

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0431

September Term, 2015

---

FRANCIS SCHMIDT

v.

TOWN OF CHEVERLY POLICE  
DEPARTMENT

---

Woodward,  
Wright,  
Friedman,

JJ.

---

Opinion by Wright, J.

---

Filed: June 8, 2016

\*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, Officer Francis Schmidt, was employed as a law enforcement officer by appellee, the Town of Cheverly Police Department (“the Department”). Officer Schmidt was terminated by the Department on January 21, 2015, without an administrative hearing.<sup>1</sup> Officer Schmidt appealed to the Town of Cheverly Town Administrator, who issued a written decision upholding his termination by the Department.<sup>2</sup>

Officer Schmidt petitioned the Circuit Court for Prince George’s County for a Show Cause Hearing and Order, pursuant to § 3-105 of the Law Enforcement Officers’ Bill of Rights (the “LEOBR”), codified at Md. Code (2003, 2011 Repl. Vol.), Public Safety Article 3-101 et seq., (“PS”), which requires the Department to show cause for not granting the administrative trial. A hearing was held on April 3, 2015, in the circuit court, where Officer Schmidt challenged the Department’s “performance based” grounds for termination, alleging that his termination was based on retaliatory reasons. Accordingly, Officer Schmidt requested an evidentiary hearing on his claim of retaliation. The court declined to hold an evidentiary hearing and held that the Department’s termination did not involve the right to an administrative trial board. The

---

<sup>1</sup> The Law Enforcement Officers’ Bill of Rights § 3-107 requires that a terminated police officer be awarded an administrative hearing board if the dismissal is a result of an investigation or interrogation.

<sup>2</sup> Cheverly Town Code, § 21-9(i), entitled *Appeals from suspension, demotion, or dismissal*, provides an employee the right to appeal the decision of a department head to suspend, demote, or dismiss the employee before the Town Administrator.

court also denied Officer Schmidt's petition for Show Cause Order. Officer Schmidt timely appealed the decision of the court, posing the following questions for our review:

1. Did the Circuit Court err when it denied Officer Schmidt the right for his case to be heard by an administrative trial board, as required by the LEOBR, and further when it held that the LEOBR was "not trigger[ed]" when the Department terminated Officer Schmidt's employment as a police officer?
2. Did the Circuit Court err when it declined, without explanation, to hold an evidentiary hearing regarding the Department's retaliation against Officer Schmidt, which by itself is a direct violation of the LEOBR?
3. Did the Circuit Court err when it denied Officer Schmidt's Petition for Show Cause Order and granted the Department's Motion to Dismiss, despite the fact that the LEOBR expressly entitles police officers the right to obtain such recourse?

For the reasons discussed below, we answer all of Officer Schmidt's questions in the negative and affirm the rulings of the circuit court.

### **FACTS**

Officer Schmidt began employment with the department as a law enforcement officer in 2008, and on January 25, 2015, he was terminated by the Chief of the Department. Officially, and according to the Department, Officer Schmidt was terminated for performance reasons and for taking leave in excess of the amount available to him. Officer Schmidt, however, maintains that his termination was a retaliatory action taken by the Chief of the Department as a result of Officer Schmidt previously asserting his rights under LEOBR.

The previous LEOBR proceedings arose in August 2011, when Officer Schmidt was charged with being involved in an accident with his assigned take-home vehicle and

failing to report it, as well as making false statements regarding the vehicle. Officer Schmidt was terminated after he was found guilty of both charges at the LEOBR hearing. After an appeal to circuit court that reversed the Chief of the Department's decision and order to terminate Officer Schmidt, the matter was remanded for a new hearing. Officer Schmidt was then reinstated with full back pay and benefits. A second LEOBR hearing took place, and the hearing board found Officer Schmidt guilty of the accident-related offenses but not of making false statements. Officer Schmidt appealed to this Court and we affirmed the judgment of the circuit court. *Schmidt v. Town of Cheverly Police Dept.*, No. 385, Sept. Term, 2015 (March 2, 2016).

Officer Schmidt had not been actively involved in policing for two years because of the police vehicle damage LEOBR proceedings. As a result, the Department provided him with remedial training upon his reinstatement in April 2014. During the course of the training, Officer Schmidt's performance was determined to be inadequate; from April through December 2014, Officer Schmidt was provided with two Field Training Officers ("FTOs"), was sent to remedial entry level training at the Southern Maryland Criminal Justice Academy, and was placed on a Performance Improvement Plan ("PIP").

Thereafter, between December 17, 2014, and January 17, 2015, while on the PIP, Officer Schmidt regularly took sick and medical leave. For over two of those days, however, Officer Schmidt was scheduled to work, and he failed to show up. He had not requested administrative leave for those days and, thus, took unauthorized leave.

Upon returning to work on January 20, 2015, Officer Schmidt was presented with a termination letter stating that the reason for his termination was for failing to complete

work according to protocol and taking excessive leave beyond what he was entitled.

Officer Schmidt later conceded to the taking of excess leave and his poor performance.<sup>3</sup>

Officer Schmidt appealed his January 2015 termination, and a five-hour hearing was held on February 6, 2015, before the Town Administrator. The Town Administrator affirmed the Chief of the Department's decision to terminate Officer Schmidt and issued a written decision on February 13, 2015. Under the Town of Cheverly Code, the decision of the Town Administrator is final and not subject to judicial review.

---

<sup>3</sup> During the hearing before the circuit court, the following exchange took place:

[Officer Schmidt's Counsel]: . . . [I]nterestingly enough they had already – they waited until he had two days of leave that he had used at work was beyond the limit. So they kind of waited –

The Court: You acknowledge that?

[Officer Schmidt's Counsel]: Yes, there's a – it's a [fact]. I mean, you know, it is what it is . . . .”

\*\*\*

The Court: What I'm saying, you conceded that he was over two days [of leave].

[Officer Schmidt's Counsel]: Right, I agree.

\*\*\*

[Officer Schmidt's Counsel]: . . . So Officer Schmidt now after two years of being at work because he had been suspended, and terminated, and checked off during the appeal process, and everything else he's – all of his skills are completely lost in terms of policing, regular day-to-day operations, he had to relearn everything . . . but he's rusty, very rusty, there's no doubt about that, after two years not having done any police work at all . . . . [S]o when he gets back out on the street, he's not up to par . . . .

The Court: So you're conceding that he was not proficient in his field.

[Officer Schmidt's Counsel]: Yeah, absolutely . . . .

On March 20, 2015, Officer Schmidt filed a verified Petition for Show Cause Order and Appropriate Relief pursuant to the LEOBR in the circuit court, in response to which the Department filed a Motion to Dismiss and Responses to Show Cause Order. The Department explained that Officer Schmidt's termination was as a result of his performance and excessive leave was unrelated to the previous LEOBR proceedings.

Additional facts will be included below as they become relevant to the discussion.

### **STANDARD OF REVIEW**

We review the circuit court's conclusions about the application of the LEOBR *de novo*. See *Moscarillo v. Prof'l Risk Mgmt. Servs., Inc.*, 169 Md. App. 137, 145 (2006) (“[W]e review the trial court's legal conclusions *de novo*.” (Citations omitted)).

However, because the grant or denial of the administrative hearing board “implicates a court's equitable powers,” we defer to the circuit court's sound discretion and review its decision for abuse of discretion. See *J.L. Matthews, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 93 (2002) (explaining that the circuit court's equitable powers are implicated on decision of whether or not to issue injunctive relief, “for which an abuse of discretion standard would be applied ordinarily on appellate review of the exercise of that power”); cf. *Wincopia Farm, LP v. Goozman*, 188 Md. App. 519, 528 (2009) (applying abuse of discretion review to the circuit court's grant or denial of an injunction).

## DISCUSSION

### I. **Officer Schmidt’s termination did not trigger procedural protections under the LEOBR.**

The LEOBR entitles a police officer, who is terminated from employment, the right to a hearing in some circumstances:

(a)(1) Except as provided in paragraph (2) of this subsection<sup>[4]</sup> and § 3-111 of this subtitle, 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 that action.

PS § 3-107 (emphasis added). “Since the nature of the duties of police officers is different from that of other public employees, the establishment of different procedures covering any potential disciplinary action is justified.” *Cancelose v. City of Greenbelt*, 75 Md. App. 662, 666 (1988) (citing *Abbott v. Admin. Hearing BD., Prince George’s County*, 33 Md. App. 681, 682 (1976)).

The protections of LEOBR are triggered only when there is “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). We have defined an investigation as “a detailed examination; a searching inquiry; to observe or study closely.” *Leibe v. Police Dep’t of City of Annapolis*, 57 Md. App. 317, 323 (1984) (citing Webster’s Dictionary Third Ed.

---

<sup>4</sup> Paragraph (2) provides: “A law enforcement officer who has been convicted of a felony is not entitled to a hearing under this section.” PS § 3-107. This provision is not applicable here.

(1976)). The intended procedural protections of the LEOBR apply “only when an officer is ‘investigated and/or interrogated as a result of a disciplinary-type complaint lodged against the officer.’” *Manger*, 175 Md. App. at 502 (citing *Calhoun v. Commissioner*, 103 Md. App. 660, 672 (1995)).

Officer Schmidt is not entitled to the procedural protections of the LEOBR because he was not under an “investigation” by the Department. His termination falls under the authority of the Department Chief’s ability to regulate the competent operations and management of the Department because it was based on administrative and performance reasons. Specifically, Officer Schmidt took unauthorized leave, failed to show up to work on days he was scheduled, and routinely exhibited substandard policing skills after his reinstatement.

In *Leibe v. Police Dept. of Annapolis*, we held that the LEOBR is not triggered when leave usage is evaluated because tracking of a police officer’s use of sick leave was not an “investigation” triggering protections afforded to the police officer by the LEOBR. 57 Md. App. at 323. After defining the “natural meaning of investigation,” *see supra*, *Leibe* states that “examination of sick leave records and even comparing them with another employee’s is not an investigation as that word is normally and ordinarily used.” *Id.* “[T]he LEOBR has not been triggered” by the review and monitoring of an officer’s leave. *Id.*



After he was reinstated, Officer Schmidt took more leave than he had accumulated, despite being on notice of his leave balance.<sup>5</sup> He conceded that his accrued leave ran out on Wednesday, January 14, 2015, and that although he was scheduled to work, he did not return to work until Tuesday, January 20, 2015. He also did not request unpaid administrative leave during this period. Officer Schmidt, therefore, took unauthorized leave for about two and a half days.<sup>6</sup> This was one of the reasons Officer Schmidt was terminated and his termination on the basis of leave did not, as a matter of law, pursuant to *Leibe*, trigger the protections of the LEOBR.

Officer Schmidt was also properly terminated because of his performance. Despite being a seasoned officer having over a decade of experience, Officer Schmidt

---

<sup>5</sup> Officer Schmidt's paystubs indicated the amount of leave remaining. He was also advised by Sergeant Towers on December 11, 2014, that he only had thirty-four hours of leave remaining.

<sup>6</sup> Notably, Officer Schmidt was only present for just over thirty-one weeks out of a fifty-six week period due to his leave usage. The Town Administrator's decision on Officer Schmidt's termination appeal hearing noted the following regarding Officer Schmidt's absences from work:

During the 61 calendar days of the Performance Improvement Plan, there were 20 regularly scheduled days off and 7 holidays leaving 34 remaining work days for you to improve your performance. It has been noted and affirmed that the Sergeant working with you in the improvement plan was sick for 2 days and on vacation leave for 5 days. This left a total of 27 days to complete the remaining 12 days of the Performance Improvement Plan. However, during this period you were out for 9 days, took 10 days of vacation and were on 3 days light duty.

I find that during this critical evaluation period, when one of the determining factors to keep your job was your attendance record that you continued to use vacation leave until it was exhausted.

exhibited significantly inadequate performances after being reinstated. To facilitate his re-entry into active “uniform patrol activities” from over a year of “no duty and/or administrative, desk-type functions,” Officer Schmidt was placed with a series FTOs who were responsible for assessing and addressing his skills before he was able to perform his work on his own: FTO Corporal Francis Webb from April 2014 until July 2014, and FTO Officer Michael Economos from July 2014 through August 2014.<sup>7</sup> The purposes of the field training was Officer Schmidt’s “reintegration into patrol activities and not retraining in elementary police operations and duties.”

Throughout this time, however, the FTOs each noted numerous deficiencies in Officer Schmidt’s performance and documented these issues in daily evaluations as well as in depth assessments. The FTOs noted “a pattern of poor performance under stressful situations, poor officer safety skills, and a measureable lack of self-motivation and self-initiated action relative to proactive patrol, traffic enforcement, police vehicle operations, and the investigation of suspicious circumstances, persons, and/or vehicles.” Officer Schmidt was also given low marks on “knowledge of laws and departmental procedure, report writing and interview techniques,” among other areas.<sup>8</sup> Subsequently, to improve

---

<sup>7</sup> Officer Schmidt was reassigned to a second FTO “[i]n order to assure a fair and balanced assessment of [his] field training[.]”

<sup>8</sup> Officer Schmidt reportedly got lost often, failed to follow safety procedures, such as standing in front of a door of someone suspected to be armed after being dispatched, or failing to require the driver of a vehicle to make his hands visible to the officer. He failed to issue citations or reports because he either “forgot about it” or because he misunderstood the law. For example, he failed to write a report for a domestic incident because he claimed he did not witness it happen.

his performance, Officer Schmidt was sent to entry level training at the Southern Maryland Criminal Justice Academy (“SMCJA”), a basic training police academy certified by the Maryland Police Training Commission, in Charles County. The SMCJA Director wrote to the Chief of the Department that Officer Schmidt was incapable of performing at the requisite standards of even an entry level police trainee. Specifically, he noted, “Finally[,] with all the information received from the practical exercises[,] if Officer Schmidt was a recruit[,] I would recommend [his] dismissal from the academy as a student officer.”

Upon his return, the Department placed Officer Schmidt on a PIP. The plan detailed Officer Schmidt’s weak areas, provided a system for evaluation, including strength and weaknesses, and explicitly stated, “If you do not receive a Proficient rating in each category of the Performance Appraisal for Police Officer (Patrol Officer) after at least 30 calendar days of additional training and appraisal by the supervisors listed in this report, you will be terminated.”

Officer Schmidt now maintains that his individualized PIP constitutes an investigation that resulted in punitive action taken against him that entitled him to an administrative hearing board on the merits pursuant to § 3-107(a)(1). We disagree, and look to our decision in *Cancelose v. City of Greenbelt*, 75 Md. App. at 662, for clear guidance. In *Cancelose*, the police chief suspended the officer and recommended his dismissal because the officer had failed to achieve acceptable levels of competence and performance, despite given multiple opportunities to improve. *Id.* at 664. The officer was terminated on the basis of the chief’s recommendation, and the officer subsequently

filed a Petition for Show Cause by the city police department in circuit court alleging that he had been denied his rights under the LEOBR. *Id.* at 664-65. The circuit court granted the city police department's motion to dismiss, and the officer appealed, arguing that he was entitled to a hearing because his dismissal was a punitive measure. *Id.* at 665. Upon our review, we determined that the officer's dismissal did not result from an "investigation." *Id.* at 668. We held that an officer whose termination was based on unsatisfactory work performance was *not* entitled to the procedural safeguards of the LEOBR. *Id.* Specifically, we noted:

[The] appellant's dismissal from appellee's police department occurred because he regularly received poor performance evaluations over a period of approximately seven months. Since appellant's work performance and conduct were considered unsatisfactory, an administrative decision to dismiss appellant was made at the recommendation of appellee's Chief of Police. At no time was any investigation or interrogation commenced against appellant. Instead, his general work performance was evaluated monthly, using departmental competency standards which are applied consistently to all police officers in evaluating overall job performance. We hold that these evaluations were not investigations as that word is normally and ordinarily used. Appellant's termination as a Greenbelt City Police Officer was based upon his unsatisfactory work performance. Hence, the LEOBR procedural safeguards are not applicable in the case *sub judice*.

*Id.* *Canselose* differentiates performance evaluations from "investigations," identifying them as "administrative" in the same way monitoring an employee's leave was administrative in *Leibe*. *Id.* at 667-68 (citing *Leibe*, 57 Md. App. at 323).

As in *Canselose*, Officer Schmidt was evaluated based on his performance. While his plan was "individualized," in as far as it was tailored to improve his weak performance areas, it did not rise to the level of an "investigation" merely because it was

specific to him. He was expected to perform to the same standards as other police officers. Further, the Department clearly and unequivocally stated in its termination letter, “This is a performance-based, non-disciplinary termination.” While Officer Schmidt labels this letter as “self-serving” and contends “that the termination letter was drafted with an eye towards preventing Officer Schmidt from receiving any hearing that might result in his continued employment” as a retaliatory measure against him, the Department’s decision was amply supported by the long and detailed accounts of Officer Schmidt’s deficient performance throughout the months after his reinstatement that, standing alone, justified his termination.

The procedural protections afforded by the LEOBR, therefore, are not applicable to Officer Schmidt. His termination was a result of his poor performance upon reinstatement and his taking of unauthorized leave. The circuit court did not abuse its discretion in so finding.

**II. Officer Schmidt presented insufficient evidence for the purpose of showing retaliatory action from the Department and, thus, the circuit court did not err in denying his evidentiary hearing.**

The LEOBR prohibits the Department from retaliating against officers for exercising their statutory or constitutional rights. Section 3-103(d) states:

(d) A law enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to the law enforcement office’s employment or be threatened with that treatment because the law enforcement officer:

- (1) has exercised or demanded the rights granted by this subtitle; or
- (2) has lawfully exercised constitutional rights.

PS § 3-103. The protection against retaliation by the LEOBR does not depend upon whether an investigation that could lead to disciplinary action was conducted. *DiGrazia v. Cnty. Exec. for Montgomery Cnty.*, 288 Md. 437, 452 (1980).

Under PS § 3-103(d), an “employee bears the burden of proving retaliatory action[.]” *Blondell v. Baltimore City Police Dep’t*, 341 Md. 680, 697-98 (1996). The “employee must show that the questioned conduct was a substantial or motivating factor in the employer’s decision.” *Id.* (internal citation and quotation omitted). “Therefore, [t]he issue is to be resolved in favor of the employee only if the court finds that he would have been reemployed but for the protected conduct.” *Id.* at 698 (quoting *DiGrazia*, 288 Md. at 448).

Officer Schmidt fails to meet his burden of showing that there was retaliatory action here because his evidence does not show that retaliation was a “substantial or motivating factor” in the employee’s decision. Officer Schmidt reads *DiGrazia* to mean that “where the aggrieved law enforcement officer makes the claim for retaliation as a result of exercising and asserting his LEOBR and/or constitutional rights, the court must order an evidentiary hearing take place [sic] to determine if retaliation was the reason for termination.” We disagree with this interpretation of *DiGrazia* and interpret the case the way the Department does, that an evidentiary hearing to determine retaliation is required only if there is a factual dispute as to the basis for the termination. In *DiGrazia*, 288 Md. at 442, the officer was removed because of alleged statements that he made about the police department, to which he never admitted making. That case, therefore, involved an

actual dispute as to whether the statements leading to the officer's termination were made at all and, thus, an evidentiary hearing was necessary. *Id.* at 454.

Here, however, although Officer Schmidt alleges several actions taken by the Department Chief that he believed were retaliatory,<sup>9</sup> the underlying facts as to his unsatisfactory performance and leave are undisputed. Officer Schmidt's attorney conceded that Officer Schmidt's performance during his training period was poor and that Officer Schmidt took more leave than he was allotted. Officer Schmidt fails to show that his removal from the Department was "motivated by" retaliation and *not* a result of performance or taking unapproved leave. The circuit court, as a result, did not err in denying his evidentiary hearing for retaliation because the undisputed facts presented legitimate grounds to remove Officer Schmidt from the Department.

**III. Officer Schmidt's Petition for Show Cause Order was appropriately denied.**

The LEOBR offers recourse for police officers whose LEOBR rights are denied.

Section 3-105(a) provides:

A law enforcement officer who is denied a right granted by this subtitle may apply to the circuit court of the county where the law enforcement officer is regularly employed for an order that directs the law enforcement agency to show cause why the right should not be granted.

---

<sup>9</sup> Officer Schmidt refers to the Department Chief's "refusal to grant Officer Schmidt paid leave (under the Family Medical Leave Act) for a hernia that he suffered while working for the Department, 'being called names, denied routine off duty employment permissions,' and being assigned an older car that was inferior to those assigned to junior officers."

PS § 3-105. Officer Schmidt contends that because his right to an administrative trial board was denied and because he was retaliated against for exercising his LEOBR rights, his Petition to Show Cause Order was erroneously denied.

As we have previously discussed, the facts are undisputed as to Officer Schmidt's poor performance and his excess leave, which are appropriate grounds for removal and do not trigger LEOBR protections. Officer Schmidt was, therefore, not "denied a right granted by" § 3-105, and the circuit court's denial of his Petition to Show Cause and grant of the Department's Motion to Dismiss were not in error.

**JUDGMENT OF THE CIRCUIT COURT  
FOR PRINCE GEORGE'S COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANT.**