Circuit Court for Prince George's County
Case No. CAL17-08361

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2459

September Term, 2017

PATRICK OJONG

v.

HYATTSVILLE CITY POLICE DEPARTMENT

Kehoe,
Arthur,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: March 19, 2019

This appeal arises from a judicial review in the Circuit Court for Prince George's County of an Administrative Hearing Board's recommendation that the Chief of Appellee, the Hyattsville City Police Department,[1] terminate the employment of Appellant, Patrick Ojong, as a police officer. During a call for service on February 9, 2016, Officer Ojong discarded evidence in violation of numerous departmental policies. Following an internal investigation, Ojong was charged with twenty-four violations of the Department's policies and elected to proceed to the Administrative Hearing Board pursuant to Maryland Code Annotated, Public Safety § 3-107. The Board convened on January 30, 2017, to hear testimony and evidence related to the charges against Ojong. Prior to the hearing, the parties entered into a plea agreement. Pursuant to the agreement and a mutually-accepted statement of facts, Ojong pled guilty to thirteen of the charges and the Department dismissed the remaining counts. Upon consideration of the evidence, the Board recommended Ojong be fined $250, termination of employment, and thirty hours of suspension without pay. The Board submitted its report to the Chief on February 21, 2017.

[1] Notwithstanding the caption of this appeal, the City of Hyattsville Police Department is technically not a proper party to this action as it is not a legally cognizable entity that is capable of being a named party. *See, e.g.*, *Hines v. French*, 157 Md. App. 536, 573 (2004). Rather, the City of Hyattsville is the proper legal entity that is responding to Ojong's requests for review. For the sake of continuity, and to avoid confusion, we will continue to refer to Respondent/Appellee as the "Department" throughout this opinion.

The Chief then sent Ojong a letter notifying him that his employment would be terminated, effective March 3, 2017. Ojong filed a timely petition requesting judicial review in the Circuit Court for Prince George's County.

On January 12, 2018, the parties appeared in the circuit court. Following oral arguments, the circuit court affirmed the Board's decision. Ojong brings this appeal, and submits the following question for our review:

1. Was the Board's recommendation of termination as to charge 12 arbitrary and capricious when viewed in light of the basis for said recommendation?

BACKGROUND

A. Mr. Ojong's Prior Incidents.

Prior to the incident at issue in this case, Ojong was the subject of two other internal investigations that resulted in the Department charging him with violations of the Department's General Orders.

On September 7, 2014, Ojong drove two civilians to their respective homes in his assigned patrol vehicle within eight hours of consuming alcohol at a pub. The Department charged Ojong with conduct unbecoming of a police officer pursuant to City of Hyattsville Police Department General Order 202, General Rules of Conduct, Section 01 Conduct Unbecoming (hereafter, "General Order Conduct Unbecoming"), and misuse of his patrol vehicle pursuant to City of Hyattsville General Order #653, Take Home Vehicle Program, Sections 06c and 11A.

On September 28, 2014, Ojong engaged in a verbal dispute with a pedestrian while in Washington, D.C., ultimately culminating with Ojong brandishing his department-

issued firearm without justification. Ojong was charged with conduct unbecoming of a police officer under General Order Conduct Unbecoming.

The Department's attorney sent Ojong a letter, on May 21, 2015, proposing a plea agreement to resolve the charges in both investigations (the "Prior Plea Agreement"). On May 27, 2015, he accepted the plea offer, and admitted guilt for all charges. Pursuant to the agreement, Ojong received a 40-hour suspension without pay and a 45-day revocation of his take-home vehicle privilege for the misconduct with the patrol vehicle. Additionally, he received a 60-hour suspension without pay and an 18-month demotion to the rank of Private for his misconduct involving the department-issued firearm. Paragraph 6 of the plea agreement stated the following: "If there are any additional sustained allegations of similar offenses within 24 months, the Department will seek termination of employment."

B. The PCP Vial Discarding Incident.

Approximately nine months later, on February 9, 2016, officers of the Department, including Ojong, responded to a call for service regarding a man in the roadway. Upon arriving at the scene, Corporal Quevedo found the man lying in the road, attempted to render aid, and determine the man's identity. Corporal Quevedo smelled what he believed to be Phencyclidine, more commonly known as "PCP." Corporal Quevedo searched the man and discovered two vials of suspected PCP.

Corporal Quevedo handed the first vial to an officer and the second vial directly to Ojong. The officer who received the first vial was needed on a different call, so he handed the first vial to Ojong, who then possessed both vials. At some point, Ojong obtained one

or more medical gloves and placed the vials inside the medical glove or gloves. After emergency services arrived and the man in the road was prepared for transport, Ojong walked over to a storm drain and discarded the medical glove or gloves containing the vials into the storm drain.[2] Ojong then left the scene and accompanied the man to the hospital.

After Ojong's departure, Corporal Quevedo realized that Ojong had discarded the PCP vials into the storm drain and contacted the Sergeant in charge of the shift, Sergeant Johnson. Corporal Quevedo and Sergeant Johnson obtained the assistance of the fire department and recovered the medical gloves containing both vials from the storm drain.

Prince George's County Police Department's Forensic Sciences Division later tested the vials. The laboratory determined that one of the vials contained 7.8 grams of PCP, worth approximately $800. However, due to the breach in the chain of custody resulting from Ojong's actions, the man found in possession of the PCP vials could not be prosecuted.

Following an administrative investigation, Ojong was charged with twenty-four violations of the City of Hyattsville Police Department's General Orders and the City of Hyattsville's Personnel Manual, and he elected to proceed to an Administrative Hearing Board (the "Board"). He ultimately pleaded guilty to the following:

> 1. **General Order 202, General Rules of Conduct, Section 27 Evidence/Property**: Property and/or contraband coming into possession of any employee in their official capacity will be reported and properly stored or otherwise disposed of in accordance with Department procedures.

[2] Ojong's disposal of the vials into the storm drain was recorded on a dash camera mounted on one of the responding police vehicles. That recording was later played at Ojong's administrative hearing.

2. **General Order 622, Controlled Dangerous Substances, Section 04 Officer Responsibilities C**. Recovered CDS will be documented and packaged according to General Order 627 – the Property & Evidence Management and the Property and Evidence Guidebook.

3. **General Order 622, Controlled Dangerous Substances, Section 04 Officer Responsibilities D**. CDS that is recovered to be destroyed will be submitted to the Property Intake for secure disposal. Officers shall not destroy CDS, CDS paraphernalia or any item containing CDS residue.

4. **General Order 622, Controlled Dangerous Substances, Section 04 Officer Responsibilities G**. CDS will be brought to the state without delay. The CDS will be immediately weighed, packaged and submitted to Property Intake. Weighing, packaging, and submission of CDS will be witnessed by a supervisor. CDS that is recovered to be destroyed will be submitted to Property Intake for secure disposal. Officers shall not destroy CDS, CDS paraphernalia or any item containing CDS residue.

5. **General Order 622, Controlled Dangerous Substances, Section 04 Officer Responsibilities H**. The chain of custody of all CDS will be maintained and documented in accordance with General Order 627 – Property & Evidence Management and Maryland Courts and Judicial Proceedings Code Ann. § 10-1002.

6**. General Order 627 Property and Evidence Management, Section 06 Officer Responsibilities A**. Bring the property to the station to be secured without delay . . .

7. **General Order 627 Property and Evidence Management, Section 06 Officer Responsibilities C**. Document the circumstances of recovery on an Incident report and a Property/Evidence Collection/Disposal Report (Form #R-6) immediately upon return to the station.

8. **General Order 627 Property and Evidence Management, Section 06 Officer Responsibilities D**. Attach a blue property tag to all releasable property and contraband to be destroyed. Attach a white evidence tag to all evidence.

9. **General Order 627 Property and Evidence Management, Section 06 Officer Responsibilities F**. Package the property according to the Property and Evidence Guidebook.

10. **General Order 627 Property and Evidence Management, Section 06 Officer Responsibilities G**. Maintain and document the chain of custody of all property on the Property Report from the time of recovery until its final disposition.

11. **General Order 627 Property and Evidence Management, Section 09 Officer Responsibilities A**. CDS or CDS paraphernalia to be destroyed will be recovered and submitted to property intake. Officers will not destroy CDS, CDS paraphernalia or any item containing CDS residue.

> 12. **General Order 202, General Rules of Conduct, Section 01 Conduct Unbecoming**: No officer will commit any act which constitutes conduct unbecoming a police officer. Conduct unbecoming includes but is not limited to, any criminal, dishonest, impolite or improper act, and/or conduct and/or behavior of violation of Hyattsville City Police Department (HCPD) General Orders or the City of Hyattsville Personnel Manual that did, or would if it did become public knowledge, bring discredit upon the City of Hyattsville, and/or HCPD, and/or any city personnel, sworn, civilian, or volunteer.
> 20. **General Order 202, General Rules of Conduct, Section 60 Duty to Comply**: All employees, sworn and non-sworn, of the Department are required to follow all Federal, State and local laws.

C. The Administrative Hearing Before the Board.

The Board was convened on January 30, 2017, pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR").[3] At the hearing, an agreed statement of facts was submitted, and Ojong pleaded guilty to charges 1 through 12 and 20. The Board accepted Ojong's guilty plea and the matter proceeded to the penalty phase of the hearing.

The Department sought Ojong's termination and, in support thereof, submitted the Prior Plea Agreement. In addition, the Hearing Board heard the recitation of the agreed upon statement of facts, argument from both parties, testimony from four character witnesses on behalf of Ojong, and reviewed the submitted exhibits.

On February 21, 2017, the Board issued its written report, which stated that there was sufficient evidence for the Department to "seek termination of Officer Ojong based on the letter dated May 21, 2015, and signed by Officer Ojong on May 27, 2015 [(i.e. the Prior Plea Agreement)]." The Board unanimously recommended that the Department fine

[3] The LEOBR is found at Maryland Code Ann., Public Safety Article § 3-101, et seq..

Ojong $250, suspend him for 30 hours without pay, and—for the conduct unbecoming charge (Charge 12)—terminate his employment.[4] The Board noted that its decision was only a recommendation, and that the final authority to impose discipline on Ojong lay with the Chief of the Department.

On February 23, 2017, the Chief of the Department, Douglas Holland, sent Ojong a letter serving as a notice of his intent to terminate Ojong's employment with the Department. The letter stated, "This is official notification that based on the outcome of the administrative hearing conducted on January 30, 2017, and based on the [B]oard's findings and recommendations received in my office on February 21, 2017 it is my intent to terminate your employment with the [] Department."

D. Judicial Review in the Circuit Court.

Ojong filed a petition for judicial review of the Board's recommendation in the Circuit Court for Prince George's County on March 24, 2017. At a hearing held on January 12, 2018, Ojong conceded that there was "no question" that he violated the Department's policies when he discarded the PCP vials. However, he argued the Board's recommendation that the Department terminate his employment was "arbitrary and capricious" because it referenced the warning in the Prior Plea Agreement that the Department would seek termination if he incurred "additional sustained allegations of similar offenses within 24 months[.]" He contended the incidents at issue in the Prior Plea

[4] The Board recommended the following disciplinary actions: $250 fine to run concurrent four counts 1 through 11, 30 hours suspension without pay for count 20, and termination for count 12.

Agreement were "completely dissimilar" from the misconduct related to the PCP vials, which resulted in his termination.

The Department initially moved the circuit court to dismiss the case because it contended Ojong's petition was not properly before the court. The Department argued that review of the Board's recommendations is not permitted by the LEOBR because the "only decision that may be appealable from an LEOBR proceeding is that of the chief's final decision."

On the merits of the case, the Department argued Ojong's incidents were similar in two ways. First, the incidents "demonstrate [Ojong's] lack of judgment regarding . . . significant areas of his duties as a law enforcement officer." Second, that all three incidents resulted in "conduct unbecoming" charges, which was "specifically what the Board pointed to in its findings."

The circuit court denied the Department's motion to dismiss and concluded the Board's decision was not "arbitrary and capricious," stating:

> On [Ojong's] request for additional review, the [c]ourt noted that on appeal, a police department's decision to terminate an employee is reviewed in the light most favorable to it, and its decision is prima facie correct and presumed valid.
>
> Further, as long as the administrative sanction or decision does not exceed the agency's authority, is not unlawful, and is supported by competent, material, and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless under the facts of a particular case, the disproportionality or abuse of discretion was so extreme or egregious that the reviewing court can properly deem the decision to be arbitrary or [capricious].

> The [c]ourt finds that based on the set of facts before it, it does not rise to that level. Based on that finding, I find that the agency's decision was not so extreme and egregious that it leaves the [c]ourt to believe that the decision was arbitrary and [capricious].

STANDARD OF REVIEW

The Court of Appeals addressed the standard of review applicable to LEOBR cases in *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108 (2002). The Court stated:

> [T]he scope of judicial review in a LEOBR case is that generally applicable to administrative appeals. Thus, to the extent that the issue under review turns on the correctness of an agency's findings of fact, judicial review is narrow. 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 . . . While an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts, we owe no deference to agency conclusions based upon errors of law.

Id. at 121–22 (internal quotations and citations omitted). Thus, we review the Board's legal conclusions *de novo*.

Further, "in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reason stated by the agency." *Blackburn v. Board of Liquor License Com'rs for Baltimore City*, 130 Md. App. 614, 624 (2000).

> As long as an administrative sanction or decision does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless, under the facts of a particular case, the disproportionality of abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be "arbitrary or capricious."

Md. Transp. Auth. v. King, 369 Md. 274, 291 (2002).

DISCUSSION

I. The Department's Motion to Dismiss.

As a threshold matter, the Department argues this appeal should be dismissed because judicial review of the Board's recommendations is not permitted by the LEOBR. According to the Department, Ojong's appeal of the Board's recommendation of termination as to Count 12 and claim that it was arbitrary and capricious is not properly before this Court because the disciplinary recommendation is not a final decision subject to review.

Maryland Code Ann., Public Safety § 3-108(d) states:

> (1) Within 30 days after receipt of the recommendations of the hearing board, the chief shall:
>
> (i) Review the findings, conclusions, and recommendations of the hearing board; and
>
> (ii) Issue a final order.
>
> (2) the final order and decision of the chief is binding and then may be appealed in accordance with § 3-109 of this subtitle.
>
> (3) the recommendation of a penalty by the hearing board is not binding on the chief.
>
> . . .
>
> (5) The chief may increase the recommended penalty of the hearing board only if the chief personally:
>
> (i) reviews the entire record of the proceedings of the hearing board;
>
> (ii) meets with the law enforcement officer and allows the law enforcement officer to be heard on the record;
>
> (iii) Discloses and provides in writing to the law enforcement officer, at least 10 days before the meeting, any oral or written communication not included in the record of the hearing board on which the decision to consider increasing the penalty is wholly or partly based; and
>
> (iv) States on the record the substantial evidence relied on to support the increase of the recommended penalty

It is the Department's position that because the Board's recommendation is "not binding," and the chief ultimately has the discretion to adopt that recommendation in whole, in part, or not at all, the aggrieved officer must appeal the chief's decision rather than the Board's recommendation.

We choose not to parse the words used by Ojong in his question presented to this Court, and conclude this appeal is properly before us. The Board recommended to Chief Holland that Ojong be terminated. Chief Holland, in a letter notifying Ojong of the termination of his employment, stated, "based on the outcome of the administrative hearing conducted on January 30, 2017, and based on the [B]oard's findings and recommendations received in my office on February 21, 2017 it is my intent to terminate your employment[.]" It is clear that Chief Holland decided to terminate Ojong's employment based wholly on the outcome of the hearing and the Board's findings and recommendations. After Chief Holland's final order, Ojong appealed arguing the recommendation on which the Chief based his order was "arbitrary and capricious." If we were to agree and our decision required the Board to revise its recommendation, Ojong could possibly obtain a less severe penalty. At that point, although the Chief may nonetheless elect to terminate Ojong's employment, he will need to satisfy the requirements set forth in Section 3-108(d)(5) for increasing the penalty recommended by the Board, including personally meeting with Ojong to allow him to be heard on the record. As we see it, our decision in this case could provide redress for the injury alleged by Ojong—his termination. Accordingly, we hold dismissal is not appropriate in this case.

II. Whether the Board's recommendation of termination as to Charge 12 was arbitrary and capricious when viewed in light of the basis for said recommendation.

Ojong alleges the Board relied on language in the Prior Plea Agreement, which warned that if Ojong had "any additional sustained allegations of similar offenses within 24 months, the Department will seek termination of employment." Specifically, Ojong claims the Board "erred in concluding that the charges submitted for its consideration were 'similar' to those at issue in his prior disciplinary action and, in so doing, acted arbitrarily and capriciously in recommending termination of his employment."

Ojong concedes that the offenses to which he pled guilty in the first internal investigation violated General Order Conduct Unbecoming, and is the same policy he was found to have violated in the most recent incident involving the PCP vials. However, he contends this fact does not equate to a finding that the offenses are "similar" as contemplated by the warning in the Prior Plea Agreement, because, according to him, General Order Conduct Unbecoming "is not capable of meaningful definition and is, essentially, a catch-all provision designed to proscribe any manner of conduct that does not fall within another category of policy."[5] Ojong asserts that "[i]n the former [offenses], he

[5] General Order Conduct Unbecoming, provides:

> No officer will commit any act which constitutes conduct unbecoming a police officer. Conduct unbecoming includes but is not limited to, any criminal, dishonest, impolite or improper act, and/or conduct and/or behavior or violation of Hyattsville City Police Department (HCPD) General Orders or the City of Hyattsville Personnel Manual that did, or would if it did become public knowledge, bring discredit upon the City of Hyattsville, and/or HCPD, and/or any city personnel, sworn, civilian or volunteer.

engaged in behavior, while off-duty, that could have been deemed criminal or, at the very least, improper," but with respect to the incident involving the PCP vials, "the allegations involved technical violations of department procedures." We disagree.

The Board, in making its recommendation, based its recommendation "on the resolution letter dated May 21, 2015, and signed by Officer Ojong on May 27, 2015[,]" i.e. the Prior Plea Agreement. The Board made no mention as to the warning in the Prior Plea Agreement being a basis for its recommendation.

We conclude the Board's recommendation to terminate Ojong's employment was supported by its stated basis. The Prior Plea Agreement showed that Ojong was involved in two incidents, within the past sixteen months, that were subject to the Department's internal investigations. It also provided the Board with information regarding the nature of the two prior offenses at issue in those investigations, and that Ojong "acknowledged his misconduct" and admitted his guilt. The Board also saw that Ojong received relatively severe punishments for these prior offenses, including a demotion and 100 hours of suspension without pay. The Board could have reasonably concluded that these two prior incidents demonstrated two separate instances in which Ojong exercised poor judgment, and found that he deserved the more severe punishment of termination for this third instance of poor judgment.

Alternatively, assuming *arguendo* that the warning within the Prior Plea Agreement was the basis for the Board's recommendation, the incidents were "similar" in that Ojong engaged conduct which could be "deemed criminal." An individual is guilty of the crime

of obstruction of justice where he or she has knowledge of an officer is engaged in the performance of his or her duty and the individual intends to and does, through an act or omission, obstruct or hinder the officer's performance of that duty. *Sibiga v. State*, 65 Md. App. 69, 80–81 (1985). "[I]ntent must be judged in light of the circumstances attending [the accused's] actions, including their natural and inevitable consequences." *Lee v. State*, 65 Md. App. 587, 593–94 (1985).

The parties stipulated to an agreed upon statement of facts. On the day in question, Corporal Quevedo, accompanied by Ojong, located a man lying in the road, and while attempting to administer aid, located what was believed to be two vials of PCP on the man. Quevedo removed the vials from the man's person for evidence. At that point, Quevedo began an investigation into the man's possession of a controlled dangerous substance. The vials were then transferred to Ojong, who eventually proceeded to discard them into a nearby storm drain. Ojong knew or had reason to know the vials likely contained an illicit substance, and that it could provide evidence in the investigation against the man who possessed them. By discarding the vials, Ojong broke the chain of custody, which resulted in the inability to prosecute the man for possession of a controlled dangerous substance—a natural and inevitable consequence of his actions. From these facts, one could infer that Ojong intended to obstruct and hinder Quevedo's investigation of the man who first possessed the vials of PCP. As we see it, all three offenses committed by Ojong were similar in that they all were expressions of his poor judgment and "could be deemed criminal, or at the very least, improper." Accordingly, we conclude the Board's

recommendation that Ojong be terminated was not "so extreme and egregious that [we] can properly deem the decision to be 'arbitrary and capricious.'" *Md. Transp. Auth. v. King*, 369 Md. 274, 291 (2002).

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