failure to comply with the Scheduling Order.

FAHA contends that Mr. Cobb also failed to file a pre-hearing statement by the date due under the Scheduling Order. The docket reflects that this is the case, and contains nothing from Mr. Cobb requesting an extension of the deadline to file its pre-hearing submission or an extension of the hearing date. In the absence of any explanation, the Hearing Examiner finds that Complainant's failure is unexcused as well. Additionally, the CCOC's DPR mandates such a submission. COMCOR 10B.06.01.06(b). Thus, Complainant's failure to file a pre-hearing statement is not only unexcused, it violates the regulations governing this case. Given the multiple

unexcused failures to comply with the Scheduling Order or applicable regulations, Mr. Cobb's behavior falls within the ambit of those actions sanctionable under the MCAPA.

The specific sanctions sought by FAHA are also authorized under the MCAPA, with the exception of recovery of attorney's fees and costs. FAHA seeks (1) to limit the documents that may be produced at the hearing to those on OZAH's docket list, (2) an admission that its production of e-mails is complete, (3) dismissal of the Second Amended Complaint, (4) to extend FAHA's time to file a pre-hearing submission, and (5) costs and attorney's fees incurred with the scheduled inspections and preparation of the Motion for Sanctions. Except for FAHA's requests for attorney's fees and costs incurred relating to the failed inspections, the sanctions requested fall into the category of "dismissal of actions" and "denial of admission of documents and exhibits and the admission of matters as adverse to a defaulting party" MCAPA, §2A-8(j).¹²

Because imposition of the requested sanctions may result in the grant of FAHA's Motion for Summary Judgment and dismissal of the Complaint, the Hearing Examiner analyses FAHA's non-monetary sanctions under the standards applied in the *Taliaferro* and *Shelton* cases, *supra*. *See also, Warehime v. Dell*, 124 Md. App. 31, 45 (1998). These standards require the Hearing Examiner to weigh whether the "violation was technical or substantial, the timing of the ultimate disclosure, the reason, if any, for the violation, the degree of prejudice to the parties, and whether any resulting prejudice might be cured by a postponement, and if so, the overall desirability of a

¹² The County Code governing CCOC disputes permits the Hearing Examiner to punish "any disobedience of any order entered under this Section as a contempt of court." *Montgomery County Code*, §10B-10. It also permits the hearing authority to assess reasonable attorney's fees when a party:

- (1) filed or maintained a frivolous dispute, or filed or maintained a dispute in bad faith;
- (2) refused to participate in mediation of a dispute; or
- (3) substantially delayed or hindered the dispute resolution process without good cause.

Id., §10B-13(d). Respondent has not explicitly addressed whether the Complainant's defaults meet these Code provisions, and the Hearing Examiner does not decide the issue.

continuance.” *Warehime v. Dell*, 124 Md. App. 31, 45 (1998), *quoting*, *Taliaferro*, 295 Md. at 390-391.

The Hearing Examiner has already concluded that Complainant has not provided reasonable, and in some instances, any excuses for failing to comply with the Scheduling Order or the order requiring him to respond to FAHA’s request for production of documents.

The Hearing Examiner also finds that Complainant’s non-compliance in this case is substantial. Complainant’s failure to act in this case can’t be characterized simply as delayed actions or delayed submissions; it is a complete failure to comply to produce documents necessary for FAHA to prepare for the hearing. Complainant’s total lack of compliance significantly impairs Respondent’s ability to defend its case at the public hearing. FAHA *has* complied with the MHAA’s requirement to permit inspection of its books and records, the issue is now Mr. Cobb’s failure to appear for those inspections. Mr. Cobb’s failure to appear at any of the scheduled inspections impairs FAHA’s ability to defend against this claim. The Second Amended Complaint requested “all” books and records. The Hearing Examiner requested the inspections scheduled in 2019 to assist in defining what FAHA considered to be books and records and whether e-mails should have been included. Whether and to what degree he agrees with what FAHA was going to produce produced is a matter of speculation at this point, leaving both the Hearing Examiner and FAHA in the dark less than one month before trial.

Most prejudicial to the Respondent is Mr. Cobb’s failure to produce a pre-hearing statement. In discovery proceedings that occurred after the Original Complaint was filed, Mr. Cobb mentions actions that could potentially violate the By-Laws that are not identified in the Complaint. For example, to support his assertion e-mails could constitute books and records of the association under MHAA, Mr. Cobb provided e-mails that, in his view, demonstrated that the Board approved

architectural committee applications outside of meetings (by e-mail.)¹³ (Dkt. 93; Appendix A, p. 7). The Complaint has never been amended to include these actions, and the Hearing Examiner still does not know whether Mr. Cobb intends to argue that these actions fall under his Original Complaint or First Amended Complaint, or whether the allegation is limited to his Second Amended Complaint, *i.e.*, that e-mails may constitute the books and records of an association under the MHAA. The pre-hearing submission include a party's theory of the case, advises of the witnesses to be called, identifies the documents which will be relied upon at trial, and advises whether the Complainant will seek attorney's fees. Two years after the Original Complaint was filed, the failure to provide any pre-hearing statement, combined with the failure to comply with the Scheduling Order, leaves FAHA in the dark as to the specifics of what evidence will be presented less than a month before the hearing.

Nor does the Hearing Examiner find that further postponement of this case is warranted. First, the Complainant has not requested one. The Original Complaint is dated two years ago. This case was referred to the Hearing Examiner on May 3, 2018, and she has granted at least two lengthy extensions, two of which were requested by Mr. Cobb. Even if, however, the Hearing Examiner were to postpone the case without a request from the Complainant, the Hearing Examiner has no reason to believe that the Complainant will utilize a postponement to adhere to the Hearing Examiner's orders. At some point, FAHA is entitled to repose.

The keystone of the quasi-judicial administrative hearing process is fundamental fairness to the parties. *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 142 (2002), *quoting*, "*Gigeous v. E. Corr. Inst.*, 363 Md. 481, 509 (2001) (*quoting*, *Regan v. State Bd. of Chiropractic Exam'rs*, 355 Md. 397, 408 (1999) (citation omitted)) (Due process "requires that administrative

¹³ The Hearing Examiner only summarizes Mr. Cobb's characterization of the e-mails. She does not decide the issue.

agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them.” (citations omitted)). The Hearing Examiner finds that proceeding to the public hearing with the numerous defaults by the Complainant, and without a request for postponement from the Complainant, will result in a hearing that is fundamentally unfair. As she does not find a postponement warranted, she does not recommend granting FAHA’s requested sanction that their pre-hearing submission deadline be extended to two weeks after Mr. Cobb files his. Rather, the Hearing Examiner recommends that, as a sanction, the Complainant be to the factual claims explicitly stated on the face of the Complaint and its attachments.

Before FAHA filed its Motion for Sanctions, the Hearing Examiner had already granted FAHA’s Motion in Limine prohibiting the Complainant from relying on any documents not listed on OZAH’s docket and the requirement for FAHA to submit a pre-hearing statement is now moot. The Hearing Examiner recommends that the CCOC impose the following additional sanctions: (1) Dismiss the Second Amended Complaint for failure to attend scheduled inspections, (2) preclude the Complainant from raising any objections to Respondent’s production of e-mails; and (3) limit the factual matters at issue to those raised on the face of the Complaint or its attachments.

With the imposition of these sanctions, the evidence and issues remaining are those already considered in FAHA’s Motion for Summary Judgment. This includes the (1) failure of the Board of Directors to elect officers at regular meetings, (2) failure to have regular meetings in accordance with the By-Laws, (3) failure to file timely financial audits, (4) that the Board scheduled meetings without the consent of all Directors. For the reasons set forth in Part III.C of this Report, the Hearing Examiner concludes that these claims are moot.

V. RECOMMENDED DECISION

For the foregoing reasons, the Hearing Examiner recommends that the CCOC:

1. Grant FAHA's Motion for Summary Judgment; and
2. Dismiss the Complaint,

OR IN THE ALTERNATIVE,

1. Grant the following sanctions:
 - a. Dismiss the Second Amended Complaint;
 - b. Preclude the Complainant from raising any objections to FAHA's production of e-mails; and
 - c. Limit factual matters at issue to those raised on the face of the Complaint or its attachments.
2. Grant FAHA's Motion for Summary Judgment; and
3. Dismiss the Complaint.

Issued this 15th day of October, 2019.



Lynn Robeson Hannan
Hearing Examiner

COPIES TO:

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Shirley Norris Lake, Esquire
Jordan F. Dunham, Esquire
Attorneys for FAHA

NOTICE TO PARTIES

Neither Montgomery County Code nor the CCOC's Dispute Resolution Procedures contain authority for any action by the parties before a final decision by the CCOC Panel. The parties should consult the CCOC for information on further proceedings in this case. The CCOC's office may be reached at:

Department of Housing and Community Affairs
1401 Rockville Pike, 4th Floor
Rockville, MD 20852-1428

(240) 777-0311

(If calling from inside Montgomery County, you may dial x311 and ask to be referred to the
CCOC.)