UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1661

September Term, 2014

SHEILA BRECK

V.

MARYLAND STATE POLICE

Kehoe,
Friedman,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, James R, J.

Filed: January 5, 2016

On July 25, 2014, Sheila M. Breck, appellant, filed a complaint to show cause in the Circuit Court for Baltimore County, pursuant to the Law Enforcement Officers' Bill of Rights (LEOBR), Maryland Code, § 3-105[1] of the Public Safety Article (PS), naming the Maryland State Police (MSP), appellee, as defendant.[2] Appellant alleged that she was unlawfully prohibited from engaging in secondary employment at National Security Agency (NSA) facilities. On October 6, 2014, after holding a hearing, the circuit court dismissed the complaint. On appeal, appellant argues that the court erred in doing so. We shall affirm.

Background

We begin with a disciplinary proceeding in 2012 because it provides context for subsequent events. At that time, appellant was a Sergeant in the MSP. In early 2012, she was charged with causing a report to be filed containing false information. Appellant's police powers were suspended, and she was placed on administrative duty. In July 2012, an LEOBR hearing board found her guilty, and her police powers were suspended. On May 21, 2013, the MSP restored appellant's police powers.[3] Appellant sought judicial review in the circuit court and, when unsuccessful, in this Court. This Court, in an unreported opinion filed on January 22, 2015, ordered that the administrative determination

[1] Section 3-105 provides that a law enforcement officer who is denied a right under the LEOBR may apply to the appropriate circuit court for an order that directs the law enforcement agency to show cause why the right should not be granted.

[2] All statutory references are to the Maryland Code.

[3] The record contains no explanatory information.

be vacated and a new hearing be conducted.[4] *Breck v. Maryland State Police,* No. 75, Sept. Term, 2014.

In July 2013, after her police powers were restored, appellant began working three days per month overtime at NSA facilities. The time worked at NSA was in addition to 40 hours per week during which she performed her primary duties for MSP. While working at NSA, appellant was in uniform, and she used her police vehicle. Appellant was paid by MSP for her overtime, and MSP was reimbursed by NSA.

On January 7, 2014, at a meeting with Lieutenant Colonel William Pallozzi, Lt. Col. Pallozzi gave appellant a letter dated November 5, 2013, signed by Marcus L. Brown, Superintendent of the MSP. In substantial part, the letter advised:

> Due to recent changes in Maryland law, we have began [*sic*] the process of reevaluating staffing assignments for those troopers who, like yourself, have an investigative or hearing board finding that could be deemed to involve untruthfulness. This duty has been thrust upon us by changes in the rules governing discovery in criminal cases, specifically MD Rule, 4-263, which requires Assistant State's Attorneys to disclose all impeachable material regardless of whether it is requested. A prior finding on a trooper's administrative record that could arguably involve untruthfulness and integrity falls into this category.
>
> A recent Court of Appeals opinion, *Fields v. State*, 432 Md. 650 (July 9, 2013), makes it clear that failure to disclose this information is grounds for reversal of criminal convictions. *Fields* involved a murder case in which the primary Baltimore City Detectives involved in the case had previously falsified time sheets. The Court reversed the murder conviction, holding that the fact that the detectives falsified time sheets should have been disclosed to the defense because it "would be

[4] This Court's opinion and mandate were based on the fact that the principal witness's testimony could not be located for inclusion in the record on appeal.

> probative of the detectives' character for untruthfulness." *Fields,* 42 Md. At 674-675.
>
> What this means is that troopers such as yourself can now have the prior "untruthfulness" finding used against them every time they testify in court. While it is unclear what every State's Attorney will do in this situation, many of them have decided they will not go forward with a case in which one of the primary investigators has this kind of finding on their record.
>
> Regrettably, this situation requires us to place troopers with "untruthfulness" findings into positions in which they will not be called upon to testify in court. We must also instruct you to avoid situations that could result in requiring you to testify in court except for your obligations specified in PER 17.03 X (Neglect of Duty) or PER 13.01 C (Crimes witnessed by Troopers while engaged in Off-Duty Secondary Employment). If you are required to testify in Court, we will be obligated to inform the State's Attorney's Office of the finding on your record and the State's Attorney's Office will make a decision of how to proceed.

In January 2014, at the time of the meeting, appellant's regular assignment was at the Facilities Management Division of the MSP, a function that did not include law enforcement. According to appellant, at the January meeting, LT. Col. Pallozzi told her that nothing would change. Based on her understanding of the comment, she continued to work overtime at NSA.

On March 26, 2014, appellant received two phone calls from her supervisor, David Manning. According to appellant, Mr. Manning told her that she could no longer wear her uniform or anything that portrayed her as a police officer, at any location. He advised she could keep her vehicle but that the emergency lights and siren would be removed. Finally, he advised her that she could not work at NSA anymore or do any work that would cause her to testify in court.

On July 2, 2014, appellant was informed that an investigation would be conducted, pursuant to PS, § 3-104, as a result of a complaint that she had disobeyed instructions in that she had continued to work at NSA.

On July 25, 2014, appellant filed this action. She alleged that the MSP had violated PS, § 3-103(b) by prohibiting her from performing secondary employment.

PS, § 3-103(b) provides:

> A law enforcement agency:
> (1) may not prohibit secondary employment by law enforcement officers; but
> (2) may adopt reasonable regulations that relate to secondary employment by law enforcement officers.

On January 1, 2013, revised on October 11, 2013, the MSP issued Personnel Directive PER 13.01 (the Directive). The Directive stated that its purpose was to establish a policy for MSP employees who engage in secondary employment. In .03, the definition subsection, it provides in part:

> EXTRA-DUTY SECONDARY EMPLOYMENT (EDSE): employment that is supervised by the MSP which includes performing tasks such as escorting oversize and overweight vehicles, State Highway Administration projects and other reimbursable overtime projects when compensation is paid through the MSP.
>
> OFF-DUTY SECONDARY EMPLOYMENT (ODSE): the participation in any activity where compensation is derived from any source other than the MSP including military reserve components and any form of self-employment.
>
> SECONDARY EMPLOYMENT (ODSE): when used alone, includes both extra-duty secondary employment and off-duty secondary employment.

The Directive contains provisions which address (1) the procedure for obtaining approval for off-duty secondary employment; (2) the procedure for handling crimes

witnessed while working on off-duty secondary employment; (3) the types of employment that will not be approved for off-duty secondary employment; and (4) limitations on the amount of overtime permitted in off-duty secondary employment and the amount permitted in extra-duty.

On October 6, 2014, the circuit court held a show cause hearing. At the hearing, in addition to arguing that the MSP had violated PS, § 3-103(b), appellant argued that it had violated PS, § 3-106.1, effective as of October 1, 2014.

Sections 3-106.1 (a) and (b) provide:

> **In general**
> (a) 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.
>
> **Punitive action against law enforcement officer**
> (b) 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:
>
> (1) demotion;
>
> (2) dismissal;
>
> (3) suspension without pay; or
>
> (4) reduction in pay.

> **Notice to officers of name placed on list**
> (c) 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.

At the show cause hearing, appellant testified that she was familiar with the Directive. She testified that she understood off-duty secondary employment to mean working overtime to provide security at a facility such as a McDonald's restaurant. She explained that, on off-duty secondary employment, she is permitted to drive her police vehicle to the site but may not use it. She is not permitted to wear her uniform. She is paid directly by the entity. She testified that, in contrast, she understood that extra-duty secondary employment is overtime performed pursuant to an agreement between the MSP and a third party. She is paid by the MSP, and MSP is reimbursed by the third party. She wears her uniform and uses her police vehicle.

Appellant testified that she was not prohibited from working off-duty secondary employment. She was working overtime for a third party in an off-duty capacity at the time of the hearing in circuit court.

Don Lewis, Director of Human Resources for the MSP, also testified. Mr. Lewis testified that extra-duty secondary employment is "on duty, reimbursable overtime" employment at a third party entity. Troopers working that type of project are required to be in uniform and use all of their issued equipment, including a police vehicle. He explained that the troopers are paid through the MSP regular payroll process and the MSP is reimbursed by the third party entities. Off-duty secondary employment, according to Mr. Lewis, is between the trooper and the third party. Troopers are not paid through the

MSP payroll. On these projects, troopers are not permitted to wear their uniform or use their police vehicle. In effect they work in the capacity of a security officer unless and until they witness a serious crime, at which time they may assume on duty status. Troopers are required to get permission from the MSP to perform off-duty secondary employment.[5]

At the conclusion of the hearing, the court dismissed the complaint. The court implicitly assumed that even if appellant were correct that her employment at NSA was secondary employment within the meaning of the LEOBR, there was no statutory violation because appellant, by her own admission, could pursue some form of secondary employment. The court concluded that a violation would occur only if the MSP prohibited all secondary employment. The court also found there was no evidence of any punitive action against appellant.

Questions Presented

As stated by appellant, the questions presented are

1. Whether the Circuit Court erred by finding the MSP could prohibit Sgt. Breck from performing secondary employment?

2. Whether the Circuit Court erred by finding that prohibiting Sgt. Breck from performing secondary employment was not punitive under LEOBR § 3-106.1(b)?

[5] The record is silent as to whether and under what circumstances permission is required for extra-duty secondary employment or whether the MSP can require an officer to perform extra-duty secondary employment.

Discussion

1.

Unfortunately, the term secondary employment as used in § 3-103 is not statutorily defined. Appellant argues that secondary employment within the meaning of § 3-103 includes both extra-duty and off-duty employment because the Directive defines both as secondary employment. Relying on *Fraternal Order of Police, Montgomery County Lodge No. 35 v. Mehrling,* 343 Md. 155 (1995), appellant then argues that the MSP violated § 3-103(b) when it prohibited secondary employment without having first enacted regulations that permitted it to do so. As in circuit court, appellant argues that, because the MSP failed to promulgate regulations under which secondary employment was prohibited for enumerated reasons, no sanction is authorized by the LEOBR.

The MSP argues that appellant's work at NSA was an on duty overtime assignment, and even though the Directive defined it as extra-duty secondary employment, the overtime was processed through the MSP payroll system and was not secondary employment within the meaning of the LEOBR. The MSP explains that the definitions in the Directive cannot change the meaning of the statute. The MSP concludes that the statutory meaning of secondary employment is employment by a third party entity. The MSP also argues that it took no punitive action against appellant.

In *Mehrling*, an officer with the Montgomery County Police Department, was employed part time at a local apartment complex. A Montgomery County Police Department rule in effect at that time prohibited employment outside of the Department without the consent of the Chief of Police and the County Ethics Commission. The rule

provided that "[n]o employee of the Department of Police will engage in any other employment without the prior written approval of the Chief of Police and the County Ethics Commission." 343 Md. at 157, n.1. The rule was promulgated by the Police Department and was not promulgated as a "regulation" pursuant to the procedure for adopting regulations as set forth in the Montgomery County Code. *Id.* at 172. The officer did not obtain consent. The Department initiated disciplinary proceedings against the officer under the LEOBR. *Id*. at 157-158. The charges resulted in a finding of guilty, and the Department, as a punitive measure, prohibited the officer from working secondary employment[6] for three months. *Id.* at 161.

The Court of Appeals concluded that the Chief of Police lacked authority to prohibit the secondary employment in question, as a punitive measure, because the Police Department had not promulgated regulations in accordance with the requirements contained in the Montgomery County Code. *Id*. at 180.

As we address the issue before us, we note that the record is skimpy, at best. The MSP is a principal department of State government. State Government (SG), § 2-201. Principal departments have the authority to adopt regulations. SG § 8-206. To our knowledge, the MSP has not formally adopted regulations governing secondary employment. See SG §§ 10-11 and 10-112 (requirements for formal adoption); COMAR Title 29 (MSP) (contains no regulation re secondary employment); and COMAR Title 28, Chapter .01 (Rules of Procedure, Office of Administrative Hearings). Nevertheless, SG

[6] Secondary employment was assumed to be employment by a third party.

§ 10-101 (g) (1), in defining "regulation," provides that it can be in any form, including "a guideline," "a rule," "a standard," "a statement of interpretation," or "a statement of policy." The only relevant regulatory information in the record consists of (1) personnel directives, which, as we understand it, are contained in the MSP Manual, and (2) the November 5, 2013 letter.

As reflected in PS § 3-103, the General Assembly intended that law enforcement officers have the right to engage in secondary employment, subject to reasonable regulation by the law enforcement agency. *Mehrling*, 343 Md. at 176. In *Mehrling,* the rule simply prohibited secondary employment without obtaining the necessary consents; it contained no detail as to when or why consent would be withheld. In contrast, the Directive does contain regulatory detail with respect to off-duty secondary employment. While we conclude that *Mehrling* is not applicable, we do not do so based on the difference in detail between the rule in *Mehrling* and the Directive in this case.[7]

We conclude that secondary employment within the meaning of § 3-103 means off-duty secondary employment and does not include on-duty overtime, identified by MSP as

[7] The LEOBR's procedural protections apply when there is a prospect of disciplinary action or a punitive measure that is within the substantive authority of a police department to impose. *Boyle v. Maryland-National Capital Park & Planning Commission*, 385 Md. 142, 155 (2005). As we indicated, the record in this matter is skimpy. It may be that, unlike the punitive measure in *Mehrling* that was related to outside private security, overtime work at NSA is under the control of the MSP in the ordinary course of its business. It seems reasonable that, in conjunction with other agencies, the MSP may determine what contractual relationships it will enter into and, thus, what services it will offer through its officers. Consequently, this may be a non-disciplinary setting, and the LEOBR's procedural protections may not be applicable. The record is silent in this regard.

extra-duty secondary employment. Secondary employment within the meaning of § 3-103 means employment directly by a third party, *i.e*., a party other than the agency for whom the employee primarily works. Extra-duty secondary employment means employment by an officer performing other than his/her primary duties either for the MSP directly or pursuant to a contractual assignment to a third party after the officer has worked 40 hours performing his/her primary duties. The officer is paid overtime compensation by the MSP, and the MSP is reimbursed by the third party. A frequent example of this type of employment is when the MSP provides escort services or construction/maintenance/repair site services to the State Highway Administration, some of which may involve overtime.

The directive PER 13.01 is consistent with this conclusion in that, after defining two types of secondary employment, the detailed portion of the directive addresses only off-duty secondary employment. We conclude that the MSP definitions are merely an internal reference to distinguish one type of employment from another.

Our conclusion is reinforced by common usage of the term secondary employment as revealed by a non-exhaustive review of reported appellate opinions in which the term "secondary employment" was involved, *e.g., Espina v. Prince Georges County*, 215 Md. App. 611 (2013), *aff'd* 442 Md. 311 (2015); *Howard County Police Officers Ass'n v. Howard County*, 126 Md. App. 319, 321 (1999), and a non-exhaustive review of State Ethics Commission opinions. *See* opinions in *COMAR*, Title 19A.[8] While a thorough

[8] The Commission has issued several opinions in the context of whether a State employee can ethically pursue direct outside employment or direct employment with more than one agency.

review of reported opinions, Ethics Commission opinions, and other sources may well reveal exceptions, generally, the secondary employment at issue was direct employment with an entity other than the employee's primary employer.

2.

Appellant also argues that the MSP violated § 3-106.1. It necessarily follows from the above that the MSP did not take punitive action against appellant. Moreover, there is no evidence that appellant suffered any reduction in pay because she testified that she engaged in off-duty employment at a McDonald's or elsewhere, and there was no evidence as to relative amounts of pay.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.