UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0109

September Term, 2015

LYNDA NESER

v.

HOWARD COUNTY PERSONNEL BOARD

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Berger, J.

Filed: February 4, 2016

This appeal involves a dispute regarding the interpretation of the overtime pay provisions outlined in the Howard County General Pay Plan ("HCGPP"). Appellant, Lynda Neser ("Neser") contends that she was deprived of compensation to which she was entitled under certain provisions of the HCGPP. Neser filed a grievance with the Howard County Personnel Office. A personnel officer denied Neser's grievance. Neser then appealed the personnel officer's decision to the appellees, the Howard County Personnel Board ("the Board"). The Board adopted the findings of the personnel officer and affirmed the denial of Neser's grievance. Neser then filed a petition for judicial review in the Circuit Court for Howard County. The circuit court affirmed the decision of the Board. This timely appeal followed.

On appeal, Neser presents two issues for our review,[1] which we consolidate and rephrase as follows:

> Whether the Board erred by interpreting the call-in overtime provision of the HCGPP to limit the availability of call-in pay to the first call-in during any one stand-by period when she may be called-in to work.

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[1] The issues, as presented by Neser, are:

1. Did the Circuit Court for Howard County and the Personnel Board for Howard County Err as a Matter of Law by Ruling that the "Call-[i]n" Overtime Provision was not Ambiguous?

2. Assuming the "Call-in" Overtime Provision was Ambiguous, did the Circuit Court and the Personnel Board Err as a Matter of Law by Interpreting the Provision Against Lynda Neser?

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Howard County, and the decision of the Board.

FACTUAL AND PROCEDURAL BACKGROUND

Neser is employed as a classified, civilian, "non-uniformed" Police Services Supervisor I ("PSSI") with the Howard County Police Department's Animal Control Division. Neser has occupied her position since 1997. Neser's responsibilities include supervising employees within her division. Neser is not a member of a union. Neser's subordinates, however, are members of AFSCME Local 3085. Therefore, while her subordinates' pay is governed by a collective bargaining agreement, Neser's compensation is governed by the HCGPP.

Neser typically works Monday through Friday from 7:30 a.m. until 4:00 p.m. In addition to her normal work schedule, Neser is on stand-by four days a week. An employee is on stand-by and called into work if a situation arises after animal control is closed, usually between the hours of 4:30 p.m. and 7:30 a.m. Neser is credited two hours of regular pay for each stand-by period when she may be called-in. A stand-by period is a period between the employee's regularly scheduled work shift, or for each 24-hour period between work shifts. Furthermore, in addition to the two hours of stand-by pay, the HCGPP provides that "[a PSSI] who is called in to work hours which are not contiguous to their regular shift shall receive a minimum of 4 hours['] pay at the overtime rate." Neser's subordinates have a similar provision in their collective bargaining agreement. The collective bargaining

agreement has been interpreted to permit only one award of call-in pay for the first call-in during any one stand-by period.

In December of 2012, Neser was called-in multiple times over the duration of one stand-by period. It came to Neser's attention that although she was called-in to work several times, she was only afforded four hours of overtime pay during the stand-by period. Neser perceived the county's interpretation of the HCGPP as erroneous and raised the issue with the county's Police Personnel Supervisor. Neser claimed that she was entitled to receive a minimum of four hours' pay at the overtime rate for each instance when she is called-in, rather than once per stand-by period. Accordingly, Neser demanded that she be compensated for the overtime pay she was denied since the county began employing its more restrictive interpretation of the HCGPP in 2007. Stacie Vollentine, the county's Police Personnel Supervisor, indicated to Neser that Neser was correct and that the county had been employing an erroneous interpretation of the HCGPP.

After Neser made her initial complaint, the police department began compensating Neser in February 2013 in accordance with her interpretation of the HCGPP. Additionally, Neser's employer agreed to compensate her as if the agency had subscribed to her interpretation of the HCGPP for the times she was called-in in December of 2012. The Board then continued to interpret the HCGPP to provide Neser four hours of overtime pay for each instance when she was called-in. Thereafter, in spring of 2013, County bill No. 23-2013 was enacted which amended the HCGPP. The amendment was dubbed a "Clarification of Call-in Pay," and provides:

> A [PSSI] who is called in to work hours which are not contiguous to their regular shift shall receive a minimum of 4 hours[’] pay at the overtime rate. Such employee officially assigned to stand-by status shall receive minimum call-in pay, in addition to their stand-by pay, for the first call-in during any one stand-by period. Any additional required work time during the same stand-by period shall be paid as overtime (i.e. time and one-half) for actual hours worked. Pay shall start when the supervisor receives notice to report to work.

Neser later filed a formal grievance alleging that she was not paid in accordance with the HCGPP between July of 2007 and January of 2013. On October 31, 2013, the parties appeared before a personnel officer for a hearing. The question before the personnel officer was whether, between 2007 and 2013, the call-in provision of the HCGPP should be interpreted to limit the four hours of call-in pay to which a PSSI may be entitled to the first call-in during any one stand-by period. On this issue, the personnel officer heard testimony from Major Lee Lachman (“Major Lachman”), and Arthur Griffin (“Griffin”).

Major Lachman was the Chief of Administration for the Howard County Police Department. Major Lachman testified that when Neser brought the issue of call-in pay to his attention, he recognized that the HCGPP was unclear. Accordingly, he decided that the agency would interpret the HCGPP in Neser’s favor until the HCGPP could be amended to reflect its intent that a PSSI only receive call-in pay for the first call-in during any one stand-by period. Major Lachman emphasized, however, that he believed that the agency’s original interpretation of the HCGPP was correct and that he was under no obligation to interpret the HCGPP in Neser’s favor. Rather, Major Lachman testified that the call-in provision was intended to pass-through the benefits that Neser’s subordinates received to Neser.

Both Major Lachman and Griffin testified that a pass-through benefit occurs when a supervisor is granted the benefits held by the unionized subordinates of the supervisors. The subordinates' benefits are often negotiated as a part of their collective bargaining agreement. The county has an interest in providing pass-through benefits to supervisors because it provides incentives for subordinates who seek promotions. Accordingly, Major Lachman averred that the 2007 revision to the HCGPP was to provide Neser a pass-though and place her on par with her subordinates.

Additionally, Griffin testified before the personnel officer. Griffin was the Chief of Classification and Pay for the Office of Human Resources in the Department of County Administration. Griffin assisted in drafting both the 2007 and the 2013 versions of the HCGPP. Griffin testified that prior to 2007, only uniform police and fire supervisors and the dispatch supervisors were afforded call-in pay. Griffin further averred that Neser was granted call-in pay in 2007 as a pass-through to make her compensation comparable to her subordinates. Further, Griffin averred that although other police officers are provided call-in pay for every instance when they are called-in, other police officers are not eligible for stand-by pay. Rather, Griffin claimed that the 2007 HCGPP was intended to pass-through the benefits received by Neser's subordinates, namely call-in pay that is limited to the first call-in during any one stand-by period.

Neser, for her part, testified that when she reported the discrepancy to the Police Personnel Supervisor, she was advised that the Board was looking into her complaint. Neser further averred that the Police Personnel Supervisor told her that the county had "been paying

[her] wrong all along and [the county is] going to start doing is . . . paying [Neser] four hours at time and a half for every individual call . . ."

The personnel officer rendered her decision against Neser on December 13, 2013. The personnel officer determined that the provision of the HCGPP that was in effect during the time period at issue was ambiguous. In so finding, the personnel officer determined that "[t]he language is clear as to **a** single call-in. The language is not clear whether additional compensation in the form of a 4-hour block of pay must be made for each additional call-in." (emphasis in original). Further, the personnel officer determined that the intent of the amendment to the HCGPP was that it mirror the terms of the collective bargaining agreement to which her subordinates were subject. Finally, the personnel officer observed that if the Board were to adopt Neser's construction of the HCGPP, Neser would be the only supervisor in the county receiving something different than her subordinates. Accordingly, the personnel officer denied Neser's claim for relief.

Thereafter, Neser appealed the personnel officer's decision to the Board. The Board considered Neser's position at a hearing on March 19, 2014. The Board subsequently affirmed the personnel officer's decision on March 24, 2014. Neser then filed a petition for judicial review in the Circuit Court for Howard County. The circuit court, by memorandum opinion dated March 12, 2015, ruled against Neser and affirmed the decision of the Board. This timely appeal followed. Additional facts will be discussed as necessitated by the issues presented.

DISCUSSION

I. Standard of Review

"'On appellate review of the decision of an administrative agency, this Court reviews the agency's decision, not the circuit court's decision.'" *Long Green Valley Ass'n v. Prigel Family Creamery*, 206 Md. App. 264, 273 (2012) (quoting *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008)); *Ware v. People's Counsel for Balt. Cnty.*, 223 Md. App. 669, 680 (2015) ("In an appeal from a judgment entered on judicial review of a final agency decision, we look 'through' the decision of the circuit court to review the agency decision itself."). Moreover,

> "Our review of the agency's factual findings entails only an appraisal and evaluation of the agency's fact finding and not an independent decision on the evidence. This examination seeks to find the substantiality of the evidence. That is to say, a reviewing court . . . shall apply the substantial evidence test to the final decisions of an administrative agency . . . In this context, substantial evidence, as the test for reviewing factual findings of administrative agencies, has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Tomlinson v. BKL York LLC, 219 Md. App. 606, 614 (2014) (alterations omitted) (quoting *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 568-69 (1998)).

While we largely defer to the factual findings of an administrative agency, "reviewing courts are under no constraint to affirm an agency decision premised solely upon an erroneous conclusion of law." *Ins. Comm'r for the State v. Engelman*, 345 Md. 402, 411 (1997). Indeed, "with respect to an agency's conclusions of law, we have often stated that

a court reviews *de novo* for correctness." *Schwartz v. Md. Dept. of Natural Res.*, 385 Md. 534, 554 (2005). We note that the material facts in this case are not in dispute, and the question before us involves only the legal construction of the HCGPP.

> Determining whether an agency's "conclusions of law" are correct is always, on judicial review, the court's prerogative, although we ordinarily respect the agency's expertise and give weight to its interpretation of a statute that it administers. . . . Of course, even though an agency's interpretation of a statute is often persuasive, the reviewing court must apply the law as it understands it to be. . . . Nevertheless, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.

Christopher v. Montgomery Cnty. Dept. of Heath & Human Servs., 381 Md. 188, 198 (2004) (internal quotations and citations omitted). With these principles in mind, we proceed to determine whether the Board erred in construing the relevant provisions of the HCGPP to preclude Neser from obtaining more than one four-hour block of call-in overtime per each stand-by period.

II. The Board Did Not Err in Construing the HCGPP to Preclude Multiple Call-In Hours Within a Single Stand-By Period.

The crux of this case hinges on the construction of the provision of the HCGPP that, between 2007 and the spring of 2013, provided that

> A Police Services Supervisor I who is called in to work hours which are not contiguous to their regular shift shall receive a minimum of 4 hours['] pay at the overtime rate.

The HCGPP is promulgated and revised by the Board and enacted upon a vote of the County Council pursuant to Article VII, § 706 of the Howard County Charter. Although the

HCGPP is a hybrid between a local government ordinance and an administrative regulation, "[w]hen we construe an agency's rule or regulation, 'the principles governing our interpretation of a statute apply.'" *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 298 (2015) (quoting *Christopher*, *supra*, 381 Md. at 209). Accordingly, as we set out to construe the HCGPP, our analysis begins by observing that:

> The goal of statutory construction is to discern and carry out the intent of the Legislature. [We] have aptly summarized this quest, based on [the Court of Appeals'] past decisions, as one that requires an examination of the statutory text in context, a review of legislative history to confirm conclusions or resolve questions from that examination, and a consideration of the consequences of alternative readings. "Text is the plain language of the relevant provision, typically given its ordinary meaning, viewed in context, considered in light of the whole statute, and generally evaluated for ambiguity. Legislative purpose, either apparent from the text or gathered from external sources, often informs, if not controls, our reading of the statute. An examination of interpretive consequences, either as a comparison of the results of each proffered construction, or as a principle of avoidance of an absurd or unreasonable reading, grounds the court's interpretation in reality." *Town of Oxford v. Koste*, 204 Md. App. 578, 585–86, 42 A.3d 637 (2012), *aff'd*, 431 Md. 14, 63 A.3d 582 (2013) (citations omitted).

Blue v. Prince George's Cnty., 434 Md. 681, 689 (2013). Stated another way, in interpreting a statute, we consider "three general factors: 1) text; 2) purpose; and 3) consequences." *Koste*, *supra*, 204 Md. App at 585.

A. The Text of the HCGPP is Unclear.

Neser first contends that the Board erred in looking beyond the text of the HCGPP to glean the intent of the provision involving call-in pay. Neser argues that the text is

unambiguous, and as such, the Board was unjustified in looking to extrinsic sources to discern the HCGPP's meaning. We disagree. "'The first step in determining legislative intent is to look at the statutory language and if the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous. . . .'" *Johnson v. Mayor & City Council of Balt. City*, 387 Md. 1, 11 (2005) (quoting *Oaks v. Connors*, 339 Md. 24, 35 (1995)). "If the language of the statute is clear and unambiguous, we need not look beyond the statute's provisions and our analysis ends." *Moore v. State*, 424 Md. 118, 127-28 (2011).

An ambiguity exists "[w]hen the language of the statute is subject to more than one interpretation. . . ." *Hammonds v. State*, 436 Md. 22, 40 (2013). Further, there are circumstances when "'[a]n ambiguity may . . . exist even when the words of the statute are crystal clear. That occurs when its application in a given situation is not clear.'" *Bank of Am. v. Stine*, 379 Md. 76, 85 (2003) (alterations in original) (quoting *Blind Indus. & Servs. of Md. v. Md. Dep't of Gen Servs.*, 371 Md. 221, 231 (2002). The threshold question of whether there is an ambiguity, however, is not always as clear as our cases may suggest.

As early as the seventeenth century, the dichotomous classification of words as either unequivocal or ambiguous was considered "the great sophism of all sophisms." Francis Bacon, *The Advancement of Learning* 160 (Claredon Press, 1869) (1605). Indeed, our requirement that an ambiguity exist before we will look beyond the text of a statute "is deceptive in that it implies that words have intrinsic meanings. [Rather, a] word is merely a symbol which can be used to refer to different things." Norman J. Singer & J.D. Shambie

Singer, 2A *Statutes and Statutory Construction* 13-14 (2007). Accordingly, when determining whether an ambiguity is present, "there is no avoiding the fact that impressionistic judgments are doing important work. Some judges read the text and say that it just seems clear. Other judges read the same text and say that it just doesn't." Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation*, 2 J. Legal Analysis 257, 276 (2010).

We further observe that ambiguity may take many forms. An ambiguity may be semantic, syntactic, or contextual. Reed Dickerson, *The Diseases of Legislative Language*, 1 Harv. J. Legis. 7-8 (1964). Notably, these forms of ambiguity involve some text that may be afforded multiple, yet finite, constructions. *See e.g.*, *Id.* at 8, 8 n.9 ("The trustee shall require him promptly to repay the loan" is an example of a syntactic ambiguity. "Does 'promptly' modify 'require' or 'repay'?"); Singer, *supra*, at 15 (Explaining that a semantic ambiguity might exist in the word "bill." "[T]he word 'bill' may refer to an evidence of indebtedness, to currency, to a petition, to a person's name, to the anatomy of a bird, a portion of a cap and a host of other objects. . . ."). Accordingly, in a narrow sense of the word, ambiguity is sometimes said to be but one specific form of indeterminacy that can be found throughout language. Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 Chi.-Kent L. Rev. 859, 860 (2004) ("When discussing indeterminacy in meaning, linguists and philosophers often distinguish between ambiguity and vagueness.").

Our jurisprudence, however, does not take such a narrow view of the sort of ambiguity that must be present before we may look beyond the text of the statute in question.

As such, we are justified in looking beyond the text of the statute when "'its application in a given situation is not clear.'" *Bank of Am.*, *supra*, 379 Md. at 85 (quoting *Blind Indus. & Servs. of Md.*, *supra*, 371 Md. at 231). Indeed,

> [i]n ordinary language [ambiguity] is often confined to situations in which the same word is capable of meaning two different things, but, in relation to statutory interpretation, judicial usage sanctions the application of the word 'ambiguity' to describe any kind of doubtful meaning of words, phrases or longer statutory provisions.

Rupert Cross, *Statutory Interpretation* 76-77 (1976).

In the instant action, Neser correctly observes that there is no ambiguity within the narrow and technical definition of the word ambiguity. Indeed, neither of the parties--nor have we--identified any language that is susceptible to multiple interpretations with respect to its semantics, syntax, or context. To the contrary, the text of the HCGPP unambiguously provides that if a PSSI is called-in then they are entitled to "a minimum of 4 hours[']pay at the overtime rate." In Maryland, however, we generally will not look beyond the text of a statute "if the language of the statute is clear **and** unambiguous." *Moore*, *supra*, 424 Md. at 127 (emphasis added). "Clear and unambiguous," then, may properly be viewed as two distinct elements, the failure of either will permit us to consider other intrinsic or extrinsic aids to determine the intent of the legislature. *Id.*

This broad view of the indeterminacy we require before we may look beyond the text of a statute is in accordance with our "'cardinal rule of statutory construction [which] is to ascertain and effectuate the intent of the Legislature.'" *Walzer v. Osborne*, 395 Md. 563,

571 (2006) (quoting *Mayor & Town Council of Oakland v. Mayor & Town Council of Mountain Lake Park*, 392 Md. 301, 316 (2006)). Accordingly, "[t]he aim or policy of the legislation . . . 'is evinced in the language of the statute as read in the light of other external manifestations of that purpose.'" *Kaczorowski v. Mayor & City Council of Balt.*, 309 Md. 505, 514 (1987) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 538-39 (1947) ("'[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.'" (quoting *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J.)).

In this case, while the HCGPP may not technically be ambiguous, it is nevertheless unclear. The HCGPP provision is silent as to whether call-in pay should be awarded once per every instance when the employee is called-in, once per every stand-by period, or once per every pay period. Indeed, this text might be interpreted so as not to award any unworked hours, but to merely guarantee the employee four overtime hours notwithstanding other hours that the employee may have worked. Without looking beyond the text of this unclear statute, there are myriad constructions that may be afforded to this language. Irrespective of our ultimate holding in this case, upon looking only at the provision of the HCGPP at issue, both the Board's and Neser's positions are at least plausible. To us, looking at no more than the HCGPP, it is unclear whether a PSSI is entitled to an additional four hour award for every subsequent call-in, or whether it was the intent of the Board and the County Council to limit call-in pay to four hours per stand-by period. Accordingly, we consider

other intrinsic and extrinsic aids in an effort to discern the intent of the Howard County Council and the Board in passing the HCGPP.

B. The Purpose of the Legislature was For Call-In Pay to Be Limited to the First Call-In During Any One Stand-By Period.

Neser further contends that the Board erroneously concluded that the intent of the Board and the County Council in enacting the 2007 HCGPP was that a PSSI's pay would be limited to the first call-in during any one stand-by period. After reviewing the record and considering the aids we employ to discern the intent of the Howard County Council and the Board in promulgating the HCGPP, we hold that the Board did not err in constructing the call-in pay provision of the HCGPP to limit a PSSI's call-in pay to the first call-in during any one stand-by period.

If, after considering the text and structure of the statute the text remains either unclear or ambiguous, "courts will look for other clues --e.g., the construction of the statute, the relation of the statute to other laws in a legislative scheme, the legislative history, and the general purpose and intent of the statute." *Breslin v. Powell*, 421 Md. 266, 287 (2011). In our quest to discern the purpose of the County Council and the Board in enacting the HCGPP, we are cognizant that "[t]he 'meaning of the plainest language' is controlled by the context in which it appears." *Kaczorowski*, *supra*, 309 Md. at 514 (quoting *Guardian Life Ins. Co. of Am. v. Ins. Comm'r of Md.*, 293 Md. 629, 642 (1982)). That is, in addition to the particular text of the statutory code section, we also recognize that "to interpret a statutory provision, we must view it 'as a whole, and as part of the larger statutory scheme.'" *Yonga v.*

State, 221 Md. App. 45, 63 (2015) (quoting *Mayor & Council of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 550 (2002)).

In the instant case, the provision of the payment plan relevant to Neser's pay as a PSSI is found within a broader section titled "Overtime and Compensatory Time." Within that broader section, the HCGPP provides the rate at which police lieutenants, PSSIs, emergency communication supervisors, fire captains, battalion chiefs, and assistant chiefs are compensated for instances when they are summoned to work outside of their regular shifts. Moreover, the provisions relating to who is entitled to stand-by pay, and how stand-by pay is awarded are found in another section of the HCGPP. With respect to stand-by pay, "an employee officially assigned to stand[-]by shall receive two (2) hours of pay at the straight time rate for the stand-by period between the employee's regularly scheduled work shift, or for *each* 24[-]hour stand[-]by period between work shifts." (emphasis in original).

Although there is no explicit textual link limiting the availability of call-in pay by the terms of the stand-by pay provision under the 2007 HCGPP, the Board maintains that the provisions of the stand-by pay section serve as a limitation to the quantity of call-in pay a PSSI is entitled to. To the contrary, other police officers governed by subsections (d) and (e) of the Overtime and Compensatory Time section of the HCGPP receive call-in pay for every instance when they are called-in. In his testimony, however, Major Lachman averred that it would be inappropriate to compare a PSSI's benefits to those of other police officers because they are not afforded the benefits of stand-by pay afforded under another section of the HCGPP. Rather, Major Lachman testified that the provisions of the HCGPP involving

call-in pay are more similar to the benefits received by the employee's subordinates in accordance with the county's pass-though policy.

Interestingly, when the HCGPP first granted call-in pay to PSSIs in 2007, the provision at issue here was applicable to both PSSIs and emergency communications supervisors. An emergency communications supervisor is the first line supervisor for the 911 center. In 2011, though CB23-2011, the county amended the HCGPP to separate the call-in provisions for PSSIs and emergency communications supervisors. The provision for PSSIs remained the same as in 2007, but additional limitations were placed on when an emergency communications supervisor could recover a four-hour call-in award. Accordingly, because the same provision was applicable to both PSSIs and emergency communications supervisors between 2007 and 2011, any guidance as to how this provision has been interpreted with respect to emergency communications supervisors will aid our analysis.

Major Lachman testified before the personnel officer that it would be a rare occasion when an emergency communications supervisor was called-in at all, and even rarer when one would be called-in twice during one shift. Further, Major Lachman testified that he was unfamiliar with even one circumstance when an emergency communications supervisor was called-in twice during one shift. The record, however, is silent as to whether an emergency communications supervisor is eligible for stand-by pay, or whether the same limitation the Board would have us read into subsection (c)(3) of the Overtime and Compensatory Time section would be applicable to emergency communications supervisors.

In considering the structure of the HCGPP as a whole, we question the Board's attempt to employ the stand-by provisions found in a separate section of the HCGPP as a limitation on the availability of call-in pay. The testimony before the personnel officer also illustrates, however, that every position outlined in subsections (d) and (e) of the Overtime and Compensatory Time section of the HCGPP is *sui generis* in that each position under that subsection has its own separate overtime provisions in accordance with the practicalities and the demands of each respective job. Accordingly, while the fact that the text of subsection (e)(3) fails to clearly invoke the stand-by period as a limitation on the availability of call-in pay weighs in favor of Neser's interpretation of the HCGPP, so too does the failure of the HCGPP to expressly equate the call-in pay of a PSSI to other police officers undermine her interpretation.

In continuing our search to discern the intent of the Howard County Council and the Board in approving the HCGPP, it is appropriate to consider the legislative and judicial history of a statute "when a clear result cannot be determined solely from the text of the statute[]." *People's Ins. Counsel Div. v. Allstate Ins. Co.*, 424 Md. 443, 458 (2012). "Legislative history includes 'the derivation of the statute, comments and explanations regarding it by authoritative sources during the legislative process, and amendments proposed or added to it. . . ." *Hackley v. State*, 161 Md. App. 1, 14 (2005) (quoting *Boffen v. State*, 372 Md. 724, 736-37 (2003)).

In the instant case, the personnel officer declared that "[i]t is uncontroverted that the intent of this addition to the Pay Plan in 2007 was to treat Appellant like members of Local

3085." In support of the county's position that only one four-hour call-in award is to be granted per every stand-by period, the county relied on the testimony of Griffin. Griffin testified that prior to 2007, only uniform police and fire supervisors, and dispatch supervisors were eligible for call-in pay. Later in 2007, the HCGPP was amended so that a PSSI would be afforded call-in pay. Griffin testified that the 2007 amendment was passed so that Neser, a PSSI, would receive call-in pay at a rate equal to that of her subordinates. Neser's subordinates were eligible to receive four hours of call-in pay for every stand-by period they were available to be called-in. Therefore, according to Griffin, the intent of the HCGPP was that Neser could obtain four hours per stand-by period of call-in pay.

Neser aptly observes that the persuasive value of Griffin's testimony regarding the intent of the HCGPP is tempered by the fact Griffin articulated his statements regarding the section's intent after this question arose concerning the nuances of this provision. Indeed, the persuasive value of Griffin's testimony is discounted to the extent that it might constitute an *ad hoc* iteration of the agency's subsequently articulated intent. Griffin's testimony regarding the intent of this provision is nevertheless consistent with the subsequent amendment made to adopt the Board's interpretation of the statute. "While amendments are not controlling as to the meaning of prior iteration of the same statutory scheme, 'nevertheless, subsequent legislation can be considered helpful to determine legislative intent.'" *Cunningham v. Feinberg*, 441 Md. 310, 347 (2015) (quoting *Johnson*, *supra*, 430 Md. at 389).

In this case, after, and presumably in response to, Neser's complaint regarding her entitlement to call-in pay, the Board promulgated an amendment to the HCGPP which was adopted by the County Council. The revision to the relevant portion of HCGPP added three sentences to the end of the provision that is the subject of this dispute. In total, the amended provision of the HCGPP provides:

> A Police Services Supervisor I who is called in to work hours which are not contiguous to their regular shift shall receive a minimum of 4 hours['] pay at the overtime rate. Such employees officially assigned to stand-by status shall receive minimum call-in pay, in addition to their stand-by pay, for the first call-in during any one stand-by period. Any additional required work time during the same stand-by period shall be paid as overtime (i.e. time and one-half) for actual hours worked. Pay shall state when the supervisor receives notice to report to work.

The subsequent amendment to the HCGPP clearly provides that a PSSI is only entitled to a four-hour call-in award for the first call-in during one stand-by period. Griffin testified that the intent of the revisions to the HCGPP was to clarify the language of the provision, and not to effect any substantive rights regarding a PSSI's entitlement to call-in pay. Critically, Griffin's testimony that the purpose of the amendment to the HCGPP was merely to clarify the agency's understanding of that provision is consistent with our presumption regarding the modification of statutes.

> "Recodification of statutes is presumed to be for the purpose of clarity rather than change of meaning and, thus, even a change in the phraseology of a statute by a codification will not ordinarily modify the law unless the change is so radical and material that the intention of the Legislature to modify the law appears unmistakably from the language of the Code."

Windesheim v. Larocca, 443 Md. 312, 346 (2015) (alterations omitted) (quoting *Allen v. State*, 402 Md. 59, 71-72 (2007)).

The use of the word "'clarifying' can mean . . . that this is what lawmakers viewed as the state of the law all along." *Johnson*, *supra*, 430 Md. at 389. As Neser aptly observes, however, an amendment classified as a clarification "can also signify . . . an oversight that lawmakers subsequently decided to correct by 'clarifying' the law." *Id.* at 389-90. These two inferences regarding the interpretive significance of a clarification, however, are not necessarily at odds with each other. Indeed, while Griffin asserted that the subsequent amendment to the HCGPP was intended to clarify the relevant provision so as to be in accordance with the Board's pre-existing intent and long-standing interpretation of that provision, he also acknowledged that the former iteration of the rule "was weakly worded and could have been worded better."

When construing a statutory provision, we are instructed to consider "three general factors: 1) text; 2) purpose; and 3) consequences." *Koste*, *supra*, 204 Md. App at 585. With respect to the consequences of the competing interpretations of the HCGPP, we hold that neither construction affords a more reasonable outcome than the other. The Board contends that Neser's construction would be unreasonable because Neser could gain a windfall if she is called-in multiple times for minimal work during one stand-by period. This allegedly unreasonable construction, however, is precisely the way call-in pay operates for other uniformed police officers. In short, we are not persuaded by the potential consequences of

one construction over another. We, therefore, decline to engage in the policy making that is inherently attendant to allowing our analysis to be guided by the outcomes of the competing constructions here.

After considering the "1) text; 2) purpose; and 3) consequences" of the call-in provision of the HCGPP at issue, we are persuaded that the intent was for a PSSI to attain one call-in pay award for every stand-by period when the employee is called-in. *Koste, supra*, 204 Md. App at 585. In light of the circumstances surrounding the passage of the 2007 amendment to the HCGPP, Major Lachman and Griffin's testimony regarding pass-through benefits, and the 2013 amendment to the HCGPP, we are satisfied that the intent of subsection three of the Overtime and Compensatory Time section of the HCGPP was that a PSSI would be afforded only one four-hour award of call-in pay per stand-by period. We recognize, however, that the interpretive value of this intent, however, is discounted by the fact that this intent was so poorly expressed in the terms of the HCGPP. Nevertheless, we are confident that the intent of the Howard County Council and the Board was that a PSSI would be entitled to a call-in pay award for the first call-in during any one stand-by period, notwithstanding the fact that this intent was poorly expressed in the HCGPP. Further, for the reasons stated in Part III, *infra*, our holding is bolstered by the significant deference we afford to the Board's interpretation of its regulations in circumstances such as this.

III. It Is Appropriate to Afford Deference to The Board's Interpretation of The HCGPP.

For the reasons articulated in Part II(B), *supra*, neither the text nor the legislative history of the HCGPP offer overwhelming compelling reasons that lead us to the proper interpretation of the call-in provision as it relates to Neser. On one hand, the Board asks us to interpret this rule with a limitation of the amount of call-in pay that can be awarded in the absence of any text supporting that limitation. On the other hand, the history of this provision, and the subsequent amendments made thereto, seems to support the limitation, despite that this intent is so poorly articulated in the rule. In this case, neither the text of the HCGPP nor its purpose are particularly compelling, and these factors point our analysis in opposite directions. With the factors we consider when interpreting statutes in or near equipoise, we circle back to reconsider our standard of review.

When we review an agency's decision, we give considerable weight to an agency's interpretation of a statute that it administers. *Christopher*, *supra*, 381 Md. at 198. We afford an agency such deference out of recognition that when a statute is susceptible to more than one reasonable interpretation, an agency often has a superior knowledge of the technicalities of that subject matter. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Indeed, the Court of Appeals has observed that:

> Agency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency. A question concerning the interpretation of an agency's rule is as central to its operation as an interpretation of the agency's governing statute. Because an agency is best able to discern its intent in promulgating a

> regulation, the agency's expertise is more pertinent to the interpretation of an agency's rule than to the interpretation of its governing statute.

Md. Comm'n on Human Relations v. Bethlehem Steel Corp., 295 Md. 586, 593 (1983).

> The weight given [to] an agency's construction of a statute depends on several factors--the duration and consistency of the administrative practice, the degree to which the agency's construction was made known to the public, . . . the degree to which the Legislature was aware of the administrative construction when it reenacted the relevant statutory language . . . the extent to which the agency engaged in a process of reasoned elaboration in formulating its interpretation[,] and the nature of the process through which the agency arrived at its interpretation, with greater weight placed on those agency interpretations that are the product of adversarial proceedings or formal rules promulgation.

Marriott Emp. Fed. Credit Union v. Motor Vehicle Admin., 346 Md. 437, 445-46 (1997) (internal citations and quotations omitted).

In the instant matter, the HCGPP is commissioned to include the rules for the administration of the pay plan. Howard County Code § 1.300(3). Griffin testified that the HCGPP is used to govern the compensation for approximately 2,500 of the county's employees. The process by which the HCGPP is promulgated first requires approval by the Board, before it is approved by the County Council. *Id.* § 1.301. The HCGPP, then, is a hybrid between a local ordinance and an administrative regulation. We are particularly deferential the Board's interpretation of its rules that are "designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency." *Md. Comm'n on Human Relations*, *supra*, 295 Md. at 593. Accordingly,

the nature of the HCGPP and the rules contained therein are such that we should generally be deferential to the Board's interpretation of those provisions because they serve the specific needs of the agency and govern its day-to-day operations.

Critically, Griffin, who substantially assisted in drafting this particular section in the HCGPP, testified that it was their intent that a PSSI would only receive one award of call-in pay award per stand-by period. This more narrow interpretation of the HCGPP has governed since the provision was promulgated in 2007, until half a decade later when Neser first challenged the rule seeking a more favorable interpretation. In the year 2012 alone, Neser avers that there were 52 instances when she was harmed by what she preserved as an erroneous interpretation of the HCGPP. Further, in her petition for grievance appeal, Neser implies that she was aggrieved similarly between July of 2007 and 2011. Notably, the Board has interpreted the meaning of the HCGPP consistently since the provision was enacted, no fewer than 280 times by Neser's calculations. The consistency with which the Board has construed the HCGPP buttresses its argument that we should be highly deferential to the Board's interpretation of a provision it administers, had promulgated, and has interpreted consistently since 2007.

We emphasize that "an agency's interpretation of a regulation is a conclusion of law, and . . . it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Hranicka*, *supra*, 443 Md. at 297-98 (alterations and quotations omitted). When, however, we employ our tools of statutory construction and the justifications for endorsing one construction over another are in equipoise, the deference we afford to an

agency's construction of its regulation assumes an increased significance. Here, the text and the intent of the unclear provisions of the HCGPP are in tension with each other. No factor in our analysis of statutory construction overwhelmingly compels us to reach a particular result, and both positions are plausible. Under these circumstances, we defer to the Board and its reasonable interpretation of its regulation. In our view, the reasons for deferring to the Board and its interpretation of the regulation governing the compensation of approximately 2,500 county employees are significant. We, therefore, hold that the Board did not err in construing subsection three of the Overtime and Compensatory Time section of the HCGPP to limit the call-in award a PSSI could receive to four hours per stand-by period.

IV. Conclusion

For the reasons set forth herein, we affirm the decision of the Howard County Personnel Board. We hold that the text of subsection three of the Overtime and Compensatory Time section of the HCGPP is sufficiently unclear so as to permit us to look beyond the text of the statute in an attempt to discern the intent of the Board and the Howard County Council in enacting that provision of the HCGPP. Further, we are satisfied that it was the intent of the Howard County Council and Board that a PSSI may only be awarded four hours of call-in pay for the first call-in during any one stand-by period. Accordingly, we hold that the Board of Appeals did not err in constructing subsection three of the Overtime and Compensatory Time section of the HCGPP to limit to call-in pay to which a

PSSI can be awarded to four hours for every stand-by period for which a PSSI can be called-in. We, therefore, affirm the decision of the Circuit Court for Howard County.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. APPELLANT TO PAY COSTS.