UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1454

September Term, 2015

CARLTON W. BRITTINGHAM, JR.

v.

CAMBRIDGE POLICE DEPARTMENT

Arthur,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: December 29, 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.

Carlton W. Brittingham, Jr. (hereinafter "Brittingham") was hired by the Cambridge Maryland Police Department (hereinafter "the Department") as a police officer on January 4, 2009. About six years later, on January 9, 2015, Brittingham was terminated from that position.

Pursuant to the personnel policies of the City of Cambridge, Brittingham filed an administrative appeal of his termination to the Commissioners of Cambridge. The Commissioners conducted a hearing on February 11, 2015 to consider whether it was appropriate for the Department to terminate Brittingham. Brittingham was represented by counsel at that hearing. On March 6, 2015, the Commissioners issued a decision upholding Brittingham's termination. Brittingham did not seek judicial review of that decision.

On April 20, 2015, Brittingham filed a complaint and petition to show cause in the Circuit Court for Dorchester County against the Department. That pleading alleged that it was filed pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"), which is codified in Maryland Code, Public Safety Article (2011 Repl. Vol., 2016 Supp.), §§ 3-101-113. The complaint and show cause order alleged that Brittingham was terminated in violation of § 3-106.1 of the Public Safety Article,[1] which provides:

> (a) *In general*. – A law enforcement agency required by law to disclose information for use as impeachment or exculpatory evidence in a criminal case, solely for the purpose of satisfying the disclosure requirement, may maintain a list of law enforcement officers who have been found or alleged to have committed acts which bear on credibility, integrity, honesty, or other characteristics that would constitute exculpatory or impeachment evidence.
> (b) *Punitive action against officers on list prohibited*. – A law enforcement agency may not, based solely on the fact that a law enforcement officer is

[1] Hereafter, all statutory references are to sections in the Public Safety Article.

> included on the list maintained under subsection (a) of this section, take punitive action against the law enforcement officer, including:
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> (1) demotion;
> (2) dismissal;
> (3) suspension without pay; or
> (4) reduction in pay.
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> (c) *Notice of placement on list*. – A law enforcement agency that maintains a list of law enforcement officers under subsection (a) of this section shall provide timely notice to each law enforcement officer whose name has been placed on the list.
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> (d) *Rights of appeal*. – A law enforcement officer maintains all rights of appeal provided in this subtitle.

Brittingham's complaint and petition to show cause asked that the Department be required to show cause why the Petitioner should not be afforded his rights under the LEOBR.

In turn, the Circuit Court for Dorchester County ordered the Department to show cause why it had not provided to Brittingham the rights afforded him under the LEOBR. The Department filed a motion to dismiss Brittingham's complaint and petition for show cause on July 1, 2015 and Brittingham responded to that motion thirteen days later.

On July 21, 2015, the circuit court, after hearing argument on the Department's motion to dismiss, granted that motion. This timely appeal followed in which Brittingham raises two questions, which he phrases as follows:

> 1. Does LEOBR § 3-106.1 apply when a police department terminates the employment of an officer solely because [of] the state's attorney's refusal to call the officer as a witness?

> 2. Is a law enforcement officer entitled to recover damages for back pay when a police department unjustly terminates the employment of a police officer?

We shall hold: 1) that § 3-106.1 of the LEOBR is inapplicable; and 2) that the circuit court did not err when it dismissed Brittingham's petition to show cause. Because of these holdings, it is not necessary to decide question 2.

I. BACKGROUND

On September 2, 2012, Brittingham was placed on administrative leave by the Department after allegations of rape were made against him. The rape was alleged to have occurred while Brittingham was off-duty. After an investigation, Brittingham was charged in the Circuit Court for Dorchester County with rape. At the rape trial, Brittingham testified that on the date when the rape was alleged to have occurred he had not been able to engage in sexual intercourse with the alleged victim because he was unable to achieve an erection due to intoxication. Previously, Brittingham had told investigators that he had sex with the alleged victim but that the sex had been consensual.

Brittingham was acquitted on the rape charge but was later charged with having committed perjury when he testified at the rape trial. He was also acquitted of the perjury charge. After these acquittals, Captain William B. Jones of the Cambridge Police Department inquired of the State's Attorney for Dorchester County as to whether the State's Attorney, in the future, would use Brittingham as a witness. On September 19, 2014, the State's Attorney for Dorchester County replied to Captain Jones's inquiry as follows:

> You have asked for the position of the State's Attorney regarding the future use of Carlton Brittingham as a witness. It is my understanding that he has been acquitted of both the Rape and Perjury charges, in separate trials.
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> As you know, the issue in this case involves the existence of potentially conflicting statements made by Mr. Brittingham during the course of the investigation as well as his trial testimony that appears to be in conflict with both his original attorney's representations to the State and certain forensic evidence. For those reasons, this Office is of the opinion that serious credibility concerns exist so as to prevent the use of him as a witness for the State in the future. This is consistent with the observations made by the Honorable David Mitchell, sitting in the Circuit Court for Dorchester County. I have attached hereto the relevant portions of the trial transcript where Judge Mitchell makes his observations (p.53). This Office will not put such a witness before a trier of fact.
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> As well, Maryland Rule 4-263 requires the State to notify the defendant in a criminal case of any information that tends to impeach a State's witness, including evidence of prior conduct to show the character of the witness for untruthfulness. As such, we will be required to provide any and all defendants with what information we have regarding evidence of Mr. Brittingham's character of untruthfulness.
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> My understanding is that Mr. Brittingham is seeking to have all records regarding these incidents expunged, and I believe he is likely entitled to that. However, destruction of the records will not eliminate what we know. For these reasons, Mr. Brittingham is now, and will be, prohibited by this Office from testifying in any matter as a witness for the State.
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> Please feel free to contact me with any questions.

Over three months after receipt of the State's Attorney's letter, on January 6, 2015, Cambridge Police Captain Mark K. Lewis wrote a memorandum to Acting Police Chief W. Bruce Jones that read:

> I am recommending that the employment of Officer Carlton Brittingham be terminated on a non-disciplinary basis for his failure to maintain qualifications to serve as a police officer for the City of Cambridge.

> An essential job function for any Cambridge Police Officer is to be competent to prepare and present cases for judicial processing and testifying in court. (Copy of position description attached[.]) In the past two years, Carlton Brittingham has been criminally prosecuted, separately, for the crimes of rape and perjury. Although he was not convicted of either crime, his credibility as a witness and a representative of this Police Department has been irreparably damaged and there was probable cause to believe that he committed these crimes. In fact, William H. Jones, the State's Attorney for Dorchester County has issued an official notice to this agency that Brittingham's character trait of untruthfulness will result in his never being eligible to serve as a witness for the State in any criminal proceeding. (Copy of letter attached[.]) As such, by his own actions, Brittingham has rendered himself unfit for duty and his employment must be terminated.
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> In addition, due to the protracted nature of the proceedings against Brittingham, his certification from the Maryland Police Training Commission lapsed in June 2014. His continued employment would necessitate renewal of his certification. In order to qualify for renewal, an officer must "Continue to meet the Commission's selection and training standards for a police officer." Md. Regs. Code 12.04.01.06.
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> Brittingham's conduct, culminating in the letter from the State's Attorney, may constitute derogatory information that indicates that he no longer meets the Commission's selection standards, and thus the Commission may refuse to renew his certification. *See* Md. Regs. Code 12.04.01.05 (10)(b) ("the Commission may refuse to certify [an] applicant based upon derogatory information.")
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> I recommend that this action be taken as soon as possible.

On January 9, 2015, the Acting Chief of the Department, W. Bruce Jones, sent Brittingham a letter, which read, in material part, as follows:

> On or about September 2, 2012 you were placed on an Administrative Leave of Absence with pay after allegations of criminal acts were reported against you during an off duty incident for which an investigation was conducted by the Maryland State Police and the State[']s Attorney's Office of Wicomico County. During this investigation you told investigators that the sex between you and [the] victim had been consensual. When you testified under oath during the trial on or about September 26, 2013, in the Circuit Court for Dorchester County, Maryland you articulated that you had

> not been able to perform any sexual acts with the victim, due to you being intoxicated in that you could not achieve an erection. This sworn testimony is in direct conflict with statements you provided to investigators during the post incident interview. In fact you admitted under oath that you lied to investigators on or about September 2, 2012. In consideration of the potential conflicting statements made by yourself during the course of the investigations as well as in the trial, the sitting judge of the September 26th trial, the Honorable David Mitchell, is quoted as saying "You have no value as a Police Officer." In [a]ddition, the Dorchester County State[']s Attorney . . . has informed our office that in consideration of the above mentioned incidents that you will be prohibited by his office from testifying in any matter as a witness for the State of Maryland.
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> As you are aware[,] one among many essential job functions of a Police Officer is being able to affect arrest, prepare and present cases for judicial processing and testifying in court proceedings. In consideration of the observations of the Honorable David Mitchell, and the prohibition of you being able to testify by the Dorchester County State[']s Attorney's Office, it is hereby determined by this office that you can no longer perform the essential job functions of a Police Officer for the Cambridge Police Department.
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> Therefore[,] be advised effective January 9, 2015 your employment with the Cambridge Police Department is hereby terminated. This is a non-disciplinary termination due to your failure to maintain job competence and your inability to perform all the essential job functions as a police officer for the Cambridge Police Department.

(Emphasis added.)

II. DISCUSSION

A. The LEOBR

Under the LEOBR, police officers have numerous rights that they can exercise when a police agency decides to take administrative or punitive action against them. Section 3-107(a)(1) of the Public Safety Article protects officers subject to punitive action by their employer and reads, in pertinent part, as follows:

> [I]f 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.

(Emphasis added.)

In this case, the Department takes the position that § 3-107(a)(1) is inapplicable because there was no investigation or interrogation upon which Brittingham's termination was based. Quoting *Fraternal Order of Police Montgomery County Lodge 35*, *Inc. v. Manger*, 175 Md. App. 476, 501 (2007), the Department maintains that "'there must be a threshold investigation or interrogation resulting in a recommendation of punitive action to implicate'" § 3-107(a)(1) of the Public Safety Article. The Department points out, accurately, that the dismissal of Brittingham did not result from an investigation or interrogation, rather it resulted from the information received from the Dorchester County State's Attorney's Office that Brittingham would never be called as a witness. Therefore, according to the Department, Brittingham's claim that he was entitled to a hearing under § 3-107(a)(1) is without merit. The Department further maintains that inasmuch as his termination was performance based (i.e., he could not perform a necessary job function), the only hearing to which Brittingham was entitled was an administrative one, which he received when his case was considered by the Cambridge Commissioners.

Brittingham admits that ordinarily an officer does not have a right to a hearing before a hearing board if the reasons for the dismissal (or for other punitive actions by his/her employer) are based on an allegation that an officer cannot perform his/her duties.

He contends, however, that in situations where § 3-106.1 applies, an officer, prior to dismissal, has a right to a police trial board hearing. For purposes of this appeal we will assume, *arguendo*, that this is true. The question then becomes: Is § 3-106.1 here applicable? As can be expected, Brittingham takes the position that § 3-106.1 is applicable; the Department maintains that it is not.[2]

B. Section 3-106.1

Section 3-106.1 had its origin when House Bill 598 was introduced in 2014. As originally drafted, House Bill 598 reads:

> (A) Based solely on the fact that a prosecutorial agency has determined that it shall disclose information about a law enforcement officer to the defense in accordance with Maryland Rules 4-262(D) or 4-263(D), the law enforcement officer may not:
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> (1) Be demoted;
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> (2) Be dismissed;
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> (3) Be transferred;
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> (4) Lose pay;
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> (5) Be reassigned; or
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> (6) Face any other similar action that is considered punitive.
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> (B) Nothing in this section may be construed to limit the ability of a law enforcement agency to take punitive action against a law enforcement officer based on the underlying acts or omissions for which information

[2] Section 3-106.1 became effective on October 1, 2014, which was 12 days after the State's Attorney for Dorchester County told the Department that Brittingham "would be prohibited from testifying in any matter as a witness for the State." Because the Department waited until January 9, 2015 to fire Brittingham, the issue of whether § 3-106.1 is here applicable must be decided.

> about the law enforcement officer was disclosed to the defense in accordance with Maryland Rules 4-262(D) or 4-263(D).

As can be seen, as originally drafted, Bill No. 598 said nothing about whether a law enforcement agency could keep a list of officers alleged to have committed acts that "bear on credibility." In section § 3-106.1 (pre-amendment) the bill drafter used the term "prosecutorial agency," which meant the various State's Attorney's offices in this State. But as amended the phrase "prosecutorial agency" was deleted. In any event, it is fair to say that even if House Bill 598 had been passed in its original form, that statute would not have helped Brittingham in this case inasmuch as he was not fired "[b]ased solely on the fact that a prosecutorial agency" had determined that it would be required to disclose information about Brittingham's credibility to defense counsel. Instead, Brittingham was fired because a prosecutorial agency told the Department that it would never call Brittingham as a witness.[3]

Subsequently, Bill No. 598 was amended to read as § 3-106.1 now does (see pages 1-2, *supra*). Section 3-106.1(a) presently allows, but does not require, a law enforcement agency to keep a list of police officers alleged to have committed or who have been found to have committed acts that would constitute exculpatory or impeachment evidence. If a list is kept, it must be maintained solely for the purpose of fulfilling the law enforcement

[3] Because Brittingham was on his "do not call list" the State's Attorney, under Md. Rule 4-262(d) or 4-263(d), would never have had to disclose negative information to defense counsel about Brittingham's credibility. Under the aforementioned rules, the duty to disclose to the defendant impeaching information about credibility only applies to persons the State intends to call as a witness.

agency's obligation in criminal cases to disclose exculpatory evidence. The purpose clause of House Bill 598 was also changed. As amended, it read:

> For the purpose of authorizing a certain law enforcement agency to maintain a list of certain law enforcement officers solely for the purpose of satisfying a certain disclosure requirement relating to impeachment or exculpatory evidence; prohibiting a certain law enforcement agency from taking certain punitive action against a law enforcement officer whose name is on the list under certain circumstances; requiring a certain law enforcement agency to provide a certain notice to a certain law enforcement officer under certain circumstances; providing that a law enforcement officer maintains all rights of appeal under certain circumstances; and generally relating to disclosures and the Law Enforcement Officers' Bill of Rights.

The Cambridge Police Department is "a law enforcement agency," but a State's Attorney's office is not. Section 3-101(e) of the LEOBR, insofar as here relevant, reads:

> (e) *Law enforcement officer*. – (1) "Law enforcement officer" means an individual who:
> (i) in an official capacity is authorized by law to make arrests; and
> (ii) is a member of <u>one of the following law enforcement agencies</u>. . . .
> (6) the police department, bureau, or force of a municipal corporation . . . .

(Emphasis added.)

Section 3-101(e)(ii) lists a total of 26 "law enforcement agencies" but no State's Attorney's office is included in that list. Therefore, within the meaning of § 3-106.1, the Dorchester County State's Attorney is not a law enforcement agency.[4] By contrast, because the town of Cambridge is a municipal corporation, the Department is a law enforcement agency covered by the LEOBR.

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[4] Maryland Code, Criminal Procedure Article (2008 Repl. Vol.) § 15-102 states, with an exception not here relevant, that the duty of a county State's Attorney is to "defend on the part of the State all cases in which the State may be interested."

Brittingham claims that in his case the Department did what § 3-106.1(a) prohibited it from doing. To reiterate, § 3-106.1(a), as now written, provides:

> (a) *In general*. – A law enforcement agency required by law to disclose information for use as impeachment or exculpatory evidence in a criminal case, solely for the purpose of satisfying the disclosure requirement, may maintain a list of law enforcement officers who have been found or alleged to have committed acts which bear on credibility, integrity, honesty, or other characteristics that would constitute exculpatory or impeachment evidence.

The Department contends that it never kept a list of the type permitted by § 3-106.1(a). The Department also asserts that rather than keeping a list for the sole purpose of fulfilling its obligation to disclose exculpatory evidence to defendants, it simply fired Brittingham for the reasons set forth in the termination letter dated January 9, 2015. Brittingham counters:

> Officer Brittingham was essentially placed on [a] list [of the type mentioned in § 3-106.1(a)]. The State's Attorney[']s Office of Dorchester County clearly submitted to the law enforcement agency a written refusal to call Brittingham to testify in any matter as a witness for the State because of the disclosure requirement. This letter is tantamount to a "list," as envisioned by § 3-106.1. Several months later, the law enforcement agency terminated Brittingham's employment *solely* because of the actions taken by the State's Attorney and as such the provisions of Md. Code Ann. Pub. Safety § 3-106.1(a) apply. A letter or series of letters may certainly make up a list.

We disagree with Brittingham's assertion that the letter from the State's Attorney's office was "tantamount to a 'list' as envisioned by § 3-106.1." For starters, as previously demonstrated, because the employees of the State's Attorney's office are not law enforcement officers as defined in the LEOBR, whether the State's Attorney's office keeps a "list" is irrelevant. Moreover, even if receipt and later retention of the State's Attorney's letter could somehow be considered to be deemed the keeping of a list of the type

envisioned by the statute, that letter was not maintained by the Department "solely" for the purpose of satisfying the Department's discovery obligation owed to criminal defendants. *See* 3-106.1(a). The letter showed that Brittingham would never be a State's witness. If an employee of a law enforcement agency can never be called as a witness, neither the State's Attorney nor the Department would have any duty to disclose to a defendant in a criminal case exculpatory or impeachment evidence about that employee. The duty to disclose, under Maryland law, is to advise the defendant of "all material or information in any form, whether or not admissible, that tends to impeach a <u>State's</u> witness." (Emphasis added.) *See* Md. Rule 4-262(d) (District Court) and Md. Rule 4-263(d) (Circuit Court).

Brittingham makes an alternative argument, based in part on subsection (b) of § 3-106.1. As previously stated, subsection (b) provides, in material part:

> (b) *Punitive action against officers on list prohibited*. – A law enforcement agency may not, based solely on the fact that a law enforcement officer is included on the list maintained under subsection (a) of this section, take punitive action against the law enforcement officer, including: . . . .
>
> (2) dismissal[.]

Brittingham argues:

> Even if Brittingham was not put on a *physical* list, the actions taken by the State's Attorney and the Police Department are evidence of Brittingham being on such a list. The statute at issue does not specify the nature or form of any list and the legislative history does not reveal any further guidance. LEOBR § 3-106.1(a) permits a law enforcement agency, as well as a State's Attorney's office, to maintain a list of law enforcement officers who have been found or alleged to have committed acts which bear on credibility, integrity, honesty, or other characteristics that would constitute exculpatory or impeachment evidence. LEOBR § 3-106.1 does not define "list" or the method in which this type of "list" must be kept. In fact, LEOBR § 3-106.1(b) prohibits a law enforcement agency from taking certain actions

> regarding an officer if the action is based "solely on the fact that a law enforcement officer is included on *the list maintained under subsection (a) of this section*."
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> Neither the statute, nor the legislative history, provides procedures on how the list needs to be maintained. Indeed, a mere telephone call from the State's Attorney to an agency head advising of a refusal to call an officer should be sufficient to activate § 3-106.1's application. Otherwise, if a tangible list is required by the statute, any law enforcement agency could avoid the statute altogether by simply not keeping a tangible list, thereby making the statute moot. Such an interpretation should be rejected. *See Erwin & Shafer*, *Inc. v. Pabst Brewing Co.*, 304 Md. 302, 311 (1985); *Blandon v. State*, 304 Md. 316, 319 (1985) (a construction which leads to unreasonable and illogical results or which is inconsistent both with common sense and the purpose of the statute should be shunned). Whether the list was a physical list, a mental list, or a list with only one person on it, Officer Brittingham was clearly placed on some kind of list described by LEOBR § 3-106.1(a) or an equivalent thereof.
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> Section 3-106.1 was designed specifically to protect police officers such as Brittingham from punitive action due to the State's Attorney's decision to not use him as a witness. To the extent the [c]ircuit [c]ourt determined that § 3-106.1 did not apply in this case because there was no physical list, the court was in error because § 3-106.1 was created specifically for circumstances such as Brittingham's in the case at bar.

(References to record extract omitted.) (Emphasis added.)

We will address Brittingham's last argument first. His argument that the purpose of § 3-106.1 was to protect police officers from punitive actions due to the State's Attorney's decision concerning an officer's credibility is based on the "purpose" clause of House Bill 598 before it was amended. The purpose clause, as amended, does not even mention the State's Attorney's office or any other prosecutorial office. The purpose clause, as amended, clearly did not evince the purpose espoused by appellant.

Contrary to Brittingham's argument, § 3-106.1 does not permit "a State's Attorney's office [] to maintain a list." A State's Attorney's office is not a law enforcement agency and is not covered by the LEOBR. Moreover, under the plain wording of the statute, a law enforcement agency cannot be deemed to have established a list, as envisioned by § 3-106.1, simply because a member of the State's Attorney's office tells a law enforcement agency in a phone conversation that a certain officer will never be called as a witness. The statute makes this clear because for § 3-106.1 to be applicable, a list must be "maintain[ed]." Receiving a phone call or letter cannot be equated with writing the information down as part of a list that is kept solely for the purpose of fulfilling the requirements owed in criminal cases, to disclose impeachment or exculpatory evidence.

But even if Brittingham had shown that the Department put him on a list for the sole purpose of fulfilling its obligation to divulge exculpatory or impeachment evidence in criminal cases, he would not succeed in this appeal because for § 3-106.1 to be applicable, Brittingham was also required to show that he was fired <u>solely</u> because he was on the list. *See* § 3-106(b). Brittingham was fired because he could not fulfill one of the essential duties of his job, which was to testify in court and not because the Department put him on a list kept solely for the purpose of fulfilling the discovery obligations mentioned in § 3-106.1(a).

C. <u>Conclusion</u>

As shown by the wording used in the first question raised by appellant (*see* page 2, *supra*), Brittingham reads § 3-106.1 as if it prohibited law enforcement agencies from firing

officers solely because a prosecutorial agency put the officer on a "Will Not Call" list. But there is no way that the words used in the statute can be construed to support such an interpretation. Because Brittingham proffered no facts that would show that the Department violated § 3-106.1 when it fired him, the circuit court did not err when it granted the Department's motion to dismiss. It is therefore unnecessary for us to address the Department's argument that this case should be dismissed due to Brittingham's failure to exhaust administrative remedies.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.