Circuit Court for Baltimore City
Case No.: 24C16003539

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2345

September Term, 2016

CHARLES W. HAGEE

v.

BALTIMORE CITY POLICE DEPARTMENT

Nazarian,
Shaw Geter,
Fader,

JJ.

Opinion by Shaw Geter, J.

Filed: March 27, 2018

This case arises from a hearing held by the Baltimore City Police Department's administrative hearing board. Appellant Charles W. Hagee, a Baltimore City Police officer, was accused by the Howard County Police Department of soliciting prostitution. At the conclusion of the criminal investigation, the Office of the State's Attorney for Howard County filed criminal charges against appellant. Sometime later the SAO entered a *nolle prosequi* to all charges. Appellant subsequently filed a petition for expungement in the Circuit Court for Howard County, which was granted.

The Baltimore City Police Department, thereafter, charged appellant with violating Baltimore City Police Department policy. At the administrative hearing, appellant filed a motion to suppress, arguing that the expunged police records, or any testimony related thereto, should not be admitted at the trial board, and that the statements of victims should not be admitted because they constituted hearsay. The Administrative Law Judge issued a written ruling, finding that the expunged police records and any testimony based on those records would not be admitted, but that investigatory records and work-product would be admissible. Following testimony, the hearing board ultimately found appellant guilty of twelve of the fifteen specification of charges filed and recommended termination. The Police Commissioner adopted the recommendation. Appellant filed a Petition for Judicial Review in the Circuit Court for Baltimore City. The court affirmed the findings of the hearing board.

Appellant presented the following questions for our review:

1. Whether the Administrative Court abused its discretion by allowing the witnesses to testify to the contents of the official expunged police records,

and whether the prejudicial, non-collateral testimony was improperly admitted into evidence.

2. Whether the Administrative Court erred in admitting expunged records into evidence at the hearing Board, and whether the Circuit Court erred in finding that the admitted records were personnel files not subject to expungement?

For the following reasons, we answer these questions in the negative and affirm the decisions of the administrative judge.

BACKGROUND

On April 9, 2014, the State's Attorney for Howard County charged appellant Charles W. Hagee with three counts of third degree sex offense, one count of solicitation of a minor, and three counts of prostitution. These charges were *nolle prossed* on January 6, 2015, when the minor victim could not be located.

Appellant subsequently filed for expungement. On January 16, 2015, while appellant's expungement petition was still pending, the Baltimore City Police Department ("BPD") obtained a complete copy of appellant's criminal case file from the State's Attorney for Howard County.[1] On February 18, 2015, the Circuit Court for Howard County issued an expungement order requiring certain listed agencies to "expunge all court and police records" pertaining to appellant's "arrest, detention or confinement on or about 3/19/2014." The agencies listed on the order included the Office of the State's Attorney for Howard County, the Howard County Sheriff's Department, the Howard County Police

[1] There is nothing in the record to suggest that the transfer of files from the State's Attorney for Howard County to the BPD was intended as a way to evade the expungement order.

Department, the Maryland State Police – CJIS, the District Court of Maryland for Howard County, the Maryland Division of Parole and Probation, the Howard County Department of Corrections, and Mary Rogers, Court Reporter. Importantly, the BPD was not included in the list. On March 26, 2015, the Howard County Police Department issued its certificate of compliance with the order for expungement.

Throughout this time, the BPD investigated the matter and ultimately interviewed appellant. Following its investigation, BPD brought administrative charges against appellant for engaging in acts of prostitution, violating criminal statutes, and associating with persons of questionable character, all of which constitute misconduct and are cause for termination.

The Board that adjudicated these charges consisted of two BPD Majors and a BPD Police Officer, with an Administrative Law Judge ("ALJ") deciding procedural and evidentiary matters. During the first day of the hearing, on April 4, 2016, appellant filed a motion to suppress, arguing BPD should be prohibited from presenting or using the expunged Howard County police records, and that no witnesses be allowed to testify to any information contained in the expunged records. The ALJ held that, pursuant to the expungement statute,

> the expunged police and court records and evidence or testimony based on those records shall be excluded in this case. The records shall include, as stated in the law: the official record of the Howard County Police Department, a booking facility, or the Central Repository and the Circuit Court for Howard County's index, docket entry, charging document, pleading, memorandum, transcription of proceedings, electronic recording, order and judgment. Additionally, if those expunged records are kept in

> either the [Internal Affairs Division "IAD"] investigatory file or the Howard County Police Department files those records shall be excluded.

The ALJ held, however, that records that were investigatory files or police work product would be admissible at the hearing board. Appellant's counsel at that time conceded that the witnesses could testify to their independent recollections of the investigations.

The Board then reconvened for two days of evidence and argument. Detective Joshua Mouton, of the Howard County Police Department Child Abuse and Sex Assault Unit, testified to his involvement in an operation targeting prostitutes utilizing the website backpage.com to advertise services. He stated that, during the course of the operation, an adult prostitute described several occasions on which she met appellant at his home and engaged in sex acts for which appellant paid her. He was able to corroborate this account by reference to text messages between the adult prostitute and appellant, arranging meetings.

Detective Mouton further testified that he collaborated with BPD to determine that appellant was the officer referenced in a previously-obtained statement by a minor, who described having been trafficked and exchanging sex for money with a police officer in Columbia, Maryland. He testified his independent investigation traced the phone number provided by the minor to appellant. Detective Mouton further described his personal involvement in a second interview of the minor victim, during which she described being delivered by her pimp to the home of a police officer where, on two separate occasions, she had oral and vaginal sex with him for money. He recalled that the minor described details of the townhouse, including the presence of a police vehicle. He was able to

corroborate the minor victim's account by text messages between her and appellant. Detective Mouton testified that both the adult prostitute and minor victim provided appellant's address as the location where the sex acts took place.

The second witness for BPD was Lieutenant Jason Luckenbaugh of the Howard County Police. He recalled having assigned Detective Mouton and Detective Ryan McCrone to the investigation, which identified appellant as the adult with whom the minor victim reported having sex for money.

Detective Ryan McCrone of the Howard County Police Department's Child Abuse and Sex Assault Unit testified that in September of 2013, he learned he and Detective Mouton were investigating separate cases that appeared to involve the same suspect – a BPD police officer who lived on Goose Landing Circle in Howard County. His investigation of appellant originated with information from the Maryland State Police that a minor victim had reported having sex with a Baltimore City police officer while she was operating as a prostitute. He recalled conducting, together with Detective Mouton, two recorded interviews, in September of 2013 and March of 2014, with the minor victim during which she reported going to the home of a police officer on Goose Landing Circle on two or three occasions to have sex for money. He also recalled her describing one of these visits as 'scary,' because the male identified himself as a police officer and she feared she would get in trouble.

Detective McCrone explained that the minor victim had been instructed by her pimp to place advertisements on backpage.com and to make meeting arrangements, and that her

pimp would provide transportation. He further testified that phone records showing 13 text messages between the minor victim and appellant corroborated this process had been used to arrange the acts of prostitution with appellant. He stated that the minor had knowledge of the details of appellant's house, and that she had provided a list of roughly ten items in appellant's home which he verified during the execution of the warrant. He searched backpage.com for the minor victim's phone number, and found a picture of the minor's face. Based on this information, they were able to obtain a search warrant for appellant's house and a warrant for his arrest. Inside the home, he recalled finding a notepad bearing the screenname used by the minor, along with an indication of the amount paid to her for her sex acts and the name "Chuck," which was associated with appellant by the adult prostitute.

The next witness was Sergeant Erika Heavener, with the Communications Division of the Howard County Police Department, who testified she supervised the execution of a search and seizure warrant at appellant's home, at which time she was able to confirm the accuracy of the minor victim's detailed description of the home. Sergeant Heavener testified she recalled noting the following details that had been provided by the minor victim: (1) the staircase to the left that went upstairs; (2) a living room on the second level; (3) a patio; (4) a computer on the desk in the living room; (5) a balcony overlook from the second level, that allowed a person to peer down and see the front door; (6) a blanket hanging over the banister; (7) bedrooms that appeared to belong to children; (8) a master bedroom where there was a ceiling fan, a dresser with mirror on it, a tub that had been used

for storage, various police paraphernalia, uniforms hanging in the closet with Baltimore City police patches, and handcuffs in the drawer. Sergeant Heavener testified that, during the execution of the two search warrants, a ledger and paper bearing the screenname used by the minor victim on backpage.com were seized from appellant's home.

Detective Clate Jackson of the Howard County Police Department's Digital Forensic Unit testified that he examined the cell phones belonging to the minor victim and to appellant. Detective Jackson testified that appellant's phone contained a history of web searches on backpage.com, which Detective Jackson knew to be a website where prostitution is advertised.

Detective Michelle Bolden of the BPD's Internal Affairs Division ("IAD") testified that she was assigned to investigate appellant's possible involvement in prostitution with an adult female and a minor female child in September 2013, six months before he was criminally charged. As required by BPD policy, Detective Bolden documented the new case assignment and allegations into the BPD case assignment system, and continually updated her report with information developed throughout the investigation.

During the course of the investigation, Detective Bolden met with Howard County Police detectives and Assistant State's Attorneys and stayed up to date regarding the developments of the criminal case. On January 16, 2015, after disposition of the criminal case, Detective Bolden received from her contacts in Howard County a packet containing all of the reports and files obtained and prepared by the Howard County Police Department during the course of the investigation. She used the documents received from Howard

County to assist in her independent investigation into appellant's alleged criminal acts. In the course of the investigation, she interviewed appellant, who confirmed information concerning his address and cell phone number previously provided by the minor victim and adult prostitute. She recalled that appellant denied any acquaintance with either witness and contended that the pad bearing their backpage.com screennames that was recovered from his home, he had taken during a BPD training program on human trafficking. He also explained his contact with the adult prostitute was an effort to reconnect with a childhood friend. Detective Bolden testified that, based on her investigation, IAD sustained the allegations against appellant.

The defense did not call any witnesses or introduce any exhibits.

The Board thereafter found appellant guilty of twelve counts of misconduct on May 26, 2015. "Based on the testimony and evidence presented and the hearing,"

> The Board has determined that Detective Charles Hagee did associate and solicit sex from a minor…who was 14 years old at the time, in exchange for money. The Board also finds that Detective Charles Hagee did associate and solicit sex from Charlene Williams, a known prostitute. Detective Charles Hagee paid Charlene Williams and [the minor victim] for sex. [The minor victim] is a juvenile. The sex acts occurred at Detective Charles Hagee's home. Detective Charles Hagee's home was described in detail by [the minor victim]. Detective Charles Hagee was criminally charged in Howard County with Solicitation of a Minor and 3rd Degree Sex Offense. The Board finds that although Williams and [the minor victim] failed to appear in court, Detective Charles Hagee did commit these and acts of prostitution. The Board finds Detective Charles Hagee's actions violated provisions of Maryland Law and Baltimore Police Department General Orders, as charged related to these offenses.

Ultimately, the Board recommended Detective Hagee be terminated, which the Commissioner adopted on June 7, 2016.

Appellant appealed to the Circuit Court for Baltimore City, which held, relying on a case from New Jersey, that it was not error for the ALJ to admit portions of the expunged records as they were part of appellant's personnel file. The court also held that it was not error for the ALJ to have admitted the testimony of the witnesses, based on the Board's critical fact findings. Any other testimony, it found, was ancillary to these findings.

Appellant timely appealed.

DISCUSSION

I. The Administrative Law Judge did not abuse her discretion by allowing the witnesses to testify.

Appellant argues that the ALJ erred in allowing the witnesses to testify in light of its ruling excluding the expunged police records, when each witness testified they had reviewed the expunged records in question. Because there "were no collateral facts that did not appear in the Board's findings that were not also included in the expunged police records," appellant contends, the testimonies of the officers should have been excluded. Appellee, conversely, argues that the key facts found by the Board; that appellant engaged in solicitation and prostitution with a female minor and a female adult, the sex acts occurred in appellant's home, that he was charged in Howard County, and that appellant's actions violated both Maryland and BPD General Orders; were facts the witnesses, who had investigated appellant, could reasonably have testified to from their personal knowledge and recollection. BPD argues that the remaining testimony, regardless of its basis, was ancillary at best to these facts.

"[T]he scope of judicial review in a LEOBR case is that generally applicable to administrative appeals." *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108, 121 (2002) (internal citations and quotations omitted). "Thus, to the extent that the issue under review turns on the correctness of an agency's findings of fact, judicial review is narrow." *Id.* "It is 'limited to determining if there is substantial evidence' in the administrative record as a whole 'to support the agency's findings and conclusions.'" *Id.* (internal citations omitted). Decisions of administrative agencies are "prima facie correct [and] carry with them the presumption of validity." *Travers v. Balt. Police Dept.*, 115 Md. App. 395, 421 (1997) (internal citations omitted). "The court's task on review is *not* to substitute its judgment for the expertise of those persons who constitute the administrative agency." *Gigeous v. Eastern Correctional Inst.*, 363 Md. 481, 496 (2001) (internal citations omitted).

In the case at bar, both parties cite the *Gigeous v. Eastern Correctional Institute* cases. In *Gigeous*, the defendant was employed as a correctional officer with the Division of Correction, a division of the Maryland Department of Public Safety and Correctional Services ("DPSCS") at the Eastern Shore Correctional Institution. While off duty, he was arrested by Anne Arundel County Police for possession of marijuana, and he was placed on suspension without pay. The DPSCS filed charges against Gigeous to discharge him. However, the Anne Arundel County State's Attorney entered a *nolle prosequi* to the possession charges. The court ordered an expungement of all records pertaining to his arrest. Thereafter, and following a denial to dismiss the administrative charges based on

the *nolle prosequi*, an administrative hearing was held, at which time both arresting officers testified, and documents concerning the arrest were admitted into evidence, over appellant's objection that the records had been expunged. Gigeous was thereafter discharged and an appeal was filed. The circuit court found the expunged records were inadmissible and the case was remanded for a determination by the ALJ as to what extent the use of inadmissible expunged records were relied upon to make the decision to terminate Gigeous. Another hearing was held and the police officers again testified, but no documents involving the arrest were admitted. The ALJ once again issued a proposed opinion to dismiss appellant, which was upheld. A second appeal was then filed and, again, the case was remanded for a determination as to whether the officers' testimony was based on expunged records. The third decision of the ALJ upheld the dismissal, and, upon appeal to the circuit court, the dismissal was affirmed.

Upon the second remand to determine whether the officer's testimony was based upon review of the expunged records or from his independent recollection, the ALJ in *Gigeous* concluded

> I found [the officer's] testimony completely credible…when [he] arrested [the defendant], he was not on regular assignment, but was specially assigned. Thus, it was an unusual assignment, made all the more unusual when [the defendant] informed the arresting officers that he was a correctional officer and asked to be given a 'break.'…I am not persuaded by the [defendant's] argument that it is impossible to believe that the officers could independently recall the particulars of [the defendant's] 1992 arrest at the March, 1995 hearing…Moreover, for the purposes of the administrative hearing regarding the charges for removal, the relevant information concerns the basic facts of the arrest, not the type of minutia that would require referencing a document.

This Court, after noting that "[t]he question of credibility and believability of the witness's testimony at trial is within the fact-finding function of the administrative law judge and we may not disturb it simply because we disagree," found "[w]e are required to determine whether there is relevant evidence that a reasonable mind would accept as adequately supporting the judge's conclusion." *Gigeous v. Eastern Correctional Inst.*, 132 Md. App. 487, 504 (2000) ("*Gigeous I*"). We then found "no error in the ALJ's conclusion that the testimony of the officers, concerning the basic facts of appellant's arrest…originated from their independent recollection of the incident, and not any information in any expunged records or investigative files." *Id.* at 505. "It is clear from [the ALJ's] decision…that any testimony that did include information contained in the officers' investigative file was not dispositive in this case and, therefore, did not form the basis of the ALJ's decision." *Id.*

The Court of Appeals, in its review, agreed. 363 Md. 481, 496 (2001) ("*Gigeous II*") (internal citations omitted). "[A]s the Court of Special Appeals noted, 'the determination by the agency that the officers' testimony was not based on inadmissible evidence, i.e., expunged records, is a matter of the agency's fact-finding process, which is subject, on appellate review, to the [deferential] standard' of substantial evidence." *Id.* at 499 (citing *Gigeous I*, 132 Md. App. at 495-96). "The question [is] could '[r]easoning minds…reasonably reach the conclusion reached by the agency from the facts in the record,' and therefore, are the findings based 'upon substantial evidence,…[for which] the court has no power to reject' these findings?" *Id.* at 502 (internal citations omitted).

The Court "determine[d] that [the ALJ] did not abuse her discretion when she concluded that the officers testified from their independent recollection and that such conclusion was supported by substantial evidence on the record." *Id.* at 495. "We further conclude that any testimony resulting from examination of the [expunged files] was collateral." *Id.* Despite Gigeous' contention that certain discrepancies in the officer's testimony proved his testimony was not credible, the Court disagreed. "The asserted testimonial discrepancy…in no way leads to the inescapable conclusion that a reasoning mind necessarily would have concluded the officer generally to be bereft of credibility." *Id.* at 504. "In any event, on the record of this case, that call is left properly to the administrative fact-finder, unless a reasoning mind could not have found but otherwise." *Id.*

The reasoning in the *Gigeous* opinions is applicable to the present case. We hold the ALJ did not err in allowing the officers to testify. In clarifying her ruling excluding the expunged record, the following exchange occurred:

> [ALJ]: But I ordered that the official record – let's see. A police record means an official record that a law enforcement unit, booking facility or central repository maintains about the arrest and detention or further proceedings against a person for a criminal charge.
>
> [Counsel for BPD]: Yes, ma'am.
>
> [ALJ]: So in this case, the Howard County Police Department received an order of expungement from the Court to expunge their official record, and those records are excluded here. Now, if the detective or any of the other witnesses have their investigatory files, then they can testify – you can offer them and they can testify concerning their notes, their investigation. But I won't admit at least the documents into – the official law enforcement record into evidence. However, this witness has reviewed expunged records,

> nevertheless I find that that does not bar his testimony concerning the investigation.
>
> [Counsel for appellant]: I was just basing my objection on your order of April 11th, which said all court and police records – the motion to suppress is granted, in part, all court and police records and evidence, or testimony based on those records expunged in accordance with Howard County's order to –
>
> [ALJ]: Well, there's going to necessarily be some overlap, so –
>
> [Counsel for appellant]: And I think that's where my client's rights should be afforded. And if there is an overlap, it should not go to the benefit of the Department on an expunged record, it should go to my client.
>
> [ALJ]: All right. Well, I'll note your objection for the record but I'm going to overrule it.

In responding to appellant's questioning of the basis of the witnesses' testimonies, the ALJ specified appellant would "have the opportunity to object if [he] believe[d] that what [the witnesses were] testifying about…is part of the formal record of either the court or the police department." She also stated if counsel for BPD "would establish the basis for the witness's testimony," she could then "determine what is admissible." Upon objections from appellant, the ALJ repeatedly clarified that "if the witness remembers what occurred, I'm going to allow him to testify to that," but would not admit any actual documents from the formal record. Appellant did not question any of the witnesses as to the basis of their testimony. Instead, appellant would have us find the witnesses were banned from testifying to any fact that could be found in the expunged record, regardless of whether the officers testified to it from their personal recollection or from reviewing the expunged documents. That is not required by the expungement statute, nor by its fundamental purposes.

In the instant case, all the witnesses that testified were involved in the investigation of appellant's case. This, as in *Gigeous*, is an "unusual" case in which officers investigated another officer's alleged illegal conduct. We are therefore not persuaded by appellant's arguments that it would "shock the conscience" for the officers to have remembered the particulars of this case, or the findings of the Board: that appellant solicited and paid for sex with an adult prostitute and minor victim in his home, and that he was charged in Howard County for these crimes. In fact the opposite is true.

Moreover, all of the facts found by the Board in its recommendation for termination were provided by Detective Mouton, who specifically testified he had not reviewed the police record since "the first time this trial was happening," nearly a year prior. Detective Mouton testified that: he personally interviewed both the minor victim and an adult prostitute, whom appellant solicited and paid for sex, in appellant's home, which both were able to give details of, which the Detective later corroborated. Based on his testimony alone, "'[r]easoning minds [could]…reasonably reach the conclusion reached by the agency from the facts in the record.'"

Therefore, appellant's contentions "in no way lea[d] to the inescapable conclusion that a reasoning mind necessarily would have concluded the officer[s]" were not testifying from their personal knowledge. "In any event, on the record of this case, that call is left properly to the administrative fact-finder, unless a reasoning mind could not have found but otherwise." *Gigeous II*, 363 Md. at 504. We therefore find the ALJ did not err in allowing the testimony.

II. The Administrative Court did not err in admitting the IAD investigatory files into evidence. Admitting the non-investigatory files, however, was harmless error.

Appellant also argues "the ALJ made a legal error by admitting portions of the expunged police records into evidence by finding that the exhibits were considered investigatory files." "Expunged police records do not become investigatory records simply because they are used in an internal affairs administrative hearing board." He argues that the ruling in the present case "significantly weakens the protections afforded to [a]ppellant by the expungement statute." Ultimately, appellant concludes that "[w]hile the erroneously admitted exhibits may have been stored separate from the official police record, for the purposes of the hearing board, the files are not investigatory files."

Appellee conversely argues that the documents, though acquired from the Howard County Police Department, were integrated into the BPD's IAD file. "Every exhibit BPD admitted…against [a]ppellant during his Board hearing was part of [his] IAD file, which was not expunged by the Expungement Order, comports with the applicable evidentiary standard, and was properly admissible for the Board's consideration." Moreover, they contend that because BPD was not identified on the expungement order, they were not required to expunge any of their documents concerning the investigation into appellant.

"We…'may always determine whether the administrative agency made an error of law.'" *Gigeous II,* 363 Md. at 496. "Therefore, ordinarily the court reviewing a final decision of an administrative agency shall determine (1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision."

Id. at 496-97 (citing *Baltimore Lutheran High Sch., v. Employment Sec. Admin.*, 302 Md. 649, 662 (1985)).

The expungement order from the Circuit Court for Howard County required the Howard County Police Department to "expunge all court and police records pertaining to this action or proceeding in their custody." The ALJ held that, pursuant to the expungement statute, those records

> shall include, as stated in the law: the official record of the Howard County Police Department, a booking facility, or the Central Repository and the Circuit Court for Howard County's index, docket entry, charging document, pleading, memorandum, transcription of proceedings, electronic recording, order and judgment. Additionally, if those expunged records are kept in either the [Internal Affairs Division "IAD"] investigatory file or the Howard County Police Department files those records shall be excluded.

Upon questioning by appellant, the ALJ further clarified her holding on the expungement statute:

> is limited solely to docket entries, charging documents and the formal police record.

In *Gigeous I*[2], we addressed "to what extent the limitation of expunged records applies to police investigatory files." *Gigeous I*, 132 Md. App. at 500. Citing the statute,

[2] In *Gigeous II*, the Court of Appeals found that "the record of the present case provided a compelling and fundamental reason" not to address "the intent and scope of the 'investigatory files' exception to the definition of 'police records' provided for in the expungement statute and the ramifications flowing from the expungement of the criminal case records in this case upon the related administrative action of [Gigeous'] dismissal from State employment." 363 Md. 481, 498 (2001). The Court ultimately "neither bless[ed] nor curse[d] the positions taken" in *Gigeous I*, and, therefore, we find they are still controlling. *Id.*

then codified at Art. 27, § 735(e), now Md. Code, Crim. Proc. § 10-102(c)(5) & (6)[3], we found "[i]t [was] clear from the language of this exclusion [of police investigatory files from expungement] that the legislature did not intend to grant a citizen the ability to have his or her criminal record expunged, while crippling law enforcement officials and impeding their ability to conduct effective criminal investigations." *Id.* at 501. "The statute's exclusions are consistent with the recognition by the Court of Appeals in *Doe* [*v. Wheaton Police Dept.*] that the right of a person to have a criminal record expunged is a balancing between the 'need for public safety and effective law enforcement…[and] 'the right of the individual to privacy.'" *Gigeous I*, 132 Md. App. at 501 (citing 273 Md. 262 (1974)).

"The plain words of the statute express the legislature's intent that, while generally police records and court records may be expunged and thereby denied public access under the statute, police may still maintain files of incidents and documentation to allow them to conduct continuing police investigations." *Gigeous I*, 132 Md. App. at 501. "There are many reasons a case may be *nol prossed* and police, who are charged with the enforcement of the criminal laws, cannot be limited in their lawful investigatory processes because an individual received an order of expungement based on the prosecutor's decision, for whatever reason, not to pursue the charges." *Id.* "The statute clearly limits the use of police investigative files and police work product of otherwise expunged material to

[3] Section 10-102(c)(5) and (6) of the Maryland Code, Criminal Procedure, states that "an investigatory file" or "a record of the work product of law enforcement unit that is used solely for police investigation" is not subject to the expungement statute.

investigative purposes only." *Id.* at 502. "It follows, therefore, that such investigative files maintained by police are not subject to expungement to the extent that they relate to a police investigation and any subsequent prosecution that directly relates to the subject of that police investigation." *Id.*

In the *Gigeous* cases, the Division of Correction, a division of the Maryland Department of Public Safety and Correctional Services, sought to discharge him, and, in the administrative hearing, Anne Arundel County Police officers testified and reports were admitted. Therefore, we held "[d]isclosure to an agency outside of the police department," for a hearing "not related to a police investigation, nor [related] to the prosecution of [Gigeous]," "was inappropriate, and any evidence admitted at the administrative hearing that stemmed from that file was inadmissible." *Gigeous I*, 132 Md. App. at 502. However, we ultimately found that

> although the ALJ initially erred in admitting information contained in the police officers' investigative file because the administrative hearing is not a prosecution of any related continued criminal investigation against appellant and the record is otherwise expunged, the error was harmless, because the agency's ultimate decision was not based on any of that evidence.

Id. at 505.

Appellant, here, relies on *Mora v. State*, 123 Md. App. 699 (1998), *aff'd on other grounds*, 355 Md. 639 (1999)[4] for the proposition that the records should have been

[4] Our decision in *Mora* was reviewed by the Court of Appeals in *Mora v. State*, 355 Md. 639 (1999). The Court found that the record, which did not include the original expungement order, was deficient, and, therefore, this Court should not have decided whether the expunged records should have been admitted, and declared our holding regarding that issue "*dicta*, having no precedential value."

excluded. Mora was convicted by a jury in the Circuit Court for Anne Arundel County of two counts of maintaining a common nuisance. He then appealed to this Court, and asked us to decide whether the lower court had erred in denying his motion to exclude evidence on grounds that he had obtained judicial expungement of the records in three prior criminal cases against him involving the same facts.[5] He argued that "the police reports, search warrants, affidavits, and inventory reports, relied upon by the police in the investigation of this case, were all developed by the police in connection with the three district court cases that had been expunged." He also argued that any evidence obtained during the searches which pertain to those records was also inadmissible. The State countered that the materials developed by the police in the previous cases constituted "investigatory files" or "work-product" which was exempted by the statute.

We first detailed the purpose of the expungement statute, finding

> it is society's concern with individual privacy that evokes its recognition of an individual's need for expungement of a criminal record under certain circumstances. In other words, our society accepts that persons formally accused, but not convicted, of a crime should not be tainted with that arrest record in the pursuit of employment, education, licensing, financial transactions, or the like. Second, the individual's interest in privacy regarding such matters must be balanced against the State's interest in efficient and effective law enforcement procedures.

Mora, 123 Md. App. 699, 712 (1998) (internal citation omitted). "The individual's need for expungement, however, does not extend to protecting against future criminal

[5] Mora had already obtained review by a three-judge panel, which had altered the original sentence imposed. On appeal to this Court, he also asked us to decide whether the court erred in denying his motion to dismiss and his motion for a mistrial, and whether there was sufficient evidence to support the convictions.

prosecution, and the individual's privacy interest must be balanced against society's need for efficient law enforcement." *Id.* at 715-16.

"Keeping the goals of the expungement statute in mind…[w]e conclude that [the] inclusion of [the statutory investigatory file and police work-product] exceptions was intended to make clear that police are allowed to maintain, away from public view, files that contain documents facilitating ongoing police efforts to identify and gather evidence of suspected criminal conduct." *Id.* at 716. We ultimately rejected Mora's contention that the police could not use the files from the previous, expunged investigations in the case at hand. *Id.* at 717. These documents, although expunged, we found to be "precisely the sort of information that the police need to maintain for the purpose of ongoing criminal investigation." *Id.* at 718. "All of [the previously expunged records] certainly [are] information that was created by police work." *Id.* "The records pertaining to [the police officer's work] are not records of Mora's arrest and charges brought against him which, absent expungement, could be obtained by a criminal records check that certain employers and others are authorized to conduct." *Id.* "Nor are they court records, which are available for public inspection unless expunged." *Id.* at 719. "The type of information in the files subject to question in this case is not information that is available to anyone other than the police." *Id.* We also rejected Mora's contention that "once a case has been expunged, then all files relating to investigations previously performed in connection with that case cease to be investigatory files." *Id.* at 720.

In reliance on *Gigeous* and *Mora*, we find the ALJ did not err in admitting internal affairs reports, prepared by Detective Bolden, the investigator assigned to appellant's IAD case, as investigatory files. Given the balancing act between an individual's right to privacy and the "need for public safety and effective law enforcement," it follows the 'investigatory files' exception would allow police departments to use IAD investigative files in IAD hearings of a law enforcement officer accused of violating their code of conduct, even if they contained information from criminal charges for the same actions which were expunged.

Moreover, our concern in *Gigeous*, that the "disclosure to an agency outside the police department" for purposes "not related to a police investigation" is not found here. The reports that were admitted are not "records of [appellant's] arrest and charges brought against him which, absent expungement, could be obtained by a criminal records check that certain employers and others are authorized to conduct." *Id.* "Nor are they court records, which are available for public inspection unless expunged." *Id.* at 719. The documents admitted were files, incorporated into the IAD investigatory file, which the BPD had access to. Therefore, the ALJ did not err in admitting the files as investigatory files, and, if there was error, it was harmless.

The internal affairs reports, appellant argues, nevertheless should have been excluded because "Detective Bolden did not independently investigate the allegations against [a]ppellant, and the [reports] clearly include information from the expunged records." We first note Detective Bolden began her investigation into the allegations

against appellant nearly a year before receiving the Howard County Police Department file. The admitted internal affairs management system ("IA Pro") entry sheet details the various contacts and conversations she had regarding the joint investigations into appellant. Based on the descriptions on the IA Pro entry sheet, Detective Bolden had the pertinent information – that appellant solicited an adult prostitute and minor victim at his home, and he was being investigated by the Howard County Police for these actions – before the Howard County Police's file was transferred.

The fact that BPD's internal affairs reports include information that is also contained in the expunged records is not dispositive of their admissibility. Much like the witnesses who were allowed to testify to the same facts from their personal recollections, documents containing the same information are admissible as long as they are not "the official record of the Howard County Police Department, a booking facility, or the Central Repository and the Circuit Court for Howard County's index, docket entry, charging document, pleading, memorandum, transcription of proceedings, electronic recording, order and judgment."

Appellant, however, further contends that BPD's first exhibit, a Howard County Police Report for the adult prostitute, was subject to the expungement order and should not have been admitted because it was used to access appellant's expunged records. He cites Maryland Rule 4-502(e)(3)[6] to support this proposition, which states "if effective access to

[6] Maryland Rule 4-502(e)(3) states:
(e) Expungement. "Expungement" means the effective removal of police and court records from public inspection:
…

a record can be obtained only by reference to other records," "'[e]xpungement' means the effective removal of police…records from public inspection" "by the expungement of the other records or the part of them providing the access." Upon appellant's objection to the admittance of the report, the ALJ held that as "it's still a police record from another criminal investigation…I find that it's admissible in this proceeding and will admit [it]."

The report in question, a "Howard County Police Department Incident Report," details the "reverse sting" leading to the arrest of the adult prostitute and makes no mention of appellant or her allegations against him. It was merely a collateral document which further supported Detective Mouton's testimony regarding the arrest of the adult prostitute. Therefore, we hold that it was not subject to expungement under Rule 4-502(e)(3), nor error for the ALJ to admit it as an investigatory record. Furthermore, even assuming, *arguendo*, it was error to admit the report, we find the error was harmless "because the agency's ultimate decision was not based on any of that evidence" found in the report. *See Gigeous I*, 132 Md. App. at 505.

The admitted text messages sent by appellant, his phone search data, the search and seizure photographs and video walk-through of appellant's home, the Baltimore County police report, and the minor victim's text message records, he argues, should have all been excluded because "[t]hey were admittedly referenced and attached to the criminal records maintained by the Howard County Police Department" or were "admitted with the report"

(3) if effective access to a record can be obtained only by reference to other records, by the expungement of the other records or the part of the them providing the access.

and "incorporated into the official police report," and, therefore, were admitted in error, because they were part of the official police record and subject to the expungement order.

In admitting the text messages Detective Mouton found on the adult prostitute's phone, between her and appellant, the ALJ held that they were "involve[d] [in] a separate investigation independent of the [appellant's] case," and "while it may or may not have been expunged in the [appellant's] case, it's still part of the record for the case against" the adult prostitute.

The photos, taken by Sergeant Heavener during searches of appellant's home, were admitted on Sergeant Heavener's testimony that the photos were "not something that would go into the records [or] to the case file" and were instead "archived in the crime lab." Therefore, the ALJ found that they were not part of the official record. The video and the minor victim's phone records, the ALJ found, based on Sergeant Heavener's testimony, were "archived…with the Child Abuse and Neglect Section, and that's not expunged and it's a different investigatory record of the department." The BPD report, detailing its interview of the minor victim, the ALJ found was relied upon by Detective McCrone in his investigation, and, that it was "not shown that this record was expunged as part of the criminal proceedings against [appellant], or even subject to the expungement order."

We find it was error to admit these records under Md. Rule 4-502(e)(3). These were all records that were included in the official police record of appellant's charges, or records through which access to appellant's expunged records could be obtained. However, the error was harmless in that the information contained in these records was cumulative to the

witnesses' overall testimony, nor was there any information exclusive to these records on which the Board relied for its recommendation. *See Gigeous I*, 132 Md. App. at 505.

Appellant also argues the circuit court erred in finding the admitted exhibits constitute "personnel files," and, moreover, the Maryland expungement statute does not exclude personnel files. Although in appellate review of an administrative agency decision, "[t]his Court looks 'through the circuit court's decision and evaluates the decision of the agency,'" *Miller v. City of Annapolis Historic Pres. Comm'n*, 200 Md. App. 612, 632 (2011) (internal citations omitted), we note only that the Court of Appeals has specifically found, albeit in the context of the Public Information Act, "because the internal affairs records of [the officers] related to employee discipline, the records are indeed 'personnel files.'" *Montgomery Cty, Md. v. Shropshire*, 420 Md. 362, 381 (2011); *see also Maryland Dept. of State Police v. Dashiell*, 443 Md. 435 (2015) (holding internal affairs investigatory records specific to a State Police sergeant were 'personnel records' related to discipline of sergeant).[7] Therefore, to the extent that IAD investigatory files were indeed personnel files, it was not error for the ALJ to include them.

Ultimately, we find it was not error for the ALJ to consider the admitted IAD investigatory files as investigatory files, or to admit the police report relating to the adult

[7] The Court in *Shropshire* distinguished from our opinion in *Maryland State Police v. NAACP Branches*, 190 Md. App. 359 (2010), *cert. granted Maryland State Police v. NAACP Branches*, 415 Md. 38 (2010), in which we held that police internal affairs records were not personnel records. The Court found that because the investigative records were not indexed by the name of the employee or by their identification number, "but were rather stored in a central location, suggesting that the records were significant in the aggregate."

prostitute. The other exhibits were admitted in error. However, we find, as in *Gigeous I*, the error was harmless "because the agency's ultimate decision was not based on any of that evidence." The information found by the Board to support its recommendation of termination was all provided by Detective Mouton, who had not reviewed the expunged records in over a year.

Therefore, we affirm the judgment of the Baltimore City Police Department Trial Board as approved by the Commissioner.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY, WHICH AFFIRMED THE DECISION OF THE BALTIMORE CITY POLICE DEPARTMENT, AFFIRMED. COSTS TO BE PAID BY APPELLANT.