

Circuit Court for Prince George's County
Case No. CAL21-13309

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1795

September Term, 2022

NICHOLAS HERNANDEZ

v.

PRINCE GEORGE'S COUNTY POLICE
DEPARTMENT

Nazarian,
Zic,
Harrell, Glenn, T.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: August 20, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Nicholas Hernandez, appellant, was employed by appellee, the Prince George’s County Police Department (“the Department”), as a police officer. Following an arrest for driving while impaired by alcohol and subsequent investigation, the Department recommended Mr. Hernandez’s termination. Mr. Hernandez exercised his right to a hearing in front of the Administrative Hearing Board (“AHB”) and agreed to plead guilty to driving while impaired by alcohol. Following the plea, Mr. Hernandez requested a character hearing to present evidence to the AHB to inform their decision concerning discipline.

The AHB recommended that Mr. Hernandez be suspended without pay for 40 days and forwarded its findings and recommendation to the Chief of Police. The Chief of Police, Malik Aziz, notified Mr. Hernandez that he would increase the proposed discipline recommendation to termination and offered Mr. Hernandez the opportunity to present information that Chief Aziz should consider before issuing a final disciplinary decision. Mr. Hernandez met with Chief Aziz on October 1, 2021. On October 7, 2021, Chief Aziz issued a Final Disciplinary Action terminating Mr. Hernandez’s employment. The Circuit Court for Prince George’s County affirmed Mr. Hernandez’s termination. This appeal followed.

QUESTION PRESENTED

Mr. Hernandez presents one question for our review, which we have rephrased as follows:¹

Whether the circuit court erred when it found that the Chief complied with Public Safety § 3-108(d)(5) when he increased Mr. Hernandez’s final discipline to termination.

For the following reasons, we affirm the decision of the circuit court, holding that the circuit court properly found that Chief Aziz complied with Md. Code Ann., Public Safety (“PS”) § 3-108(d)(5) (2003, 2019 Repl. Vol.).²

BACKGROUND

Underlying Incident

On or about June 8, 2019, Mr. Hernandez was arrested in Severna Park, Maryland, by the Anne Arundel County Police Department for operating a motor vehicle while impaired by alcohol. While detained, Mr. Hernandez allegedly assaulted Officer Magnuson when he pushed her while in the detention area. That same day, Mr. Hernandez failed to provide a sufficient breath test to Detective Baxter of the Special Investigation Response Team, refusing to comply with Detective Baxter’s orders. On or

¹ Mr. Hernandez presented the following question for review:

1. Did the Chief’s decision to increase the AHB’s disciplinary recommendation comply with the procedural requirements set forth in MD Code Ann., Public Safety § 3-108(d)?

² All citations to the Maryland Code refer to the Public Safety Article.

about January 29, 2020, Mr. Hernandez pled guilty in the District Court of Maryland, sitting in Anne Arundel County, for driving while impaired by alcohol.

In response to the incident, the Prince George’s County Police Department’s then Chief of Police, Henry Stawinski, issued a Disciplinary Action Recommendation to Mr. Hernandez on or about June 17, 2020. The recommendation listed four charges: Charge 1, Unbecoming Conduct, “on or about June 8, 2019, at 204 Pasadena Road, Pasadena, Maryland, the Respondent, Corporal Nicholas Hernandez #3701 assaulted Officer Magnuson #2230 of the Anne Arundel Police Department by pushing her while in the detention area;” Charge 2, Violation of Laws, “on or about January 29, 2020, at the Circuit Court for Anne Arundel County, Maryland, the Respondent, Corporal Nicholas Hernandez #3701 was convicted in the District Court for Maryland for driving a vehicle while impaired by alcohol;” Charge 3, Unbecoming Conduct, “on or about June 8, 2020, at 110 Ritchie Highway, Severna Park, Maryland, the Respondent, Corporal Nicholas Hernandez #3701 was arrested by the Anne Arundel Police Department for operating a motor vehicle while impaired by alcohol;” and Charge 4, Chain of Command-Compliance with Order From Superior Authority, “on or about June 8, 2019, at 204 Pasadena Road, Pasadena, Maryland, the Respondent, Corporal Nicholas Hernandez #3701 did fail to provide a sufficient breath test after being ordered to do so by Detective Baxter #2876 of the Special Investigation Response Team.”

For the first three charges, Chief Stawinski proposed Mr. Hernandez’s termination and ordered him to contact the Psychological Services Division and complete a substance abuse treatment program. For Charge 4, Chief Stawinski proposed a 20-hour suspension

without pay. Mr. Hernandez acknowledged receipt of the Recommendation and timely requested a hearing with the AHB on August 21, 2020.

Administrative Hearing Board

An AHB was convened on August 23, 2020, where the Department and Mr. Hernandez presented an agreement that stipulated the Department would dismiss Charge 1 and Mr. Hernandez would plead guilty to Charges 2, 3, and 4. The Board accepted the agreement, and, therefore, no exhibits or evidence were admitted at the hearing.

After entering his guilty plea, Mr. Hernandez requested a character hearing be held before the AHB announced its recommended disciplinary action. On September 2, 2021, the AHB convened a character hearing where four members of the agency and two civilian witnesses testified to their working and personal relationships with Mr. Hernandez. Mr. Hernandez and his attorney also testified that Mr. Hernandez had been sober since the incident on June 8, 2019, had completed inpatient and outpatient treatment, and regularly attended Alcoholics Anonymous meetings. The Board also considered Mr. Hernandez's personnel file while determining their recommended discipline.

The AHB recommended that for Charges 2 and 3, Mr. Hernandez be demoted to the rank of Police Officer First Class, receive the associated pay cut, and be ineligible for promotion for two years. For Charge 4, the Board recommended a 40-hour suspension without pay. The AHB also recommended that Mr. Hernandez be required to contact and complete substance abuse and mental health treatment programs through the Psychological Services Division.

The Chief's Determination

On September 21, 2021, Chief Malik Aziz³ issued the Report of Administrative Hearing Board to Mr. Hernandez and stated that after “fully reviewing your past job performance, the entire record of the proceeding of the Administrative Hearing, the Board Report and considering all the facts surrounding the charges in which you were found guilty,” he determined that increasing the disciplinary action for Charges 2 and 3 to termination was appropriate. Chief Aziz also wrote that “[i]n accordance with [Public Safety] § 3-108 (d)(5), I want to extend to you and your representative the opportunity to present in person, any facts, legal arguments, or other information that you want me to consider prior to determining the final action to be taken.”

On October 1, 2021, the AHB Chiefs Meeting for Mr. Hernandez was convened. Mr. Hernandez, his counsel, and Chief Aziz were present at the meeting along with several other Deputy Chiefs and officers. While discussing the contents of the September 21, 2021 letter from Chief Aziz, Mr. Hernandez’s representative asked to clarify that “[t]he Chief hasn’t made the decision to increase the termination. The Chief has called this hearing . . . to consider whether or not . . . the recommendation should be increased.” Lieutenant Black, who was running the meeting, answered affirmatively: “That is correct.” Mr. Hernandez’s counsel also clarified that “[t]he ultimate discretion lies with Chief Aziz” and that the meeting would not be “a situation where it’s being voted on or

³ Chief Malik Aziz replaced Chief Stawinski as the Chief of the Prince George’s County Police Department between the initial Disciplinary Action Recommendation in June 2020 and the Report of the AHB on September 21, 2021.

considered by the deputy chiefs.” Chief Aziz stated that “the final determination is with the Police Chief and me alone.”

Mr. Hernandez testified during the meeting that his DUI was not representative of his character, his underlying problem was using alcohol to cope with the burdens of working as a police officer, he was working on being healthier, both physically and mentally, and he was a hard-worker and helped however he could even when he was on desk duty. Mr. Hernandez’s representative also testified that he had noticed a positive change since he first met Mr. Hernandez, soon after Mr. Hernandez’s 2019 DUI. Mr. Hernandez’s representative also sought to remind the Chief that Mr. Hernandez was not hired as a conditional employee, despite the Department knowing about Mr. Hernandez’s prior DUI in 2005.

Without directly stating how he was going to decide the case, the Chief stated: “I’m just making sure that you understand where I’m coming from with how I view Prince George’s County Police Department[] and this badge that we proudly wear. You know that that’s important for me to uphold that image.” The Chief also asked Mr. Hernandez, who the Chief pointed out was a “veteran officer” in the Department, what his “wake-up call” was to realize he needed to step away from alcohol. Mr. Hernandez attested that while he had heard about situations with other officers receiving suspensions, “you don’t understand until you deal with that same adversity.” The Chief continued by stating that his “take on” Mr. Hernandez’s testimony was that he would not feel obligated to give him a warning to “let [him] know what is already wrong,” and that “as adults . . . we understand what the ramifications and consequences [are] in which we

exist.” Additionally, in response to Mr. Hernandez’s counsel’s point that previous chiefs had handled these issues with specific levels of discipline, the Chief stated:

I have no desire to be placed into [previous Chiefs’] thinking and what they were looking at Those past decisions, [] the things that have come out of Prince George’s County, things that are coming to light now, [] whether they were good decisions or bad decisions. And I think the general public, [] would view of in a negative way, [] for policing [T]he administration has changed and that direction, [] will be of my protection and I believe I will protect, [] Prince George’s County is the honor and integrity, [] to the best that I ever could I love this badge and this patch that’s on my sleeve, [] and I intend to uphold the integrity of it at every, every chance I get[.]

On October 7, 2021, Chief Aziz issued the Final Disciplinary Action which ordered the same discipline as proposed in the September 21, 2021 letter. The letter stated that Mr. Hernandez would be terminated at the close of business on October 8, 2021.

Circuit Court for Prince George’s County Hearing

Mr. Hernandez appealed the Department’s decision to increase his penalty to termination to the Circuit Court for Prince George’s County. The circuit court held a hearing regarding the matter on November 17, 2022. Mr. Hernandez’s attorney recounted the basic procedural history of the case and then described the statutory requirements to increase a penalty recommended by the AHB. He indicated that the only issue before the court was requirement (iv), which required the Chief to “state on the record the substantial evidence relied upon to support the increase of the recommended penalty.” In a decision from the bench during the same proceeding, the circuit court

determined that the Department did not make an error of law and the Chief relied on substantial evidence when deciding to increase Mr. Hernandez’s penalty. The circuit court explicitly found that it was clear from the record “that the chief had not made a decision prior to” the October 1, 2021 meeting and that the Chief satisfied § (iv) of the statute because “[h]e stated what he relied upon for the recommendation, and again, the statute does not state with any level of specificity [what] the chief must have in order to do so[.] [I]t is silent as to that.” The circuit court affirmed the Department’s decision. Mr. Hernandez timely appealed.

STANDARD OF REVIEW

When reviewing an administrative agency’s decision, “this Court reviews the agency’s decision, not the circuit court’s decision.” *Belfiore v. Merch. Link, LLC*, 236 Md. App. 32, 43 (2018) (quoting *Long Green Valley Ass’n v. Prigel Family Creamery*, 206 Md. App. 264, 273-74 (2012)). We “apply a limited standard of review and will not disturb an administrative decision on appeal if substantial evidence supports factual findings and no error of law exists.” *Belfiore*, 236 Md. App. at 43 (quoting *Long Green Valley*, 206 Md. App. at 273-74). Under this deferential standard, this Court may “overrule an agency’s factual finding only when the finding is unsupported by competent, material, and substantial evidence in light of the entire record as submitted.” *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 529 (2004) (internal quotation marks omitted). “[J]udicial review of agency factual findings is limited to ascertaining whether a reasoning mind could have reached the same factual conclusions reached by the agency on the record before it.” *Id.* If, however, the case “involves an interpretation and

application of Maryland statutory and case law, [we] must determine whether the lower court’s conclusions are legally correct under a *de novo* standard of review.” *Motor Vehicle Admin. v. Smith*, 458 Md. 677, 686 (2018) (quoting *Nesbit v. Gov’t Employees Ins. Co.*, 382 Md. 65, 72, (2004)).

DISCUSSION

I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE DECISION OF THE CHIEF TO TERMINATE MR. HERNANDEZ.

A. Under the Law Enforcement Officers’ Bill of Rights, Mr. Hernandez was Afforded the Right to a Hearing Before Termination.

The Law Enforcement Officers’ Bill of Rights (“LEOBR”), previously codified at Md. Code Ann., Public Safety §§ 3-101 – 3-113 (2003, 2019 Repl. Vol.), “was enacted in 1974 with the primary purpose of ‘guarantee[ing] certain procedural safeguards to law enforcement officers during any investigation or interrogation that could lead to disciplinary action, demotion, or dismissal.’” *Montgomery County v. Fraternal Order of Police*, 427 Md. 561, 573 (2012) (quoting *Coleman v. Anne Arundel County Police Dep’t*, 369 Md. 108, 122 (2002)). The LEOBR was repealed effective July 1, 2022; however, both parties agree that the LEOBR is controlling for this case.

The LEOBR provided that, “if the investigation or interrogation of a law enforcement officer results in a recommendation of demotion, dismissal, transfer, loss of pay, reassignment, or similar action that is considered punitive, the law enforcement officer is entitled to a hearing on the issues by a hearing board.” PS § 3-107(a)(1). If the Board “[made] a finding of guilt,” it then reconvened the hearing to receive evidence and

“consider the law enforcement officer’s past job performance and other relevant information as factors before making recommendations” to the Chief. PS § 3-108(a)(4).

After the hearing, the Board was permitted to “recommend the penalty it consider[ed] appropriate under the circumstances.” PS § 3-108(b)(1). This recommendation, however, was not final, except under certain circumstances, and could be increased by the Chief if he personally:

- (i) review[ed] the entire record of the proceedings of the hearing board; (ii) [met] with the law enforcement officer and allow[ed] the law enforcement officer to be heard on the record; (iii) disclose[d] and provide[d] 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) state[d] on the record the substantial evidence relied on to support the increase of the recommended penalty.

PS § 3-108(d)(5).

B. Mr. Hernandez Did Not Preserve the Argument that the Department Violated § 3-108(d)(5)(iii) and Conceded the Point at the Circuit Court.

As a preliminary matter, Mr. Hernandez raises an argument that the Chief, in violation of § 3-108(d)(5)(iii), failed to disclose that he considered outside materials in making his decision because he specifically referred to Mr. Hernandez’s “past job performance.” However, Mr. Hernandez failed to preserve this argument during the October 1, 2021 meeting with the Chief, and conceded the point during his oral argument at the circuit court: “I don’t believe that requirement [(iii)] is applicable here. There was no indication at any point that the chief relied on outside information in rendering his

opinion.” Even assuming Mr. Hernandez did properly preserve this argument, § 3-108(d)(4) itself requires that the “chief [] consider the law enforcement officer’s past job performances as a factor before imposing a penalty.” PS § 3-108(d)(4). Furthermore, this Court has held that an officer’s disciplinary record or personnel file “[does] not constitute the transmission of information or ideas from another person Thus, it is not a ‘communication’ under the plain language of the statute.” *Baltimore City Police Dep’t v. Robinson*, 247 Md. App. 652, 678 (2020). Therefore, this argument is without merit.

C. The Circuit Court Did Not Err in Finding that the Chief Did Not Increase the Final Penalty to Termination Prior to Meeting with Mr. Hernandez.

Mr. Hernandez’s first preserved argument is that the Department failed to follow LEOBR procedures to increase his final penalty because “Chief Aziz made the decision that, if an increase in discipline were warranted, termination would be the appropriate outcome prior to complying with the requirements of [Public Safety] § 3-108(d)(5).” This argument fails on two grounds.

First, the Report of the AHB specifically stated that the “proposed discipline” for Charges 2 and 3 was termination, not that the final disciplinary action was termination. There is no evidence that Chief Aziz had determined the final action prior to the meeting, which Mr. Hernandez does not argue. Rather, Mr. Hernandez argues that the Chief’s statement that if he were to impose an increased penalty, it would be to the level of

termination, violates the LEOBR. Mr. Hernandez does not point to language in the LEOBR that specifies this but rather makes a conclusory statement that:

A plain reading of [Public Safety § 3-108(d)(5)] suggests that its purpose is to preclude the type of “knee jerk” reaction to discipline that is apparent in the matter *sub judice*: if an enhanced penalty is being considered, what that penalty would entail should not be determined until such time as § 3-108(d)(5) has been fully satisfied.

What § 3-108(d)(5) “should” require is not at issue. Instead, we must only consider what is actually required by § 3-108(d)(5), which is that the Chief review the entire record, the Chief hold a meeting with Mr. Hernandez, disclose other oral or written communication outside of the record that the Chief relied on, and state on the record the substantial evidence relied on before implementing a final, increased penalty. There is no language in the relevant section that indicates that the Chief cannot decide what type of penalty he will propose until after all four requirements are met.

Secondly, if the Court endorsed Mr. Hernandez’s reading of the LEOBR, it would render § 3-108(d)(5) superfluous if a Chief was not permitted to propose the increased penalty he thought was appropriate before holding the required meeting. Under Mr. Hernandez’s logic, the Chief would be able to say he was considering increasing the penalty but would not be allowed to state or decide what that penalty would be until after the required meeting with the officer. We disagree with Mr. Hernandez’s reading of the LEOBR because it also would arguably raise concerns about proper notice to officers subject to disciplinary proceedings. There is no requirement that a Chief refrain from an

inclination towards a specific increased penalty prior to fulfilling all four statutory elements that are required before the final action.

D. The Circuit Court Did Not Err in Determining that the Chief Adequately Stated on the Record the Substantial Evidence he Relied on when Increasing Mr. Hernandez’s Penalty to Termination.

Mr. Hernandez’s primary argument is that Chief Aziz failed to state “on the record the substantial evidence relied upon to support the increase of the recommended penalty.” PS § 3-108(d)(5)(iv). The circuit court correctly stated that the statute does not explicitly state the proper level of specificity which constitutes “stat[ing] on the record the substantial evidence relied on.” Although the Chief appeared to use form language in his final decision letter and his statements at the October 1, 2021 meeting, this language is sufficient to satisfy requirement (iv). In the October 7, 2021 letter, the Chief stated:

The report from the Administrative Hearing Board dated September 10, 2021, has been reviewed. Copies of the report, which include finding of facts, conclusions, and recommendations, were furnished to you on September 21, 2021.

The Board has also recommended disciplinary action to be taken in this matter. In complying with Maryland Public Safety Code Ann. § 3-108, I have fully review[ed] your past job performance, the entire record of the proceeding of the Administrative Hearing, the Board Report and considering all the facts surrounding the charges in which you were found guilty, as well as met personally with you and your Attorney . . . on October 1, 2021.

After reviewing the results of the Administrative Hearing Board and all material[s] submitted, I concur with the conclusion of the Board that you are guilty of [Charges 2, 3, and 4].

Mr. Hernandez argues that this language does not meet the threshold for stating the “substantial evidence relied on” to satisfy § 3-108(d)(5)(iv) and relies on *VanDevander v. Voorhaar*, 136 Md. App. 621 (2001) to support this argument. We disagree. In *VanDevander*, a Sheriff increased the disciplinary penalty for a former sheriff’s deputy from suspension to termination. *Id.* at 627. The circuit court affirmed the Sheriff’s decision to terminate. *Id.* On appeal, this Court reversed, holding that the Sheriff failed to meet all four pre-conditions of § 3-108(b)(1). *Id.* at 629. Specifically, this Court held that the Sheriff failed to “[s]tate on the record the substantial evidence relied on to support the increase of the recommended penalty” because the Sheriff stated that he was relying on the finding of guilt by the administrative hearing board. *Id.* at 631. Of note, however, this Court held that “because [the administrative hearing board’s finding of guilt] lacks the support of substantial evidence and is otherwise contrary to law . . . it can in no way support an enhanced penalty.” *Id.*

Conversely, Mr. Hernandez pled guilty to Charges 2, 3, and 4, and, therefore, his guilt is not in question. The AHB stated in its report that Mr. Hernandez “[pled] guilty to [] all charges, except for Charge #1 which was dismissed. The Board accepted his plea of guilt.” Because Mr. Hernandez is not challenging the findings or conclusions of the AHB, the Chief’s decisions to rely on the AHB’s report and Mr. Hernandez’s admission of guilt were not erroneous. Thus, the Chief’s statement that he was relying, in part, on the AHB proceedings and report satisfied the requirements of § 3-108(d)(5)(iv) that the Chief state the substantial evidence relied on to increase Mr. Hernandez’s penalty to termination.

CONCLUSION

We hold that the circuit court did not err when it found that Chief Aziz satisfied the requirements of § 3-108(d) when enhancing Mr. Hernandez's penalty to termination. Finding no error, we affirm.

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