Circuit Court for Prince George's County
Case No. CAL 16-35180

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2258

September Term, 2017

MICHELLE BURNETTE

v.

MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION POLICE

Fader, C.J.,
Shaw Geter,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: March 4, 2019

Appellant, Michelle Burnette, having been found guilty of several departmental infractions by an Administrative Hearing Board, was terminated from her position as a Detective with the Maryland National Capital Park and Planning Commission Police Department (the Department). Her request for judicial review in the circuit court for Prince George's County was unsuccessful. On appeal to this Court, she asks:[1]

1. Was a meeting with her superior officers an "investigation" or "interrogation" for purposes of triggering her rights under the Law Enforcement Officers' Bill of Rights (LEOBR)?

2. If so, was information obtained during that meeting admissible before the Administrative Hearing Board?

For the reasons that follow, we shall affirm the judgment of the circuit court and, hence, the findings of the Administrative Hearing Board.

BACKGROUND

As a Detective, Burnette was issued an iPad by the Department. It is the damage to that iPad, the source of the damage, and the manner in which Burnette reported the damage to the appropriate officials that generated charges against her and, ultimately, this litigation.

[1] We have slightly recast appellant's questions, which were:

1. Did Burnette's December 1, 2014 meeting with Sgt. [Kevin] Coles and Lt. [Karla] Newman constitute an "investigation" and/or "interrogation" for purposes of MD Code Ann., Public Safety § 3-107, thus triggering her rights under the Law Enforcement Officers' Bill of Rights?

2. Was the agency permitted to use the information obtained during the December 1, 2014 meeting between Sgt. Coles, Lt. Newman, and Burnette as a basis for the administrative charges?

On the morning of November 14, 2014, prior to her shift, she spoke with two members of the Department's IT branch, reporting a crack in the iPad screen. She was given a hard-rubberized protective case for the iPad to prevent further damage, or injury to her. Later that day, in the afternoon, she reported the damage to her supervisor, Sgt. Kevin Coles. She told Coles that she had not dropped the iPad, but believed that the screen had been cracked by cold temperatures. At his request, Burnette sent Coles two emails memorializing what she had reported to him concerning the damage to the iPad.

In her reports, she represented that the iPad was fine the morning before, that it had remained in her car all day while she was at a conference, and that she had brought it inside when she returned home, not looking at the iPad again until the next morning, when she noticed the screen had cracked. She then showed Coles the iPad in the hard-rubberized case, revealing only the cracked screen. Once the iPad was sent to IT to be processed and replaced, the case was removed revealing the extent of the damage. IT reported to Coles and to his supervisor, Lt. Karla Newman, that the extent of the damage could not have been caused by cold temperatures, but was consistent with having been dropped, which Burnette later conceded.[2]

With this information, Coles and Newman met with Burnette on December 1, 2014, to obtain more information concerning the damage. Finding Burnette's statements about

[2] As the Board noted, "… Burnette admitted during her testimony under oath that she often carried the [iPad] inside of her work bag and that she sometimes tosses her bag inside of her assigned work vehicle onto the floor."

how the iPad was damaged inconsistent with her initial reporting, Newman submitted a Report of Investigation to Capt. Michael Murphy.

Based on that report, Murphy submitted a Complaint Against Police Practices to the Internal Affairs Division to investigate whether Burnette had violated agency policies in her reporting of the damaged iPad.

At the conclusion of the investigation, Burnette was charged with violations relating to several of the Department's divisional directives:

> **Rule 6: Conduct Unbecoming** – "Conduct unbecoming an officer or employee shall include any criminal, dishonest, prejudicial or disgraceful act." PG DD 300.0 - Rules of Conduct.
>
> **Rule 12: Integrity of the Reporting System** – "No employee shall make, or cause to be made, any omission, false, inaccurate, or improper entries in any official record, form or report, nor shall they under any circumstances make any false official statement or international misrepresentation of fact." PG DD 300.0 - Rules of Conduct.
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> **Maintenance of Uniforms and Equipment** – "Officers and employees of the Division shall take all reasonable measures to safeguard their uniform and related equipment items from theft, loss, or damage that may result from their own negligence." PG DD 1700.0 – Uniforms and Equipment (VII)(G)(2)(a).
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> **Maintenance of Uniforms and Equipment** – "Officers, upon suffering a theft of, loss of, or damage to any item of uniform or related equipment shall, as soon as possible, initiate the following actions: … Notify and submit a detailed memo to their immediate supervisor relating all circumstances surrounding such theft, loss or damage." PG DD 1700.0 – Uniforms and Equipment (VII)(G)(2)(b).

The Board found Burnette not guilty of the "conduct unbecoming" charge, but guilty of the "reporting" and "maintenance of equipment" charges. For those violations the Board recommended that Burnette be demoted for her violation related to Integrity of the

Reporting; receive a letter of reprimand; and be required to reimburse the Department for the replacement of the iPad.

The findings of the Board were forwarded to Chief Stanley R. Johnson, who ordered termination of her employment and assessed damage reimbursement of $629.00.

The proceedings

Prior to her trial before the Administrative Hearing Board, Burnette moved to suppress statements she made at the December 1, 2014 meeting with Coles and Newman, alleging that the meeting constituted an interrogation, for which LEOBR provides procedural protections that had not been followed. The Board initially denied the motion, affording Burnette the opportunity to renew the motion at the close of the Commission's case. The Board denied the renewed motion to suppress.

DISCUSSION

Standard of Review

We have recently explained the appropriate standard for reviewing agency decisions:

> It is "[b]ecause an appellate court reviews the agency decision under the same statutory standards as the circuit court," *Consumer Prot. Div. v. George*, [383 Md. 505, 512] (2004) (quotations and citation omitted), that "we analyze the agency's decision, not the [circuit] court's ruling." *Martin v. Allegany County Bd. of Educ.*, [212 Md. App. 596, 605] (2013) (citation omitted). We are "'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *W.R. Grace & Co. v. Swedo*, [439 Md. 441, 453] (2014) (quoting *Bd. of Physician Quality Assur. v. Banks*, [354 Md. 59, 67–68] (1999)).

Mihailovich v. Dep't of Health & Mental Hygiene, 234 Md. App. 217, 222 (2017), *cert. denied*, 457 Md. 396 (2018).

Was the Law Enforcement Bill of Rights Implicated?

We shall answer that question in the negative, and explain.

In her brief, Burnette asserts that: "The December 1, 2014 meeting between Coles, Newman and [her] was an investigation and/or interrogation for purposes of MD Code Ann., Public Safety § 3-104 and, therefore, [she] was entitled to the protections of the LEOBR." Burnette claims that her rights were violated because she "was not provided with written notification concerning the nature of the investigation against her, nor was the interrogation memorialized in any way, shape or form." She concludes that "the Board erred as a matter of law by denying [her] preliminary Motion to Suppress." Alternatively, as she argued during the motions hearing, she contended that if the Board did not find suppression to be appropriate, that any parts of the charges against her that were based on her statements made during that meeting "should be essentially nullified[,]" because they were "illegally obtained."

In renewing her motion before the Board, Burnette relied on the testimony of Coles, asserting that: "He did testify that he was aware that the questions that he was asking and the responses thereto could potentially lead to departmental discipline." The Board denied Burnette's renewed motion, concluding:

> We have now heard witness testimony concerning the facts of the supervisory questioning and the Board has determined that the questioning was not interrogation giving rise to LEOBR rights. Accordingly, we now formally and unconditionally deny the Defense motion.

The Law Enforcement Officers Bill of Rights is codified in Maryland Code (2003, 2011 Repl. Vol., 2018 Supp.) Public Safety Article (PS), §§ 3-101, *et seq*. Of particular concern to the matter before us are the provisions of PS § 3-104, which implicate the invocation of the statute. More precisely, we must consider whether, as Burnette argues, the December 1st meeting with Coles and Newman was an "interrogation" that would have (a) entitled Burnette to representation, and (b) precluded the introduction before the Board of matters discussed or disclosed at the meeting.

In response to her argument that the meeting was an interrogation, the Department posits that the meeting was a "mere inquiry" which afforded her no rights under the LEOBR. Moreover, the Department argues, even if the meeting was an "interrogation" that engaged the LEOBR, the statute provides no exclusionary rule and admission of the information obtained did not offend Burnette's due process rights.

A police officer is entitled to due process protection, but "only when the officer is investigated and/or interrogated as a result of a disciplinary-type complaint …." that has been lodged. *Calhoun v. Comm'r, Baltimore City Police Dep't*, 103 Md. App. 660, 672 (1995). In *Liebe v. Police Dep't of Annapolis*, 57 Md. App. 317, 323 (1984), we said "[t]he cases demonstrate that something more than counseling sessions, but perhaps less than formal complaints leading to inquiry, is necessary to trigger the LEOBR[.]"[3]

Neither "investigation" nor "interrogation" are defined by the statute. In the absence of such definition, the courts have taken a case by case approach. Indeed, it would be

[3] The factual predict developed by the Department led to charges and disciplinary action, which was not ordered until one year later.

difficult to provide a bright-line definition to fix the point at which an inquiry becomes an investigation and when that leads to an interrogation.

While, on the facts before us, we might find that by December 1st, the Department had gathered sufficient evidence to lead to departmental charges, we need not do so. Even if we assume that the December 1st meeting was an interrogation, however defined, Burnette's due process rights were not impinged.

We have found no case, and Burnette cites us to none, in which the appellate courts of this State have imposed an exclusionary rule to preclude the admission of evidence before a trial board that was obtained in potential violation of the employee's due process rights under the LEOBR in circumstances such as those in the instant case. Here, it was incumbent upon Burnette to show that her comments to superior officers at the December 1st meeting were, in some fashion, compelled under threat or improper inducements. There is nothing in her testimony before the Board, or otherwise in the record, that would lead to a conclusion that she was directed or compelled to participate in the December 1st meeting. She was not asked if she was ordered to attend and she did not volunteer that she was compelled to attend. Indeed, it is clear from the record that her attendance and participation were voluntary.

Our opinion in *Martin v. State*, 113 Md. App. 190 (1996) provides support for our conclusions. Martin, a police officer, was charged with sexual offenses while on duty. He gave a voluntary statement to police investigators and later invoked the LEOBR in his effort to have the statement suppressed in his criminal trial. We held, with Judge Moylan writing for this Court, that because Martin was unable to establish that he had been ordered

to make a statement, "the statutory exclusionary rule established by the LEOBR did not come into play."[4] 113 Md. App. at 209. Likewise, as we said in *Miller v. Baltimore Cty. Police Dep't,* 179 Md. App. 370, 393 (2008), "there is no general exclusionary rule under State law, based on unlawful obtention of evidence." (citing *Thompson v. State*, 395 Md. 240, 259 (2006)[5]; *Fitzgerald v. State*, 153 Md. App. 601, 682 n.4 (2003)[6]).

Burnette argues also that, in the absence of an exclusionary rule, we should adopt a *de facto* exclusionary rule to preclude use of her statements and comments to Coles and Newman. Lacking the authority to do so, we decline that invitation.

Because we hold that, even assuming the Department's conduct prior to or during the December 1st meeting might have triggered the implication of the LEOBR, and further

[4] As discussed in *Martin*, the statutory exclusionary rule was provided under former Article 27 – Crimes and Punishments, § 728(b)(7)(ii), the relevant provision of which is now found, with minor modifications, under PS § 3-104(l)(3). *See Martin*, 113 Md. App. at 208 (the statutory exclusionary rule provides that, "'[t]he results of any … interrogation, *as may be required by the law enforcement agency* under this subparagraph are not admissible … in any criminal proceedings against the law enforcement officer *when the law enforcement officer has been ordered to submit* thereto.'" (emphasis in *Martin*) (quoting Crimes and Punishments § 728(b)(7)(ii)).

[5] In *Thompson*, the Court determined that "[t]he ruling of the Circuit Court in the case *sub judice* is the equivalent of the creation of an exclusionary rule because it categorically precludes the use of the test result in advance of an actual violation of the retention provision in the court's DNA testing Order. In the absence of statute or a rule promulgated by this Court, the Circuit Court does not have the inherent power to create an exclusionary rule of evidence under a statute that itself does not have an exclusionary rule." *Thompson*, 395 Md. at 259.

[6] In *Fitzgerald*, we discussed that, "Maryland has no independent exclusionary rule for physical evidence…. [and] has always been among the overwhelming majority of American states that have, on balance, opted against an exclusionary rule for search and seizure violations." *Fitzgerald*, 153 Md. App. at 682 n.4.

because there is no operative exclusionary rule from which Burnette could benefit, we need not consider her general assertions that if the challenged evidence were excluded, the remaining evidence was insufficient to sustain the Board's rulings and order.[7]

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

[7] We note, parenthetically, that Burnette makes no challenge to the sufficiency of the evidence to support either the Board's findings and recommended sanctions, or the Chief's termination order; nor does she challenge any of the other sanctions imposed.