Circuit Court for Baltimore County
Case No. 03-C-18-005910

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0038

September Term, 2019

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CHRISTOPHER BURTON

v.

INTELLIGENCE & INVESTIGATIVE DIVISION

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Kehoe,
Reed,
Kenney, James A., III
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Reed, J.

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Filed: August 25, 2020

Christopher Burton ("Appellant") brings this appeal, challenging the judgment of the Circuit Court for Baltimore County. That court affirmed the Intelligence and Investigative Division ("IID") of the Department of Public Safety and Correctional Services' ("DPSCS" or the "Department") decision to terminate the Appellant's employment as a law enforcement officer with the Department. Errol Etting, the IID Executive Director, issued disciplinary charges against Appellant for failure to perform his job duties adequately and for providing false statements related to a criminal investigation.

The Administrative Hearing Board (the "Board"), comprised of three law enforcement officers, found Appellant guilty of four of the five disciplinary charges brought against him and recommended the penalty of termination. The Executive Director and Secretary of the Department approved the Board's recommendation, and Appellant was subsequently terminated. Appellant appealed the Board's decision to the Circuit Court for Baltimore County pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"), which is codified in Title 3, Subtitle 1, of the Maryland Public Safety Article. The circuit court affirmed, prompting this present appeal.

In bringing his appeal, Appellant presents two questions[1] for our review, which we have rephrased for clarity:

[1] Appellant presents the following questions *verbatim*:

1. Did the Administrative Hearing Board and DPSCS fail to support its decision with substantial evidence when it terminated Christopher Burton for arbitrary and capricious reasons when Mr. Burton truthfully reported an incident of excessive force?

I. Did substantial evidence exist to support the Board's findings and conclusions, which resulted in Appellant's termination from the Department?

II. Did the Department violate the LEOBR's prohibition against retaliation when it terminated Appellant after he reported two correctional officers for using excessive force against an inmate?

For the following reasons, we answer the first question in the affirmative and hold that the Board's decision was supported with substantial evidence. We decline to answer the second question because it is not properly before this Court to review. In all, we affirm the Board's conclusions and the Department's decision to terminate Appellant's employment.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Underlying Excessive Force incident

The facts relevant to this case began on February 17, 2016 when Appellant observed an alleged excessive force incident perpetrated by two correctional officers against an inmate housed at the Brockbridge Pre-Release Facility ("BPRF"). On this date, Appellant volunteered to assist in interdiction at the BPRF. The interdiction was scheduled to be conducted by the Contraband Interdiction Team ("CIT"), the Special Operations Group ("SOG"), and the K9 Unit.

While providing assistance, Appellant observed two officers assaulting an inmate later identified as Marvin Davis. Appellant heard a CIT officer state to Mr. Davis, "You're going to fucking do as I say," to which Mr. Davis mumbled an inaudible comment. The

2. Did the DPSCS violate the LEOBR when Christopher Burton was terminated from employment as a reprisal for reporting the use of excessive force by two correctional officers?

CIT officer then told Mr. Davis, "I want you to give me your shirt," however, Mr. Davis refused. Appellant then recounted that a SOG officer pushed him out of the way; stated, "I'm tired of [Mr. Davis'] fucking mouth;" then approached Mr. Davis from behind and placed him in a chokehold, taunting, "I will smash your motherfucking head into this wall." Appellant next alleged that another SOG officer intervened and repeatedly punched Mr. Davis in the left ribcage while he was still held in the chokehold. The two SOG officers then closed the bathroom door and in the ensuing struggle Mr. Davis fell to the floor. Appellant claimed he was not able to see the rest of the altercation from his vantagepoint but was able to hear that it had continued.

Shortly after, Mr. Davis was seen with blood stains on his shirt as the SOG officers escorted him to the medical unit. The medical staff noted that Mr. Davis sustained a head injury, suffered from disorientation, and exhibited swelling on the right side of his forehead. Given his injuries, Mr. Davis was sent to the Shock Trauma Unit.

Upon returning to his office that day, Appellant immediately reported the incident to his supervisor Lieutenant Mark Forrest who instructed him to report the matter to Captain Bobbie Jo Fockler. Appellant submitted his initial matter of record attesting to the facts discussed above. However, since he had not previously interacted with the officers involved, Appellant described the officers' appearances rather than identifying them by name.[2] Nonetheless, Lt. Forrest and Capt. Fockler ordered Appellant to submit a revised

[2] A matter of record is a separate report that is used by the Department to clarify a previously issued report. The record seems to indicate that this is a standard procedure and form for correcting reports previously issued.

report to include the names of the officers that assaulted Mr. Davis. Appellant updated the report then rewrote the matter of record for a third time that day, identifying Officer Jeremy Snyder as the officer that placed Mr. Davis in a chokehold while an unknown Caucasian male wearing a green uniform threw multiple punches to the left side of Mr. Davis' ribcage.

On February 19, 2016, Appellant rewrote the matter of record for a fourth time, identifying Sargent Brandon Wilt as the officer who placed Mr. Davis in a chokehold and Ofc. Snyder as the officer who struck Mr. Davis in the ribcage. That same day, Appellant wrote his fifth final matter of record, explaining why he revised the initial matter of record multiple times. In his final matter of record, he explained that he updated the report to include the names of the officers and inmate because he did not know their identities when he first submitted the report. Appellant then explains that after having reviewed photographs of the SOG officers, he revised the report for a fourth time, identifying Sgt. Wilt as the officer who initiated the chokehold. However, after speaking with Detective Sargent Candace Mills, Appellant realized that he misidentified Sgt. Wilt as one of the officers that assaulted Mr. Davis. Thus, he rewrote his matter of record withdrawing any mention of Sgt. Wilt and identifying Ofc. Snyder as the SOG officer that placed Mr. Davis in a chokehold. After this fifth revision, Appellant did not submit any other matters of record or written reports concerning the excessive force incident at the BPRF.

The incident sparked a series of investigations, one of which was an administrative investigation conducted by Det./Sgt. Mills. During his interview with Det./Sgt. Mills on February 22, 2016, Appellant identified Ofc. Snyder as the officer that placed Mr. Davis in a chokehold and stated that he was unable to identify the officer that had punched Mr.

Davis in the ribcage. Given Appellant's final matter of record and the investigative findings, Sgt. Wilt was removed from further investigations. However, in February of 2017, Det./Sgt. Johnnathon Wright launched a criminal investigation into both Sgt. Wilt and Ofc. Snyder.

### B. Basis of Charges for Present Appeal

During the criminal and subsequent administrative investigation, Appellant made inconsistent statements on three occasions, which led to the administrative charges against him in this present appeal. Specifically, Appellant's statements during his interview with Det./Sgt. Wright on February 8, 2017, his conversation with Capt. Fockler on February 23, 2017, and his interrogation by Det./Lt. Scott Peterson on June 9, 2017, were the basis for the five disciplinary violations against him. He was charged with violations of (1) Personal Conduct, (2) Performance of Duty, (3) Insubordination, (4) Reports, and (5) Exception information.[3] [4] We have compartmentalized the facts relevant to these three dates for clarity.

#### *(i) February 8, 2017: Interview with Det. Wright*

[3] The Standard of Conduct and Internal Administrative Disciplinary Process §IV.H provides:

> H. Exception Information
>
> 1. An Agency Head has the authority to approve or impose any reasonable disciplinary action regardless of the provisions of Section IV. E, F or G, except those provisions required by Executive Order.

[4] *See infra* Discussion A.3.

On February 8, 2017, Det./Sgt. Wright interviewed Appellant by phone as part of his criminal investigation into Sgt. Wilt and Ofc. Snyder. During the interview, Det./Sgt. Wright had Appellant's February 17, 2016 written matter of record and asked questions pertaining to the facts alleged in the report. In that matter of record, Appellant only identified Ofc. Snyder by name and was unable to identify the other offending officer. When asked whether the matter of record was true, Appellant answered affirmatively. Det./Sgt. Wright proceeded to ask Appellant whether he was ever able to identify the other officer who struck Mr. Davis to which Appellant answered affirmatively, identifying Sgt. Wilt as the assailant. Appellant further distinguished that Ofc. Snyder was the one who placed the inmate in a chokehold, and he also identified Ofc. Presgraves as having possibly been at the scene of the incident. Det./Sgt. Wright included Ofc. Presgraves' name in his notes for further investigation. Based on Appellant's interview and matter of record, Det./Sgt. Wright drafted the application for statement of charges against Sgt. Wilt and Ofc. Snyder. However, he was unaware that Appellant revised his matter of record multiple times and withdrew any mention of Sgt. Wilt in his final matter of record.[5]

*(ii) February 23, 2017: Conversation with Capt. Fockler*

Appellant's disciplinary violations also stemmed from statements he made to Capt. Fockler regarding the then-pending criminal charges against Sgt. Wilt and Ofc. Snyder. On February 23, 2017, Capt. Fockler contacted Appellant by phone and "asked him to review the charging documents to verify [that] the information was correct since it directly

[5] We can find no record that these matters were kept on a computer or in a centralized file by the Department.

contradicted" Appellant's final matter of record on February 19, 2016. As previously mentioned, Appellant withdrew Sgt. Wilt's name from his final report and identified Ofc. Snyder as the SOG officer that placed Mr. Davis in a chokehold. He also reported that he was not able to identify the other SOG officer. Although Appellant withdrew Sgt. Wilt's name, the subsequent charging documents identified Sgt. Wilt as a culpable party. Nonetheless, Appellant informed Capt. Fockler that the charging documents were correct. Capt. Fockler expressed concern that the "agency would have difficulty proving the charges due to [Appellant's] prior inconsistent statements." However, Appellant responded that "he would testify to what the charging documents alleged."

*(iii) June 9, 2017: Interrogation by Det./Lt. Peterson*

The final instance giving rise to Appellant's disciplinary charges occurred on June 9, 2017. On this date, Det./Lt. Peterson questioned Appellant about his prior interview with Det./Sgt. Wright, specifically, whether Appellant provided the names of any correctional officer involved in the excessive force incident. Appellant informed Det./Lt. Peterson that he did not provide any names during the interview, rather, he told Det./Sgt. Wright "to refer to his statement because he couldn't remember everything since the incident was over a year ago." Appellant also told Det./Sgt. Wright that "he didn't want to answer any questions about the incident because he didn't want to get 'jammed-up' by the agency if he said anything different."

Moreover, Appellant explicitly denied having implicated Ofc. Presgraves as being involved in the incident, contradicting Det./Sgt. Wright's handwritten notes from the February 8, 2017 interview. He also denied having read the charging document page that

depicted his account of the incident when he was questioned by Capt. Fockler on February 23, 2017. During the interrogation, Appellant stated that while he remembered talking to Capt. Fockler, he did not remember the "full details of the investigation" and did not "read the final page of the application for statement of charges until he appeared for Sgt. Wilt and [Officer] Snyder's court date."

The Board was presented with the aforementioned evidence and accepted it into its Findings of Fact. The Board determined that Appellant "read the narrative of the charging documents and application for statement of charges and then knowingly told Captain Fockler the documents were accurate even though he knew they directly contradicted previous statements he filed." The Board also determined that Appellant's testimony at the hearing "directly contradicted his interrogation with Det./Lt. Peterson and provided convincing evidence [that Appellant] knowingly provided false and misleading statements regarding the identification of correctional officers." Moreover, he recanted aspects of his testimony concerning how he came upon information implicating Sgt. Wilt and Ofc. Snyder. Based, in part, on these factual findings, the Board found Appellant guilty of the first four charges and acquitted on the fifth charge. Before recommending disciplinary action, the Board heard testimony, reviewed Appellant's personnel record, and reviewed the Finding of Fact and Conclusions of Law. The Board recommended to terminate Appellant's employment and the Department accepted and approved its recommendation.

### C. Appeal to the Circuit Court

Appellant subsequently appealed the Department's decision to the Circuit Court for Baltimore County. During this first level of appellate review, Appellant challenged the

sufficiency of evidence supporting his termination and argued the Department retaliated against him for reporting the excessive force incident. The circuit court found that the evidence before the Board was sufficient to support Appellant's termination and that Appellant did not properly preserve his retaliation claim for review. The circuit court affirmed the Department's Final Order and Appellant appealed to this Court.

## STANDARD OF REVIEW

"The scope of judicial review of a LEOBR case is the same as for an administrative appeal." *Baltimore Police Dep't v. Ellsworth*, 211 Md. App. 198, 207 (2013). Upon the appeal of an administrative decision, affirmed by a circuit court exercising intermediate appellate review, the Court of Special Appeals must "bypass the judgment of the circuit court and look directly at the administrative decision." *Id*. (quoting *Salisbury Univ. v. Joseph M. Zimmer, Inc.*, 199 Md. App. 163, 166 (2011)). However, Maryland law permits this Court to reverse or modify the agency's decision only if a "substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision" that:

> (i) is unconstitutional;
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
> (iii) results from an unlawful procedure;
> (iv) is affected by any other error of law;
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
> (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
> (vii) is arbitrary or capricious.

Md. Code Ann., § 10-222. In the present case, our review of "an administrative agency's decision is narrow" and "limited to determining if there is substantial evidence in the record

as a whole to support the agency's findings and conclusions, and to determining if the administrative decision is premised upon an erroneous conclusion of law." *Hill v. Motor Vehicle Admin.*, 415 Md. 231, 239 (2010) (internal quotation marks and brackets omitted).

The substantial evidence standard asks whether there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Owusu v. Motor Vehicle Admin.*, 461 Md. 687, 698 (2018) (internal quotation marks omitted) (quoting *Gigeous v. Eastern Correctional Institution*, 363 Md. 481, 497 (2001)). An agency's decision is considered "prima facie correct," thus, we will defer to the agency's factual findings and the inferences drawn, if such is supported by the record. *Ellsworth*, 211 Md. App. at 207 (quoting *Motor Vehicle Admin. v. Carpenter*, 424 Md. 401, 412–13 (2012)). And, we will view its decision in the light most favorable to the agency. *Id.*

Moreover, the arbitrary or capricious standard is also "highly deferential" to the agency. *Maryland Dep't of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 121 (2016) (citation omitted).

## DISCUSSION

### *I. Validity of the Proceeding*

#### A. Parties' Contentions

As an initial matter, Appellant contends that he was not sufficiently notified of each charge and specification against him as required by Maryland Public Safety Article § 3-107. Specifically, Appellant argues that the Notification of Charges did not specify that he was charged with "telling Lt. Peterson 'No' when asked if he provided names of the assailants to Det. Wright and the AHB." For this reason, he argues that his termination

should be reversed, citing *Reed v. Mayor and City Council of Baltimore*, 323 Md. 175 (1991) (reversing the judgment of the circuit court because Reed was not adequately notified that "her failure to warn the officers who intended to arrest Wesley Baker that Baker was armed" would be an issue at the hearing on the charges against her).

Appellant further contends that, even if he was charged, "there was no substantial evidence to demonstrate that he made such statements to Lt. Peterson." Instead, Appellant alleges that he "stated during his interrogation with Lt. Peterson that he, at minimum directed Det. Wright to his report which included the names of the assailants and otherwise stated that he did not mention Pendergrass [sic] but only Sgt. Wilt and Snyder." In directing Det. Wright to the report, Appellant contends that he clearly relayed truthful and accurate information to both Lt. Peterson and Det. Wright. In sum, Appellant argues that the evidence in the record demonstrated that the excessive force incident actually occurred and that he had witnessed the incident. For these reasons, Appellant asks this court to reverse DPSCS' notice of termination on the basis that the decision was arbitrary, capricious, and unsupported by substantial evidence.

On the contrary, the Department contends that Appellant failed to preserve the sufficiency of the notice of disciplinary charges claim because he did not raise the issue before the Board. Even if the issue had been preserved, the Department argues that the notice of disciplinary charges "sufficiently appraised [Appellant] that his June 9, 2017 interview with Lt. Peterson was a potential basis for discipline," because the notice provided "sufficient detail to enable [Appellant] to marshal evidence and arguments in

defense of the assertions." Taking into consideration the record before us, we agree with the Department.

## B. Analysis

### 1. Preservation

With respect to judicial review of rulings of administrative agencies, the same requirement of preservation applies. *See Schwartz v. Maryland Dep't of Nat. Res.*, 385 Md. 534, 553–55 (2005) ("[A] reviewing court ordinarily 'may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.'" (quoting *Brodie v. MVA*, 367 Md. 1, 4 (2001) ("Since Brodie's entire challenge to the administrative decision was based on an issue not raised before the agency, the Circuit Court should have affirmed the administrative decision without reaching the issue.")). Stated plainly, an argument not raised at the administrative hearing "cannot be asserted for the first time upon judicial review." *Sturdivant v. Maryland Dep't of Health of Mental Hygiene*, 207 Md. App. 33, 59 (2012). Here, Appellant raises the issue for the first time on appeal to this court. And for that reason, he has failed to preserve the claim for our review. Notwithstanding, Appellant's reliance on *Reed* is unavailing.

In *Reed*, the petitioner was notified of two charges. "The first, accusing her of marijuana usage" and "[t]he second...[f]or that on or about July 11, 1989, in an incident reported under Central Complaint Number 8G25445, Police Officer Irma Reed reflected discredit upon the Baltimore Police Department and/or herself as a member thereof." *Id.* at

182. The Court held "that the notice provided Officer Reed did not adequately advise her that the issue of whether 'she reflected discredit upon the Baltimore Police Department and/or herself as a member thereof' would depend upon her failure to warn the officers who intended to arrest Wesley Baker that Baker was armed." *Id*. at 184. Particularly because "[t]here [was] no mention in the report of any failure by Reed to warn the arresting officers that Baker was armed." *Id*. at 183.

On the contrary, Appellee aptly cites to our decision in *Bray v. Aberdeen Police Department*, 190 Md. App. 414 (2010), distinguishing *Reed*. Much like a notice of disciplinary charges, we stated in *Bray* that the charging document must "appraise the officer of the charges warranting disciplinary action in sufficient detail to enable the officer to marshal evidence and arguments in defense of the assertions." *Id*. at 430 (internal citation and marks omitted). Bray argued on appeal "that Counts 2 and 11, accusing him of making false statements during his interrogation, contained no hint as to what statements he made that were allegedly false" and "that Count 5, accusing him of intentionally falsifying his payroll sheet, [did] not identify the alleged falsification, or even the specific date for which allegedly false entries were made." *Id.* at 431. However, we explained that "[i]t was unnecessary for the notification to delineate every fact in support of the charges, especially in light of the fact that appellant also received all of the documentary evidence collected by [his employer], which further informed him as to the basis of the case against him." *Id.* at 432. We elaborated that *Bray*

> is comfortably differentiated from *Reed*, insofar as appellant was clearly acquainted with the misconduct that formed the basis for the charges against him. Counts 2 and 11 accused him of lying, and Count 5 accused him of

> falsifying information on his payroll sheet. It was unnecessary for the notification to delineate every fact in support of the charges, especially in light of the fact that appellant also received all of the documentary evidence collected by APD, which further informed him as to the basis of the case against him.

Like *Bray*, Appellant received the notice of charges which sufficiently apprised him that his June 9, 2017 interview with Lt. Peterson was a potential basis for the charges against him. The specification of facts provided that "[o]n June, 9, 2017, Appellant again provided erroneous and intentionally false statements to [Lt. Peterson] regarding the identity of Correctional Officers allegedly involved at the incident at BPRF." Giving the unambiguous accusation in the specification of facts, we find Appellant's notice argument unavailing.

### 2. Substantial Evidence

Turning to the issue properly before us, we now examine whether the Department's decision was arbitrary and capricious or unsupported by substantial evidence. Viewing the Department's decision in the light most favorable to the Department, we ask: "(1) whether there [was] substantial evidence in the record to support the [Department's] findings and conclusions and (2) whether the [Department's] decision [was] premised upon an erroneous conclusion of law." *McClellan v. Dep't of Pub. Safety & Corr. Servs.*, 166 Md. App. 1, 18 (2005) (internal numeration added); *see also Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509, 530 (2003). As we have previously stated, "substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Owusu v. Motor Vehicle Admin.*, 461 Md. 687, 698 (2018) (internal citation and marks omitted). This standard of review is narrow and asks not "whether we would

have reached the same conclusions," rather, it asks "whether a reasoning mind could have reached those conclusions on the record before the agency." *McClellan*, 166 Md. App. at 18 (internal citation and marks omitted). In regard to whether Appellant had the requisite intent to be found culpable of the administrative charges against him, we are reminded that, "where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Schwartz*, 385 Md. at 554 (internal citation and marks omitted). Thus, we will credit the Board's factual findings and its determination of intent unless such is unsupported by the record.

In the case at bar, the Board concluded that Appellant was guilty of four of the five disciplinary violations and recommended that the Department terminate his employment. The four sustained disciplinary charges are set forth below:

**CHARGE# 1:** SOC II.B – Personal Conduct

> The *Standards of Conduct and Internal Administrative Disciplinary Process*, II.B (1) provides:
>
> B. Personal Conduct
>
> Each employee shall conduct him/herself at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Any breach of peace, neglect of duty, misconduct or any conduct on the part of any employee of the Department, either within or outside of his/her place of employment, which tends to undermine the good order, efficiency or discipline of the Department, or which reflects discredit upon the Department or any employee thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or stated, shall be considered conduct unbecoming an employee of the Agency, and subject the employee to disciplinary action by the Agency.

**CHARGE# 2:** SOC II.J – Performance of Duty

The *Standard of Conduct and Internal Administrative Disciplinary Process*, II.J provides:

J. Performance of Duties

An employee of the Department shall be responsible for his/her own actions, as well as the proper performance of his/her duties. In carrying out the functions and objectives of the Department, an employee shall perform his/her duties in a manner that will maintain the highest standards of efficiency. Examples of unsatisfactory performance include but are not limited to lack of knowledge, unwillingness or inability to perform assigned tasks, failure to conform to work standards established for the member's rank, classification, or position, or failure to take appropriate action to ensure compliance with Department regulations.

**CHARGE# 3:** SOC II.K – Insubordination

The *Standard of Conduct and Internal Administrative Disciplinary Process*, II.K(4) provides:

4. An employee shall cooperate with a superior or other person designated to conduct an investigative procedure. An employee shall answer all questions truthfully and to the full extent of his/her knowledge

**CHARGE# 4:** SOC II.S – Reports

The *Standard of Conduct and Internal Administrative Disciplinary Process*, II.S(1) provides:

An employee may not make any false oral or written statement or misrepresent any material fact, under any circumstance, with the intent to mislead any person or tribunal. Reports submitted by employees shall be clear, concise, factual and accurate.

Viewing the case in the light most favorable to the Department, we note three separate instances detailed in the record that constitute relevant evidence that a reasonable mind might accept as adequate to support the Department's conclusion.

*(i) February 8, 2017: Interview with Det./Sgt. Wright*

The record established that on February 8, 2017, Det. Wright interviewed Appellant by phone as part of his criminal investigation into the alleged excessive force incident. During the interview, Det. Wright referenced Appellant's February 17, 2016 written matter of record and took notes on the information Appellant provided. In the matter of record, Appellant only identified Officer Snyder by name and was unable to identify the other officer present. However, when asked whether the matter of record was true, Appellant answered affirmatively.

Det. Wright proceeded by asking Appellant whether he was ever able to identify the officer who struck Mr. Davis to which Appellant answered affirmatively, identifying Sgt. Wilt. Appellant further confirmed that Officer Snyder was the one who placed the inmate in a chokehold, and he had previously offered Officer Presgraves as having possibly been at the scene of the incident. Det. Wright subsequently drafted the application for statement of charges against Sgt. Wilt and Officer Snyder based on Appellant's interview and matter of record. [6] The Board incorporated this evidence into its finding of facts.

*(ii) February 23, 2017: Conversation with Capt. Fockler*

The Board's finding of fact also established that on February 23, 2017, Capt. Fockler contacted Appellant by phone and "asked him to review the charging documents to verify the information was correct since it directly contradicted" Appellant's final report in which Appellant withdrew any mention of Sgt. Wilt and stated he was unable to identify the second SOG officer. Despite the inconsistency, Appellant informed Capt. Fockler that

[6] The criminal charges were filed in the District Court of Anne Arundel County and were ultimately dismissed a result of Appellant's inconsistent statements.

the charging documents were correct. Capt. Fockler expressed concern that the "agency would have difficulty proving the charges due to [Appellant's] prior inconsistent statements" to which Appellant responded that "he would testify to what the charging documents alleged."

*(iii) June 9, 2017: Interrogation by Det./Lt. Peterson*

The Board also incorporated Appellant's June 9, 2017 interrogation into its finding of facts. On this date, Det./Lt. Peterson questioned Appellant about his prior interview with Det./Sgt. Wright, specifically, whether he provided the names of any correctional officers involved in the incident to the Detective. Appellant told Det./Lt. Peterson that he did not provide any names to Det./Sgt. Wright, rather he told the Detective "to refer to his statement because he couldn't remember everything since the incident was over a year ago." Appellant told Det. Wright that "he didn't want to answer any questions about the incident because he didn't want to get 'jammed-up' by the agency if he said anything different."

Moreover, Appellant specifically denied having implicated Ofc. Presgraves as being involved in the incident, and he denied having read the charging document page that provided his account of the incident when he was questioned by Capt. Fockler. He stated that he remembered talking to Capt. Fockler, but he did not remember the "full details of the investigation" and did not "read the final page of the application for statement of charges until he appeared for Sgt. Wilt and [Officer] Snyder's court date."

The Board noted that "[Appellant's] testimony did not coincide with evidence presented and discredited his veracity regarding the review of the documents and the

statements made to Captain Fockler and Det./Lt. Peterson." Furthermore, the charging document clearly set out "[Appellant's] statements to Det. Wright incriminating Sgt. Wilt, [Officer] Presgraves, and [Officer] Snyder as being involved parties in the [excessive force] incident." Considering the evidence before it, the Board determined that:

> [Appellant] fully read the narrative of the charging document and application for statement of charges and then knowingly told Captain Fockler the documents were accurate even though he knew they directly contradicted previous statements he filed with the agency giving rise to the Board's determination that [Appellant's] testimony, interrogation, and statements to co-workers and supervisors lacked candor and credibility.
>
> The Board further determined [Appellant's] testimony directly contradicted his interrogation with [] Lt. Peterson and provided convincing evidence [Appellant] knowingly provided false and misleading statements regarding the identification of correctional officers. [Appellant's] testimony corroborated that he did, in fact, give the names of correctional officers he suspected of assaulting Inmate Davis during his conversation with Det. Wright. Furthermore, when questioned by the Board Chair as to how he read a protected personnel document (Det. Mills' administrative investigation) in which he was only a witness and not the investigator, [Appellant] quickly recanted aspects of his testimony as to how he came upon information implicating Sgt. Wilt and [Officer] Pendergast [sic].

(internal numeration omitted).

These Findings of Fact were derived from the testimony and evidence presented during the hearing, and based upon these findings, in part, the Board concluded that the:

> Testimony and evidence presented to the Board determined [Appellant] failed to conduct himself in a manner that reflects favorably on the Department during several administrative and criminal investigations conducted by the Intelligence & Investigative Division. Specifically, [Appellant] knowingly and intentionally made false and/or misleading statements during his interrogation with Det./Lt. Peterson when he stated ***"NO"***, he never disclosed the names of correctional officers he believed were involved in the BPRF incident to Det. Wright as part of the criminal investigation. Conversations documented by Det. Wright and [Appellant's] own testimony provided substantive evidence [that] he provided false and/or

> misleading statements in the June 9, 2017 interrogation. When Det./Lt. Peterson asked him if he provided any names regarding the BPRF incident, Det. Sgt, Burton responded directly to the question, ***"NO"***, he did not provide any names to Det. Wright. Furthermore, [Appellant] specifically denied during his interrogation that he told Det. Wright that CO Presgraves was involved in the incident at BPRF. Testimony from Det. Wright clearly identified the names of officers involved in the assault; Inmate Davis only provided general descriptions. When asked if he had anything to add to the closing of the interrogation, [Appellant] never mentioned disclosing the names of Sgt. Wilt, CO Snyder, CO Pendergast or CO Presgraves; in fact he denied it throughout the interrogation. This was the crux of the Board's determination that [Appellant] provided false and/or misleading statements in the interrogation because he admitted, in testimony before the Board that he did, in fact, specifically name officers for Det. Wright to investigate. His testimony before the Board reflected that he told Det. Wright to check out Sgt. Wilt as a suspect in the incident because he had obtained additional information that put him and other officers at the scene. Additionally, [Appellant] never disclosed the newfound information and his failure to report the information to his supervisor's [sic] when questioned was a clear neglect of duty. The Board determined it is common sense and a guiding principle that a law enforcement officer's reputation must be beyond reproach and the disclosing of information that can incriminate and/or exonerate an employee who has committed a crime or violated department policy is a duty universally shared within the law enforcement community. [Appellant's] lack of candor in his matter of record, interrogation, and hearing board testimony not only reflected poorly and impeached his credibility, it reflected poorly on all members and the agency as a whole, and [Appellant's lack of candor] hindered the department's standards of efficiency in regard[] to the related criminal and administrative investigations.

The Board clearly stated the evidence it relied on when making its factual determinations. As the reviewing Court, we will not substitute the Board's judgment with our own, particularly when its judgment is supported by relevant evidence that a reasonable mind might also accept as adequate to have reached its decision. The Department's decision was, and remains, prima facie correct. Accordingly, we hold that the evidence was sufficient to

conclude that Appellant was guilty of the administrative charges against him and that the Board's disciplinary recommendation was not arbitrary or capricious.

### *II. Retaliation*

Appellant also asks this Court to reverse the Department's decision, arguing that the Department retaliated against him for reporting the excessive force incident in violation of Maryland Public Safety Article § 3-103(d). Appellant emphasizes the fact that he was the only officer disciplined as a result of the excessive force incident and that he would not have been disciplined had he chosen not to report the incident. The Department refutes Appellant's retaliation claim and also argues that Appellant waived the argument by not raising it below.

As we previously stated in this opinion, an argument not raised at the administrative hearing "cannot be asserted for the first time upon judicial review." *Sturdivant*, 207 Md. at 59. "It is not our function as an appellate court to consider issues not raised, considered or decided in the [proceedings] below." *HNS Dev., LLC v. People's Counsel for Balto. County*, 200 Md. App. 1, 18 (2011); *see also Sadler*, 378 Md. at 530 (2003) ("judicial review of the actions of an administrative agency is restricted primarily because of the fundamental doctrine of separation of powers as set forth in Article 8 of the Declaration of Rights of the Maryland Constitution.")

Here, Appellant never raised with the Board his argument that he was terminated in retaliation for reporting the excessive force incident. The issue was first raised on appeal to the circuit court, at which point Appellant argued he did not have to raise the issue before the board because the claim was premature. Appellant is incorrect. We have previously

addressed the issue of preservation in *Halici v. City of Gaithersburg*, 180 Md. App. 238 (2008). In *Halici*, the Mayor and Council of the City of Gaithersburg denied Halici's permit application, which sought permission to demolish its property designated as a local historic site. Halici appealed to the circuit court and argued, in part, that the Historic District Committee was not lawful because one of its members did not meet the qualifications provided by the city's Historic Preservation Ordinance. *Id*. at 247. We declined to address the merits of Halici's argument because it failed to raise the issue before the Historic District Committee. *Id*. at 248. In doing so, we explained that, "[t]he failure to raise an issue before the administrative agency is a failure to exhaust administrative remedies and an improper request for the courts to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency." *Id*. at 247 (internal citations and marks). Similarly, the circuit court declined to reach the issue in the present case, briefly explaining:

> With respect to the argument by the Petitioner that this is-- Decision to terminate was in retaliation for his filing the charges, I believe Mr. McCormick has acknowledged that there's no evidence before this Court to decide retaliation at this time. There's been no evidentiary hearing before this Court on that issue. So, for those reasons, the Petition for Judicial Review is denied and the Decision of the Hearing Board is affirmed for the reasons that I've stated. Again, I don't see where the Hearing Board or this Court making a determination as to exactly what happened with respect to that incident in 2016.

Accordingly, we decline to address the merits of Appellant's retaliation claim since it was not raised with the Board. In this case it would have been preferable to raise the issue before the Board where the witnesses were being examined and could have been asked questions about the circumstances.

## CONCLUSION

Accordingly, we affirm the Department's decision to terminate Appellant's employment. The Board sufficiently articulated the evidence it relied on to support its conclusions of law; thus, we will not substitute its judgment with our own. We hold that the evidence was sufficient to conclude Appellant was guilty of the administrative charges against him and the Department's decision to terminate his employment was not arbitrary or capricious.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLLANT.**