

Circuit Court for Carroll County
Case No. C-06-CV-18-000427

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1237

September Term, 2019

MARYLAND DEPARTMENT OF HEALTH

v.

MARCUS HINES

Wells,
Gould,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: November 6, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Maryland Department of Health (the “Department”), challenges an order of the Circuit Court for Carroll County reinstating the appellee, Marcus Hines, as an employee of the Department, and ordering the Department to comply with the provisions of the Law Enforcement Officers’ Bill of Rights (“LEOBR”).¹ On appeal, the Department presents the following questions for our review:

1. Did the circuit court err in finding that Mr. Hines was a law enforcement officer who was entitled to procedural due process rights in the LEOBR prior to his termination?
2. Did the circuit court err in finding that the Department “improperly used its superior power” over Mr. Hines when it complied with its duty to obtain certification from the [Maryland Police Training and Standards Commission]?

For the reasons set forth below, we hold that the trial court erred in determining that Mr. Hines was entitled to the procedural protections of the LEOBR. We further conclude that the circuit court erred in finding that the Department improperly used “its superior position of power to circumvent the LEOBR.” Accordingly, we shall reverse the judgment of the circuit court.

BACKGROUND AND PROCEDURAL HISTORY

Mr. Hines began his employment with the Department as a Police Officer II (Skilled Service) effective January 22, 2014. Mr. Hines was assigned to the Springfield Secure Evaluation & Therapeutic Treatment Program (the “SETT”).

¹ Md. Code (2003, 2018 Repl. Vol.), §§ 3-101 – 3-116 of the Public Safety Article. All statutory citations shall refer to the LEOBR.

The job description for the Police Officer II position provided that “[e]mployees may be required to possess or obtain a special police commission in accordance with the Annotated Code of Maryland, Public Safety Article, Section 3-209.” The Department applied to the Department of Public Safety for Mr. Hines to be appointed and deputized as a Special Police Officer (“SPO”), and Mr. Hines received a three-year SPO commission effective September 27, 2016.

The Police Officer II position also required certification issued by the Maryland Police Training and Standards Commission (“Commission”). When Mr. Hines was hired as a Police Officer II, he had a valid certification from the Commission from his previous employment with the Baltimore City Sheriff’s Office. Mr. Hines’s Commission certification expired during the course of his employment with the Department. Mr. Hines could not personally apply for recertification, however, as the Commission could only act on applications for certification filed by the applicable law enforcement agency, in this case, the Department.

In November of 2017, the Department completed an application for certification to the Commission on behalf of Mr. Hines. The Department also applied to the Commission for a waiver of certain education and training requirements on behalf of Mr. Hines and four other officers. In March of 2018, the Commission issued Mr. Hines a 90-day provisional certification card, pending his waiver application. Following the issuance of the 90-day provisional certification card, the Department submitted additional information to the Commission regarding its investigation into Mr. Hines’s prior employment history.

At the Commission meeting on July 18, 2018, the Department advised the Commission that the Department had learned, as part of its background investigation for Mr. Hines’s application for certification, that Mr. Hines had resigned from his employment with the Baltimore City Sheriff’s Office in lieu of termination on July 13, 2013. According to the Sheriff’s Office, Mr. Hines had reportedly “left his assigned duty post without being properly relieved and [was] subsequently charged administratively with abandoning his post.”² As a result of the information regarding Mr. Hines’s resignation from his employment with the Sheriff’s Office, the Commission denied Mr. Hines’s application for certification.

On August 7, 2018, the Department notified Mr. Hines that he was instructed to attend a mitigating circumstances conference the following day. At that conference, Mr. Hines was asked whether he had obtained certification from the Commission. On August 8, 2018, the Department notified Mr. Hines that he was instructed to attend a second mitigating circumstances conference on August 10, 2018. Mr. Hines was provided with an opportunity at that conference to explain his failure to receive certification. Mr. Hines specifically requested that the Department honor his LEOBR rights and refused to answer questions.

The Department issued a termination letter to Mr. Hines dated August 14, 2018, citing his lack of Commission certification as the reason for his termination. The

² Evidence introduced at trial indicated that no administrative charges were pending against Mr. Hines.

Department did not provide Mr. Hines with a hearing under the LEOBR prior to his termination.

On November 5, 2018, Mr. Hines filed a petition for a Show Cause Order in the circuit court. Following a hearing on Mr. Hines’s petition, the circuit court issued a Memorandum Opinion and Order, concluding that, at the time of his termination from the Department, Mr. Hines was a law enforcement officer, subject to the terms of the LEOBR. The court found that the mitigating conferences that occurred on August 7, 2018 and August 10, 2018, were investigations that were required to be conducted in accordance with the LEOBR. The court further found that, pursuant to the LEOBR, Mr. Hines was entitled to a hearing prior to his termination, and the Department failed to provide him with a hearing.

The court determined that Mr. Hines’s “rights as a law enforcement officer pursuant to the LEOBR were violated when he was forced to attend the mitigating conferences without written notice of the nature of the investigation or enough time for him to obtain an attorney and when he was terminated without the opportunity for a hearing on the issues leading to his termination.” The court ordered that the Department comply with the LEOBR “with regard to any further disciplinary proceedings against [Mr. Hines],” and further ordered Mr. Hines “restored to his *status quo ante*” and reinstated as an employee of the Department in the position of Police Officer II, with back pay and benefits to be paid as of August 14, 2018.

The Department noticed a timely appeal.

DISCUSSION

The Department argues that the circuit court erred in finding that Mr. Hines was a law enforcement officer, whose termination was the result of a disciplinary investigation, within the meaning of the LEOBR. The Department further contends that the circuit court erred in concluding that the Department improperly used “its superior position” to ignore its obligation to obtain certification for Mr. Hines and assert that his lack of certification was a basis for dismissal.

Mr. Hines responds that the circuit court’s determination that he was a law enforcement officer entitled to the protections of the LEOBR was legally correct and supported by substantial evidence. Mr. Hines asserts that he was fully certified and qualified for the position of Police Officer II when the Department hired him, and the Department failed to timely apply for re-certification. He asserts that the circuit court correctly determined that the Department improperly used its superior power over him by ignoring its obligation to obtain certification from the Commission and disregarding his rights under the LEOBR.

We review the circuit court’s legal conclusions interpreting the application of the LEOBR *de novo*. See *Baltimore Police Dep’t v. Brooks*, 247 Md. App. 193, 205 (2020) (reviewing *de novo* a statute of limitations tolling issue under the LEOBR); *Mohan v. Norris*, 386 Md. 63, 66-67 (2005) (noting that matters of statutory construction interpreting the LEOBR are issues of law, which we review *de novo*); *Davis v. Slater*, 383 Md. 599, 604 (2004) (explaining that “[b]ecause our interpretation of . . . provisions of the Maryland

Code . . . are appropriately classified as questions of law, we review the issues *de novo* to determine if the trial court was legally correct in its rulings on these matters”).

I.

The LEOBR was enacted in 1974 to provide procedural safeguards to “law enforcement officers,” as defined in the statute, during any investigation that could result in disciplinary action or termination. *Mohan*, 386 Md. at 67. The LEOBR defines “law enforcement officer” as “an individual who: (i) in an official capacity is authorized by law to make arrests; and (ii) is a member of . . . the Maryland Department of Health.” § 3-101(e)(1). The LEOBR provides that an “investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to dismissal shall be conducted in accordance with [LEOBR].” § 3-104(a). The LEOBR provides “extensive rights to law enforcement officers that are not available to the general public.” *Myers v. Montgomery Cnty. Police Dep’t*, 96 Md. App. 668, 686 (1993). The LEOBR also provides an officer’s exclusive remedy in all police disciplinary matters. *Mohan*, 386 Md. at 69.

The LEOBR does not require that an individual have a valid certification from the Commission to qualify as a “law enforcement officer.” The LEOBR requires only that an individual be “authorized by law to make arrests,” and be employed by one of the enumerated law enforcement agencies, including the Department. The parties do not dispute that as of August 7, 2018, Mr. Hines had a valid SPO certification, which gave him the authority to make arrests on the SETT property. Mr. Hines’s authority to make arrests, therefore, derived from his commission as an SPO.

Section 3-307 of the Public Safety Article governs the scope of the powers of SPOs, and provides that an SPO is authorized to:

- (1) arrest individuals who trespass or commit offenses on the property described in the application for the commission;
- (2) exercise the powers of a police officer on the property described in the application for the commission;
- (3) exercise any powers of a police officer in a county or municipal corporation of the State in connection with the care, custody, and protection of other property of the entity that requested the appointment of the special police officer or other property, real or personal, for which the entity has assumed an obligation to maintain or protect; and
- (4) direct and control traffic on public highways and roads in the immediate vicinity of the property described in the application for the commission in order to facilitate the orderly movement of traffic to and from the property if the Secretary approves of this activity in advance.

This Court has considered the powers of an SPO, and determined that: “[i]t is not the police power itself that is limited, but only the circumstances under which it may be exercised off the particular property described in the application for the commission.” *Gray v. State*, 38 Md. App. 343, 347 (1977). In *Gray*, the defendant was suspected of shoplifting from a drug store and was arrested by an SPO employed by the store. *Id.* at 345. In the course of the arrest, the SPO conducted a pat down and discovered 70 bags of cocaine in the defendant’s shirt pocket. *Id.* The defendant moved to suppress evidence of the cocaine, arguing that the SPO’s authority to conduct a search incident to arrest was limited to searching for property belonging to the store, and that he had no authority to

conduct a general search of the defendant pursuant to the scope of his duties. *Id.* at 345-46.

In ruling that the SPO had authority to conduct the search that produced the cocaine, we explained that the SPO had the same power as a regular police officer to enforce the criminal law, including conducting a search incident to arrest. *Id.* at 347. We recognized that, when acting within their respective jurisdictions, the powers of an SPO are no different than those of a police officer. *Id.* at 353.

The Court of Appeals has noted that “[w]hen special police officers are enforcing the criminal law, they are exercising governmental powers which involve state action.” *Waters v. State*, 320 Md. 52, 58 (1990) (distinguishing SPOs from security guards, in determining that a security guard did not possess the police powers of an SPO and, therefore, was not a state actor); *see also Griffin v. Maryland*, 378 U.S. 130, 135 (1964) (recognizing that arrests made by special deputy sheriffs employed by a private park constituted state action where “an individual is possessed of state authority and purports to act under that authority”).

The Department further contends that once the Commission denied the Department’s request for Mr. Hines’s certification, he was no longer qualified to be a member of the Department’s police force. Section 3-217 provides that “[a]n individual may not serve as a police officer when the certification of the police officer has lapsed or has been suspended or revoked by the Commission.” The Department argues that because Mr. Hines lacked certification, he was not, as a matter of law, a qualified law enforcement officer, and therefore, he was not entitled to the protections of the LEOBR.

We disagree with the Department’s argument that Mr. Hines was not a “law enforcement officer” under the LEOBR once he became an “unqualified” police officer. At the time of his termination, Mr. Hines had a valid SPO commission, providing him with arrest powers, which did not expire until 2019. Though Mr. Hines’s arrest powers were limited to the property of the Department, that condition did not in any way limit his status as a “law enforcement officer” as defined in the LEOBR.

II.

The Department contends that the LEOBR did not apply because Mr. Hines’s termination was neither punitive nor the result of a disciplinary investigation. Mr. Hines contends that the Department has failed to preserve this issue because the Department did not raise the issue before the circuit court as a basis for his exclusion from the LEOBR.

Maryland Rule 8-131(a) provides that: “[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]” At trial, the Department argued that Mr. Hines’s supervisors had indicated that “they were not trying to conduct an investigation.” The Department’s position was that the mitigation conferences that occurred on August 7, 2018 and August 10, 2018 were not conducted “for the purpose of learning about any disciplinary issues. It was solely to see if he had certification and he did not.” The circuit court concluded, as a matter of law, that the mitigation conferences that occurred on August 7, 2018 and August 10, 2018 were investigations that required compliance with § 3-104 of the LEOBR. Accordingly, because the issue of whether Mr. Hines’s termination was the result of an

investigation within the meaning of the LEOBR was both raised in and decided by the trial court, it is preserved for our review.

Section 3-104(a) provides that “[t]he investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal shall be conducted in accordance with [the LEOBR].” Section 3-107(a) further provides that “if the investigation or interrogation of a law enforcement officer results in a recommendation of demotion, dismissal, transfer, loss of pay, reassignment, or similar action that is considered punitive, the law enforcement officer is entitled to a hearing on the issues by a hearing board before the law enforcement agency takes action.” The procedural safeguards of the LEOBR are invoked only in cases involving “a threshold investigation or interrogation resulting in a recommendation of punitive action[.]” *Fraternal Order of Police Montgomery Cnty. Lodge 35 v. Manger*, 175 Md. App. 476, 501 (2007) (citations omitted). In other words, “an investigation must precede the application of the rights pursuant to the LEOBR.” *Id.* at 497. *See also Coleman v. Anne Arundel Cnty. Police Dep’t*, 369 Md. 108, 122 (2002) (explaining that the procedural protections of the LEOBR are available to officers during internal investigations and administrative hearings that could result in discipline, demotion or dismissal of the officer).

An investigation for purposes of the LEOBR has been defined as “something more than counseling sessions, but . . . less than formal complaints.” *Liebe v. Police Dep’t of Annapolis*, 57 Md. App. 317, 323 (1984). “Every inquiry does not necessarily implicate the LEOBR.” *Manger*, 175 Md. App. at 497. The LEOBR is intended to apply “only when

an officer is “investigated and/or interrogated as a result of a disciplinary-type complaint lodged against the officer.”” *Id.* at 502 (quoting *Calhoun v. Commissioner*, 103 Md. App. 660, 672 (1995) (holding that annual, routine polygraph examination required of all police officers was “designed to regulate the competent and efficient operation and management of the drug enforcement units,” and was not an investigation or interrogation for purposes of LEOBR). *See also* *Widomski v. Chief of Police of Baltimore Cnty.*, 41 Md. App. 361, 369-70 (1979) (recognizing that a polygraph examination was not an investigation, even though it was conducted in connection with an internal investigation for misconduct, the officer was not under investigation or interrogated for reasons which “could have led to disciplinary action, demotion or dismissal” at the time he was asked to submit to the polygraph).

General work performance evaluations conducted “using departmental competency standards which are applied consistently to all police officers in evaluating overall job performance” do not constitute investigations within the meaning of the LEOBR. *See Cancelose v. City of Greenbelt*, 75 Md. App. 662, 668 (1988). The procedural safeguards of the LEOBR do not apply where an officer’s termination was based upon his unsatisfactory work performance. *Id.* Similarly, when an officer is involuntarily transferred following “counseling sessions” to address “shortcomings in his conduct, so that his future performance might be improved[,]” the procedural protections of the LEOBR do not apply. *See Chief, Baltimore Cnty. Police Dep’t v. Marchsteiner*, 55 Md. App. 108, 116 (1983).

We have also recognized that the monitoring and review of an officer’s sick leave records was not an “investigation” within the meaning of the LEOBR, affirming the trial court’s finding that an officer’s demotion “was an exercise of the Chief’s power and responsibility to effectively and efficiently operate the law enforcement agency,” rather than “the result of a disciplinary type complaint and investigation.” *Liebe*, 57 Md. App. at 320.

We have consistently held that compliance with ongoing job requirements was neither an investigation nor interrogation within the LEOBR. In this case, the Department’s completion of a background check as part of the application for Mr. Hines’s certification was an administrative task. It was not the result of a disciplinary-type complaint. The decision to terminate Mr. Hines due to the denial of his application for certification was an administrative decision based on an evaluation of his compliance with the requirements of his position. *See Calhoun*, 103 Md. App. at 673 (noting that decisions based on evaluations of competency, applied consistently to all officers, “were not investigations or interrogations sufficient to trigger the protections of the LEOBR”). Mr. Hines was not under “investigation” by the Department, and therefore, he was not entitled to the protections of the LEOBR. Accordingly, the circuit court erred in concluding that the mitigation conferences that occurred on August 7, 2018 and August 10, 2018 were investigations that were required to be conducted in compliance with the LEOBR.

The Department further contends that Mr. Hines’s termination was not a punitive measure requiring a hearing under the LEOBR. Because we conclude that Mr. Hines’s termination was not the result of an investigation or interrogation, we need not address this

issue. *Id.* (explaining that, once the determination was made that the officers’ reassignment to other units was not the result of an investigation or interrogation, the court need not address the officers’ contention that their reassignment was also punitive).

III.

The circuit court determined, as a matter of fundamental fairness, that Mr. Hines was entitled to the protections of the LEOBR:

The [Department] improperly used its position of power to circumvent the LEOBR, and create the circumstances where [Mr. Hines] was not certified under the [Commission]. An agency may not “exploit its superior position” with regard to certification or commissioning and claim lack of certification or commissioning as the basis for denying an individual law enforcement officer status. *Town of Cheverly Police Dep’t v. Day*, 135 Md. App. 384, 393 (2000). The “fundamental fairness” described in *Day* provides a separate and distinct reason why [Mr. Hines] should be afforded his LEOBR rights and protections. *Id.* at 393.

In *Town of Cheverly Police Dep’t v. Day*, 135 Md. App. 384 (2000), we addressed the issue of whether a law enforcement officer was entitled to the procedural protections of the LEOBR in the course of his termination from the police department due to the police department’s failure to seek recertification from the Commission on his behalf. Shortly after *Day* was hired by the Department, the Department applied for and obtained certification for him. A few months later, the Department learned that *Day* was facing potential criminal charges resulting from his collection of sick leave pay from his previous employment. *Id.* at 387. Based on that information, the police department returned *Day*’s certification card to the Commission and suspended him, informing him that he was not entitled to the procedural rights of the LEOBR because he was only a “probationary employee.” *Id.*

While suspended from the police department, Day was acquitted of criminal charges pertaining to his previous employment. *Id.* at 388. Despite that acquittal, the police department did not request the return of Day’s certification from the Commission, but instead, sent him a letter stating that he was terminated because he was presently without certification, and the adverse information regarding his previous employment would have disqualified him from employment had it been discovered initially. *Id.* Day filed a petition for contempt and sought an injunction in the circuit court. *Id.* at 388-89. The circuit court found that Day was entitled to the protections of the LEOBR and directed the police department to reinstate Day. *Id.* at 390. The police department appealed.

This Court determined that Day qualified as a law enforcement officer under the LEOBR because, at the time the police department initiated its termination efforts, Day had a valid certification from the Commission. *Id.* at 391-92. The police department had conducted a “facially adequate” background check of Day, and based upon the department’s representation to the Commission that Day was an officer in good standing, the Commission issued Day a certification card. *Id.* Day’s certification was revoked when the police department notified the Commission of the charges pending against Day, but after those charges were dismissed, the department did not seek to have Day’s certification reinstated. *Id.* at 388. We recognized that Day was faced with a “catch 22” because only the police department could request that the Commission return his certification, and without that certification, Day was no longer qualified for his position as a law enforcement officer. *Id.* at 393. To balance the inequity of the situation caused by the department’s

“attempt to exploit its superior position” and prevent Day from obtaining certification, we determined that Day was entitled to the rights and protection of the LEOBR. *Id.*

The major distinction between *Day* and the present case is that the police department in *Day* failed to apply for recertification after Day was cleared of the criminal liability that had disqualified him from certification.³ Had the department done so, presumably Day’s certification would have been restored and he would have been qualified for his position. In the present case, Mr. Hines was not “cleared” of the issue that had disqualified him from certification, and, therefore, there was no basis for the Department to apply for his recertification.

We conclude that the Department did not abuse its superior position in this case. It was not the Department that was preventing Hines from becoming certified — it was the report from his previous employer that had disqualified him and kept him from being certified. Though the Department’s delay of over four years in seeking certification for Mr. Hines was inexplicable, that delay was not the cause of Mr. Hines’s failure to obtain certification.

**JUDGMENT OF THE CIRCUIT COURT FOR
CARROLL COUNTY REVERSED. COSTS
TO BE PAID BY APPELLEE.**

³ We also note that the *Day* decision did not address the issue of whether Day’s termination was the result of an investigation or interrogation within the meaning of the LEOBR.