Circuit Court for Baltimore City
Case No. 24-C-21-004883

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 439

September Term, 2022

IN THE MATTER OF THE PETITION OF MICHAEL POOL

Nazarian,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 22, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

In April 2020, Michael Pool, a former Baltimore City Police Officer, was charged with various administrative charges after he improperly accessed and disseminated certain records while he was a member of the Baltimore City Police Department in January 2019. Pool elected a trial before the Administrative Hearing Board (the "Board"). During that trial, Pool moved to have the charges dismissed pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"), which required administrative charges to be filed within one year.[1] The Board denied the motion on the grounds that the LEOBR allowed for the tolling of the one-year statute of limitations where the acts that gave rise to the charges involved "criminal activity." Pool was subsequently convicted on all charges, and his employment was terminated. Pool thereafter filed a petition for judicial review in the Circuit Court for Baltimore City, and, following a hearing, the court affirmed the Board's decision.

In this appeal, Pool has presented three questions, which we have rephrased and consolidated into a single question for clarity. That question is:

1. Did the Board err in finding that the "criminal activity" exception applied in Pool's case?

For reasons to follow, we hold that the Board did not err. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

On January 25, 2019, Pool, who at the time was a Lieutenant in the Baltimore City Police Department (the "Department"), received an electronic message from another

[1] The Maryland General Assembly revised and recodified the LEOBR in 2021. *See* 2021 Maryland Laws, Ch. 59 (effective July 1, 2022).

officer, Lieutenant Eric Leitch, that contained a "booking photograph" of the Department's former Deputy Commissioner. Two days later, Pool sent the photograph, via text message, to two current and two former Department members. On January 28, 2019, a local resident, Kinji Scott, posted the booking photograph, along with additional confidential information related to the photograph, on Twitter. It was later discovered that the booking photograph and confidential information had most likely been taken from an expunged arrest record housed in the Department's "Arrest Viewer," an internal electronic database used by authorized Department employees to store and access information on arrests and other police-related matters. It was also discovered that Lieutenant Leitch had accessed the Arrest Viewer on January 25, 2019, the same day that he sent the booking photograph to Pool. At the time, Department employees were prohibited from accessing and/or disseminating criminal history records or files, except in the performance of their official duties.

On January 28, 2019, Pool accessed Twitter and discovered Kinji Scott's post containing the booking photograph and confidential information. Using another employee's login information, and without the appropriate authorization, Pool then accessed Arrest Viewer to "see if the picture was actually real." After that, Pool contacted another officer, Lieutenant Deanna Effland, to report the Twitter post. Lieutenant Effland informed Pool that she had already been made aware of the post. That same day, Lieutenant Effland reported the post to her commanding officer and the Department's Public Integrity Bureau ("PIB").

On February 1, 2019, Pool received a letter from the Department's Office of Professional Responsibility, informing him that he was the subject of an internal investigation. The letter indicated that Pool was being investigated for allegedly disseminating and/or accessing restricted records outside the performance of his duties. The letter also stated that Pool had allegedly failed to report serious misconduct by a Department member.

Baltimore City Police Sergeant Anthony Faulk was assigned to investigate the allegations against Pool. During the course of his investigation, Sergeant Faulk discovered that Pool was in possession of a cell phone issued by the Department that was likely relevant to the investigation. Sergeant Faulk subsequently asked Pool to surrender the phone, but Pool never did. Sergeant Faulk later testified that he believed that Pool "was evading or hindering the investigation."

On April 24, 2020, the Department issued four administrative charges against Pool: 1) failure to report misconduct; 2) improperly releasing restricted records; 3) improperly accessing restricted records; and 4) obstructing or hindering an investigation. Pool thereafter requested an administrative hearing before the Board to consider the merits of the charges against him.

Evidence of "Criminal Activity"

At that hearing, Sergeant Faulk testified regarding the allegations against Pool and his investigation into those allegations. Sergeant Faulk testified that his investigation uncovered facts showing that Pool had engaged in misconduct and conduct unbecoming a police officer by: failing to report the existence of the booking photograph after receiving

it on January 25, 2019; disseminating said photograph without authorization; accessing Arrest Viewer for an improper purpose; and obstructing the Department's subsequent investigation into the matter.

Sergeant Faulk testified that, while he was conducting his internal investigation, the Office of the State Prosecutor was also conducting a criminal investigation into the matter. Sergeant Faulk stated that he assisted the State Prosecutor by collecting certain Department electronics and by providing certain information as it was collected during the course of his administrative investigation. Sergeant Faulk testified, however, that he was not privy to the details of the criminal investigation. He explained that, ordinarily, when there are parallel criminal and administrative investigations into the same matter, "we have to stay separate." He added that he sometimes may assist in a criminal investigation by seizing evidence on behalf of the prosecutor.

Sergeant Faulk testified that, on or around September 6, 2019, the State Prosecutor sent a letter to the Department. According to that letter, which was admitted into evidence, the Department's Commissioner had referred the case to the State Prosecutor for review. The letter stated: "After consulting with you and reviewing your investigative file in reference to allegations of misconduct in office and other crimes stemming from the dissemination of an expunged arrest record it is our determination no police officer's action constitutes criminal misconduct and we decline prosecution." Sergeant Faulk testified that, in addition to the aforementioned administrative charges, Pool had been administratively investigated for criminal misconduct. Sergeant Faulk stated that, due to the letter from the State Prosecutor, he decided not to pursue the allegation of criminal misconduct.

Motion to Dismiss

At the conclusion of that evidence, Pool moved to dismiss the charges pursuant to the LEOBR's statute of limitations. Under the LEOBR, "a law enforcement agency may not bring administrative charges against a law enforcement officer unless the agency files the charges within 1 year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official." Md. Code, Pub. Safety ("PS") § 3-106(a) (effective through June 30, 2022). The LEOBR included an exception to that rule, which stated that the one-year statute of limitations "does not apply to charges that relate to criminal activity or excessive force." PS § 3-106(b) (effective through June 30, 2022).

Pool argued that the act that gave rise to the charges – his receipt and dissemination of the booking photograph – occurred in January 2019 and that, as a result, the Department needed to bring any administrative charges within one year of that time. Pool argued that the Department failed to meet that deadline because the charges were not filed until April 2020. Pool argued further that the "criminal activity" exception to the statute of limitations did not apply because the Department did not present any evidence that he had been accused of or investigated for criminal activity.

The Department countered that Sergeant Faulk's testimony established that there had been a parallel criminal investigation that concluded on September 6, 2019, when the State Prosecutor sent the declination letter indicating that no officers would be prosecuted. The Department maintained, therefore, that the one-year statute of limitations would not apply in Pool's case.

The Board ultimately agreed with the Department and denied Pool's motion. The Board found that there was "sufficient evidence to show there was, in fact, a criminal investigation."

In the end, the Board sustained all charges against Pool. Pool thereafter filed a petition for judicial review in the circuit court. Following a hearing, the court affirmed the Board's decision. This timely appeal followed.

DISCUSSION

Parties' contentions

Pool contends that the Board erred in finding that the LEOBR's one-year statute of limitations was inapplicable under the "criminal activity" exception contained in the statute.[2] He argues that, because the administrative charges were not brought within one-year of the acts that gave rise to the charges, the Department was required to prove "with specificity" that the criminal activity exception was applicable. Pool argues that the Department failed to make such a showing and that, consequently, the Board erred as a matter of law in denying his motion to dismiss. Pool also argues that the Board did not make the requisite factual findings to support its determination regarding the applicability of the criminal activity exception.

The Department contends that, to affirm the Board's decision, there need only be substantial evidence in the record to show that the criminal activity exception was

[2] Pool argues that he was not required to file a show cause petition prior to making his oral motion to dismiss before the Board. We are unable to discern why Pool has included this argument in his brief, as neither the Department nor the Board ever suggested that a show cause order was required.

applicable in Pool's case. The Board avers that Sergeant Faulk's testimony and the declination letter from the State Prosecutor was sufficient to show that the charges at issue involved criminal activity.

Standard of Review

"The overarching goal of judicial review of agency decisions is to determine whether the agency's decision was made in accordance with the law or whether it is arbitrary, illegal, and capricious." *Sugarloaf Citizens Ass'n v. Frederick Cnty. Bd. of Appeals*, 227 Md. App. 536, 546 (2016) (citation and quotations omitted). In making that determination, "we [assume] the same posture as the circuit court . . . and limit our review to the agency's decision." *Anderson v. Gen. Cas. Ins. Co.*, 402 Md. 236, 244 (2007). Moreover, "[w]e review the agency's decision in the light most favorable to the agency because it is prima facie correct and entitled to a presumption of validity." *Sugarloaf*, 227 Md. App. at 546 (citation and quotations omitted). "[I]f we determine that the agency's decision is based on an erroneous conclusion of law, no deference is given to those conclusions." *Kenwood Gardens Condos., Inc., v. Whalen Props., LLC*, 449 Md. 313, 325 (2016). That said, "we accord a degree of deference to an agency's decision involving the interpretation and application of a statute which that agency administers[.]" *Kim v. Bd. of Liquor License Comm'rs for Baltimore City*, 255 Md. App. 35, 46 (2022). "With regard to the agency's factual findings, we do not disturb the agency's decision if those findings are supported by substantial evidence." *Sugarloaf*, 227 Md. App. at 546. We also apply the "substantial evidence" standard when a party raises a mixed question of law and fact – that is, "[w]hen a party challenges how an agency applied, as opposed to interpreted, a

statute[.]" *CashCall, Inc. v. Maryland Comm'r of Fin. Regul.*, 448 Md. 412, 426 (2016). "Substantial evidence exists if a reasonable mind might accept the evidence as adequate to support a conclusion." *Becker v. Falls Rd. Cmty. Ass'n*, 481 Md. 23, 42 (2022) (cleaned up).

Analysis

As noted, the LEOBR precluded any law enforcement agency from bringing administrative charges against a law enforcement officer "unless the agency files the charges within 1 year after the act that gives rise to the charges comes to the attention of the appropriate law enforcement agency official." PS § 3-106(a) (effective through June 30, 2022). The LEOBR included an exception to that prohibition, which stated that the one-year statute of limitations "does not apply to charges that relate to criminal activity or excessive force." PS § 3-106(b) (effective through June 30, 2022). In the instant case, it is undisputed that the act that gave rise to the administrative charges came to the attention of an appropriate law enforcement official in or around January 2019. It is equally undisputed that the Department did not file the administrative charges until April 2020, beyond the one-year statute of limitations set forth in the LEOBR. Thus, in order for the Department to bring those charges, the charges needed to "relate to criminal activity or excessive force." As there was no allegation of excessive force, the sole question here is whether the charges related to criminal activity.

The Supreme Court of Maryland[3] discussed this issue at length in *Baltimore Police Department v. Etting*, 326 Md. 132 (1992). There, administrative charges were filed against Baltimore City Police Officer Errol Etting following an incident that occurred in October 1988 in which Etting entered a residence without permission, conducted a search, and then arrested certain individuals without a warrant or probable cause. *Id.* at 135. After the incident came to the attention of the Office of the State's Attorney, but before any administrative charges were filed, the State's Attorney's office decided to review the case for possible criminal action against Etting. *Id.* Ultimately, the State's Attorney declined to pursue a criminal action, and, in March 1989, the Department was informed that no criminal charges would be brought. *Id.* at 135-36. The Department filed formal administrative charges in March 1990, approximately 16 months after the incident that gave rise to the charges was brought to the attention of the Department. *Id.* at 136. Etting thereafter filed for injunctive relief, claiming that the Department failed to bring the administrative charges within the LEOBR's one-year statute of limitations. *Id.* at 136-37. The hearing judge granted Etting's request and found that the Department "had waited too long to bring administrative charges against Etting after learning that there would be no

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See, also*, Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

criminal prosecution." *Id.* at 137. After the Department noted an appeal in this Court, the Supreme Court issued a writ of certiorari on its own motion. *Id.*

The Supreme Court ultimately held that the hearing judge had erred because there was no violation of the LEOBR's statute of limitations. *Id.* at 141. In so doing, the Court established the following test for determining whether certain administrative charges are exempt from the one-year statute of limitations under the "criminal activity" exception contained in the LEOBR:

> We think it clear the legislature intended to exclude from the operation of the one-year limitation all administrative charges arising from an event whenever there exists an objectively reasonable basis to believe that an officer's conduct involved criminal activity and that an investigation to determine whether criminal charges will be filed is either under way or is likely to be initiated within a reasonable time. Until such time as that reasonable basis ceases to exist, whether through the absence of an investigation within a reasonable time, or through an investigation establishing no criminal activity, or through an official indication that any criminal activity will not be prosecuted, all charges arising out of the incident in question are exempt from the one-year limitation.

Id. at 139-40.

The Supreme Court cautioned, however, that its reading of the statute "does not give the Department the discretion to treat all charges as falling within the exception." *Id.* at 140. Instead, the Department must "have a reasonable basis to believe that a criminal investigation or prosecution was likely." *Id.* The Court reasoned, moreover, that "the fact that an officer might have been charged with the common law offense of misconduct in office, will not save a late filing where there was no objectively reasonable basis to believe that the appropriate authorities were actively considering the bringing of such a criminal charge." *Id.* (internal citations omitted). Applying those principles to Etting's case, the

Court concluded that the Department had an objectively reasonable belief that Etting's actions involved criminal activity and that the State's Attorney's office was considering bringing criminal charges against Etting. *Id.* at 141. The Court reasoned, therefore, that the LEOBR's one-year statute of limitations did not begin to run until March 1989, when the State's Attorney's office informed the Department that no criminal charges would be filed. *Id.* The Court concluded that, because the administrative charges were filed within one year of March 1989, there was no violation of the LEOBR's statute of limitations. *Id.*

Turning back to the instant case, we hold that the Department did not violate the LEOBR's one-year statute of limitations by filing administrative charges against Pool in April 2020, approximately 14 months after the incident that gave rise to the charges was brought to the attention of the Department. First, there existed an objectively reasonable basis for the Department to believe that Pool's actions, which involved accessing and disseminating a confidential arrest record and obstructing the subsequent investigation, involved criminal activity. It is a crime for a public official, *i.e.* a police officer, to engage in "corrupt behavior . . . in the exercise of the official's office or under the color of law." *Koushall v. State*, 249 Md. App. 717, 734 (2021), *aff'd*, 479 Md. 124 (2022). It is also a crime for any individual to intentionally, willfully, and without authorization access certain computer networks and databases. Md. Code, Crim. Law § 7-302. Finally, it is a crime for any individual to obstruct or hinder a law enforcement officer in the performance of his or her duties. *Titus v. State*, 423 Md. 548, 558 (2011).

Moreover, there existed an objectively reasonable basis for the Department to believe that an investigation to determine whether criminal charges would be filed was

under way. Sergeant Faulk testified that, while he was conducting his internal investigation, the Office of the State Prosecutor was also conducting a criminal investigation into the matter. Sergeant Faulk stated that he assisted the State Prosecutor by collecting certain Department electronics and by providing certain information as it was collected during the course of his administrative investigation. Sergeant Faulk testified that, on or around September 6, 2019, the State Prosecutor sent a declination letter to the Department indicating that no charges would be filed "in reference to allegations of misconduct in office and other crimes stemming from the dissemination of an expunged arrest record[.]" Sergeant Faulk stated that, due to the declination letter, he decided not to sustain an allegation of criminal misconduct that had been lodged against Pool.

From that, we are persuaded that substantial evidence was presented to show that the administrative charges filed against Pool related to criminal activity. Again, Pool's actions provided an objectively reasonable basis for the Department to believe that one or more crimes had been committed. Moreover, the Department established, via Sergeant Faulk's testimony and the declination letter, that the Office of the State Prosecutor was investigating the incident and considering whether to bring criminal charges, thereby establishing an objectively reasonable basis for the belief that criminal charges would be filed. That objectively reasonable belief was not dispelled until September 2019, when the State Prosecutor issued the declination letter. Thus, under *Etting*, the one-year statute of limitations did not begin to run until September 2019. And, because the administrative charges were filed within one year of that date, no violation of the LEOBR's statute of limitations occurred.

Pool argues that the Department was required to prove "with specificity" that the administrative charges involved criminal activity.[4] We disagree. The sole case on which Pool relies, *Comptroller of the Treasury v. World Book Childcraft Int'l, Inc.*, 67 Md. App. 424 (1986), did not involve the application of the LEOBR, but instead involved the burden of proof regarding the statute of limitations for the levying of tax assessments for failing to file income taxes. *Id.* at 428. Although we held that the Comptroller bore the burden of proving "with specificity" that an exception applied when such a tax assessment is challenged on the basis of limitations, at no point did we state, or even suggest, that such a holding was applicable in any context other than a tax case. *Id.* at 442-45. Rather, we explained that, in a "failure to file" tax case, where the Comptroller seeks to impose a tax assessment for a tax year that preceded the applicable statute of limitations, the burden was on the Comptroller to show that they did not discover the tax payer's failure to file until after the limitations period had expired. *Id.* at 444-45. We based that decision on the general principle that "a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must definitely allege and prove when and how his knowledge of the fraud was obtained, so that the court will be able to determine whether he exercised reasonable diligence to ascertain the facts." *Id.* at 444-45. Clearly, that principle is not applicable here, as the Department is not

[4] The Department maintains that this argument was not preserved because it was not raised below. Although we agree that Pool's specific argument does not appear to have been raised below, we nevertheless exercise our discretion and consider the matter preserved. Md. Rule 8-131(a).

claiming that there was any sort of fraud that caused the delay in the filing of the charges against Pool.

Moreover, we could find no language in *Etting*, the seminal case on the applicability of the criminal activity exception to the LEOBR's one-year statute of limitations, to indicate that any "specificity" showing is required in such cases. Rather, the Supreme Court's analysis and holding in that case makes plain that our decision here should be guided not by any "specificity" requirement but rather by the aforementioned principles of judicial review of an administrative decision, namely, whether the agency's legal conclusions were correct as a matter of law and whether the agency's factual findings were supported by substantial evidence.

Pool also argues that the Board erred as a matter of law in failing to make a finding as to each prong outlined in *Etting*, *i.e.*, that his conduct involved criminal activity and that an investigation to determine whether criminal charges would be filed was under way.[5] Again, we disagree. There is nothing in *Etting* to suggest that the Board was required to make any such findings. Again, the question is not whether the Board made certain findings; the question is whether the Board's decision was in accordance with the law and supported by substantial evidence.

Finally, Pool contends that the standard enunciated in *Etting* "implicitly implies" that, for the limitations period to be tolled, there must be evidence that he was a part of the

[5] The Department maintains that this argument was also not preserved because it was not raised below. As with Pool's prior argument, although we agree that the highlighted argument does not appear to have been raised below, we nevertheless exercise our discretion and consider the matter preserved. Md. Rule 8-131(a).

investigation by the Office of the State Prosecutor. Pool argues that none of the evidence concerning the State Prosecutor's investigation included his name or otherwise indicated that he was a part of that investigation.

We remain unpersuaded, as we do not read *Etting* so broadly. In fact, the language of *Etting* is quite clear: for the limitations period to be tolled, the Department must have had an objectively reasonable basis to believe that: 1) an officer's conduct involved criminal activity; and 2) that an investigation to determine whether criminal charges will be filed was either under way or was likely to be initiated within a reasonable time. *Etting*, 326 Md. at 139-40. Nothing else, including evidence that the officer was a part of any investigation, is required.

In sum, we hold that substantial evidence was presented establishing an objectively reasonable basis for the Department to have believed that the conduct that led to the administrative charges against Pool involved criminal activity. We hold further that substantial evidence was presented establishing an objectively reasonable basis for the Department to have believed that a criminal investigation into the matter was underway. Those reasonable beliefs were not dispelled until September 2019, when the State's Prosecutor sent the declination letter to the Department, thereby tolling the one-year statute of limitations and permitting the Department to file the administrative charges in April 2020. For those reasons, the Board did not err in relying on the "criminal activity" exception in denying Pool's motion to dismiss.

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