Circuit Court for Prince George's County
Case No. CAL15-25888

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 693

September Term, 2016

PHILIP DUPREE

v.

CITY OF DISTRICT HEIGHTS POLICE DEPARTMENT, ET AL.

Eyler, Deborah S.,
Meredith,
Arthur,

JJ.

Opinion by Arthur, J.

Filed: September 26, 2017

A police officer complained that his employer suspended him without pay and terminated his employment in violation of the Law Enforcement Officers' Bill of Rights ("LEOBR"). The Circuit Court for Prince George's County rejected the officer's claim, finding that the employer had acted lawfully.

On the thirtieth day after the circuit court had ruled, the officer moved to revise the judgment. The circuit court exercised its discretion to deny the revisory motion, and the officer appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The record, when viewed in the light most favorable to the party that prevailed below (*see Clickner v. Magothy River Ass'n, Inc*., 424 Md. 253, 266 (2012)), establishes the following facts:

A. Officer's Dupree's Employment History

The District Heights Police Department hired Philip Dupree as a police officer on June 5, 2014. Officer Dupree had an initial probationary period of one year.

By the spring of 2015, when Officer Dupree's probationary period was about to end, his conduct had generated more citizen complaints than that of any other officer in the District Heights Police Department. Hence, on May 11, 2015, the police chief met with Officer Dupree to counsel him about his deficient performance and to inform him that his probationary period would be extended until December 31, 2015. The chief, however, did not give Officer Dupree a written document stating that his probationary period had been extended.

In a letter dated August 19, 2015, the Maryland State Police informed the police chief that, in pursuing a position as a police officer with the Department of General Services, Officer Dupree admitted that he had engaged in certain unlawful conduct as a District Heights police officer and that he had done so as recently as July 2, 2015. In light of that information, the police chief decided to fire Officer Dupree. The chief made that decision during the first week of September 2015, but he did not immediately act upon it, because he wanted to follow the City's protocols.

On September 10, 2015, the police department received another complaint involving Officer Dupree. The complainant, Ms. LaToya Perry, wrote that on the evening of September 6, 2015, she learned that the police were "slamming" her adolescent son, which she later explained meant that they were "throw[ing] him against the car." She said that she intervened on her son's behalf and said that she would call the officers' commander. According to Ms. Perry, Officer Dupree responded by threatening to arrest her. Ms. Perry said that the police followed her into her building, but left when she had her son call 911. The 911 operator told her not to open her door until the commander arrived. A few minutes later, Ms. Perry heard someone saying that he was the commander knocking at her door. She opened the door, and Officer Dupree forced his way into the apartment, displayed a handgun, used disrespectful language to refer to her son, and put her under arrest.

At the time of the arrest, Officer Dupree completed a statement of probable cause for the arrest. Unlike Ms. Perry's account, Officer Dupree's statement did not disclose

that he had left her apartment without arresting her, returned to the apartment after she lodged an oral complaint about him, and arrested her only after he returned.

On September 15, 2015, the department notified Officer Dupree that it was investigating Ms. Perry's complaint. While the investigation was underway, another officer reported that Officer Dupree was carrying an unapproved and unauthorized weapon (an AR-15 semi-automatic rifle) while he was "on a call for police service." The officer reported that, when she asked Officer Dupree why he was carrying an AR-15, he "responded with a statement to the effect that he needed to keep the streets safe."

In a memorandum dated September 29, 2015, the chief formally advised Officer Dupree that the department had placed him on administrative leave without pay. The memorandum cited Ms. Perry's complaint, including her allegation that the officer had "slammed" her son and displayed his weapon. In addition, the memorandum referred to "inconsistencies" in Officer Dupree's statement of probable cause for her arrest.

On the following day, Officer Dupree's attorney wrote to the police chief to protest the decision to suspend the officer without pay. The attorney asserted that under the LEOBR a police department cannot suspend a law enforcement officer without pay unless he or she has been charged with a felony. *See* Maryland Code (2003, 2011 Repl. Vol.), § 3-112(c)(1) of the Public Safety Article. The attorney demanded a prompt hearing under the LEOBR to determine the propriety of the suspension. *See id.* § 3-112(c)(2).

The chief responded on that same day with a detailed account of the department's problems with Officer Dupree. Among other things, the chief asserted that Officer

Dupree was a probationary employee who did not have the full protection of the LEOBR. *See id.* § 3-101(e)(2)(iv). He detailed the inaccuracies in the statement of probable cause for Ms. Perry's arrest, including Officer Dupree's failure to disclose that he had originally left Ms. Perry's apartment without making an arrest and that he had returned to the apartment, forced his way in, and arrested her only after he had learned that she had complained about him to a superior. But he said that Ms. Perry's complaint was "just the tip of the iceberg" in light of the numerous citizen complaints about Officer Dupree, as well as the officer's failure to keep pace with his peers in the issuance of traffic citations and his recent deployment of an unauthorized weapon (the AR-15). He concluded by informing Officer Dupree's attorney that the department intended to terminate the officer's employment as of October 2, 2015.

In accordance with the chief's stated intentions, the department formally terminated Officer Dupree's employment on October 2, 2015.

On that same day, the department completed its investigation of Ms. Perry's complaint. The investigator concluded that Officer Dupree had returned to Ms. Perry's apartment and placed her under arrest only after he had learned that she had made a complaint against him. According to the investigator, "This was a clear case of retaliation." He recommended that Officer Dupree be charged with submitting a false report and conduct unbecoming an officer. The chief took no action in response to those recommendations, presumably because he had already terminated Officer Dupree's employment.

B. The Order to Show Cause

On October 9, 2015, Officer Dupree filed a petition for an order requiring the Town of District Heights[1] to show cause why he should not be granted the protections of the LEOBR. Among other things, the petition alleged that even if Officer Dupree had been a probationary employee, the department could not discipline him without a hearing and could not suspend him without pay, because, he said, the department had based its decision on Ms. Perry's complaint, which alleged police brutality. *See* § 3-101(e)(2)(iv) of the Public Safety Article.[2]

The circuit court ordered the Town of District Heights to show cause and scheduled a hearing.

C. The Hearing on the Order to Show Cause

The hearing occurred on February 26, 2016. On the basis of the testimony at the hearing, the circuit court found that in May 2015 the police chief had informed the officer that his probationary period would be extended; that Officer Dupree was still a probationary employee at the time of the termination of his employment in October 2015;

[1] Officer Dupree actually named the "Town of District Heights Police Department" as the defendant, but the Town correctly pointed out that its police department is not a separate entity that is capable of suing or being sued.

[2] The LEOBR grants certain procedural protections to "law enforcement officers." That term does not include "an officer who is in probationary status on initial entry into the law enforcement agency except if an allegation of brutality in the execution of the officer's duties is made[.]" Md. Code (2003, 2011 Repl. Vol.), § 3-101(e)(2)(iv) of the Public Safety Article. This exclusion means that the LEOBR does not extend its protections to an officer in probationary status, except where allegations of brutality are involved. *See Mochan v. Norris*, 158 Md. App. 45, 51, 62 (2004).

that the department had received more citizen complaints against Officer Dupree than against any other officer in the department; that Ms. Perry's complaint did not involve brutality, because her allegation of "slamming" employed a colloquial term for the routine practice of placing a spread-eagled suspect against a car to conduct a pat-down for the purpose of ensuring the officer's safety; that the department had suspended Officer Dupree because of inconsistencies in the statement of probable cause for Ms. Perry's arrest; that the chief had decided to terminate Officer Dupree's employment even before Ms. Perry made her complaint; and that the chief terminated Officer Dupree's employment because of a "series of complaints" against him, not because of Ms. Perry's complaint.

In making these findings, the court expressly rejected Officer Dupree's testimony that the chief had not informed him that his probationary period would be extended and expressly credited the chief's testimony that he had so informed Officer Dupree. The court also expressly credited the chief's testimony that he had decided to terminate the officer's employment even before Ms. Perry's complaint.

As a result of these findings, the court concluded that the Town of District Heights had met its burden of establishing that Officer Dupree was not entitled to the protections of the LEOBR. The clerk docketed an order to that effect on March 2, 2016.

D. <u>The Motion for Reconsideration</u>

Thirty days later, on April 1, 2016, Officer Dupree moved to revise the judgment under Md. Rule 2-535. In the motion, Officer Dupree reiterated his arguments that he was not a probationary employee and that, even if he was, he was entitled to the

protections of the LEOBR because Ms. Perry's complaint involved allegations of brutality. He cited no new factual developments or any change in the law.

In an order docketed on June 6, 2016, the circuit court denied the revisory motion. Officer Dupree noted a timely appeal.

QUESTION PRESENTED

Officer Dupree presents a single question, which we have restated as follows: Did the circuit court err or abuse its discretion in declining to exercise its power to revise the judgment under Maryland Rule 2-535?[3]

For the following reasons, we see no error or abuse of discretion.

DISCUSSION

The issue before this Court is not the propriety of the circuit court's initial decision that Officer Dupree was not entitled to the protections of the LEOBR. Officer Dupree did not take a timely appeal from that decision within 30 days after its entry on the docket. Instead, on the thirtieth day, he asked the circuit court to exercise its revisory power over the judgment pursuant to Rule 2-535(a). Officer Dupree has appealed only from the circuit court's discretionary decision not to revise the judgment. Hence, the only question before this Court is the propriety of that discretionary decision. *See Hardy*

[3] Officer Dupree formulated his question as follows: "Did the Circuit Court commit legal error in refusing to consider the additional evidence and argument provided with Appellant's Motion to Revise or Amend the Judgment which showed that the Appellant was eligible for LEOBR protections because of the brutality complaint against him?"

v. Metts, 282 Md. 1, 5 (1978); *Sydnor v. Hathaway*, 228 Md. App. 691, 708, *cert. denied*, 450 Md. 442 (2016).

Although abuse of discretion is ordinarily a highly deferential standard of review,[4] the required degree of deference is even greater when the appeal challenges a discretionary decision not to revise a judgment. In that context, "even a poor call is not necessarily a clear abuse of discretion." *Stuples v. Baltimore City Police Dep't*, 119 Md. App. 221, 232 (1998). "At most, the very parochial inquiry we shall undertake is into whether [the circuit court's] denial of the Motion to Revise was so far wrong – to wit, so egregiously wrong – as to constitute a clear abuse of discretion." *Id.* "[T]he ruling in issue does not have to have been right to survive so minimal and deferential a standard of review." *Id.*

In the related context of a post-judgment revisory motion under Rule 2-534, Judge Moylan has explained that "the discretion of the trial judge is more than broad; it is virtually without limit." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002).

> What is, in effect, a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been earlier but were not. Losers do not enjoy *carte blanche*, through post-trial motions, to replay the game as a matter of right.

Id.

[4] *See, e.g.*, *North v. North*, 102 Md. App. 1, 13 (1994) (stating that an "abuse of discretion" "has been said to occur where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles") (citations and quotation marks omitted).

Of course, "trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature." *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675 (2008). Nonetheless, "[a] circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived." *Morton v. Schlotzhauer*, 449 Md. 217, 232 n.10 (2016). In fact, even when a court declines to revise a decision that was based solely on an issue of law, "an appellate court will not ordinarily disturb the trial court's discretionary decision not to reopen the matter; an appeal from the primary judgment itself is the proper method for testing in an appellate court the correctness of such a legal ruling." *Hardy v. Metts*, 282 Md. at 6.[5]

In this case, we see no basis to conclude that the circuit court abused its vast discretion in declining to revise its judgment.

[5] Citing *Casey v. Grossman*, 123 Md. App. 751 (1998), Officer Dupree attempts to cast the denial of his revisory motion as a legal determination that is subject to plenary, de novo review. His reliance on *Casey* is misplaced. In that case, the circuit court granted a motion for summary judgment on the ground that there was no genuine dispute of material fact and later denied a revisory motion that was filed on the twenty-ninth day after the grant of summary judgment. This Court reversed the denial of the revisory motion, because the circuit court had failed to mention (and had evidently failed to consider) evidence, which had been before the court at the time of the summary judgment, and which revealed a genuine dispute of material fact. *Id.* at 764-75. *Casey* stands for the proposition that a court abuses its discretion if it ignores disputes of fact in making a legal determination about the absence of genuine disputes of material fact and ignores the disputes of fact a second time when they are brought to its attention again in a revisory motion.

Officer Dupree's revisory motion made two arguments. First, citing the offer of employment that he received before joining the force, he argued that his probationary period had ended in May 2015, four months before Ms. Perry's complaint. Second, citing the department's general order regarding the use of force, he argued that Ms. Perry's complaint was a complaint of brutality and, therefore, that he was entitled to the LEOBR's protections even if his probationary period had not ended.

The first argument was merely the reargument of a factual decision that the circuit court had resolved against Officer Dupree. Notwithstanding the absence of documentation to confirm the extension of Officer Dupree's probationary period in May 2015, the circuit court had made a factual finding that the extension had occurred. The court based that finding on a credibility determination, in which it credited the police chief's testimony that he had informed Officer Dupree that his probationary period was being extended and rejected Officer Dupree's contrary testimony. The court did not abuse its almost "boundless" discretion (*Steinhoff v. Sommerfelt*, 144 Md. App. at 484) in declining to entertain reargument of that factual decision.

Officer Dupree's second argument, that the Perry complaint was a complaint of brutality, was largely beside the point. Even if Ms. Perry's complaint was properly characterized as a complaint of brutality, the circuit court had already found that the chief did not terminate Officer Dupree's employment because of that complaint. Rather, the court had found that the chief had decided to terminate Officer Dupree's employment even before Ms. Perry made her complaint. The court based that finding, again, on a credibility determination, in which it credited the police chief's testimony about why he

decided to terminate Officer Dupree's employment. Although the court could reasonably have reached a different factual conclusion,[6] we would be constrained to uphold the court's credibility-based factual determination in this case even if it were before us on direct appeal – which it is not. On an appeal from the court's discretionary decision not to revise a ruling that is based on a credibility-based factual determination, we have no other option but to affirm.

On the other hand, although the nature of Ms. Perry's complaint was irrelevant to the issue of Officer Dupree's firing, it did have some bearing on his challenge to the chief's decision to suspend him without pay: if the chief suspended a probationary employee like Officer Dupree because of a complaint of brutality, he could claim the protections of the LEOBR (*see* § 3-101(e)(2)(iv) of the Public Safety Article), including the prohibition against being suspended without pay unless he or she has been charged with a felony. *See id.* § 3-112(c).

The circuit court's conclusion, that Ms. Perry's complaint of "slamming" did not involve a complaint of brutality, is not unassailable; nor is the method that the court employed in reaching that conclusion, when it seized on the Town's characterization of Ms. Perry's allegations to the exclusion of any other argument, evidence, or inference. Nonetheless, the court was still well within its almost "boundless" discretion (*Steinhoff v.*

[6] If the chief had really decided to fire Officer Dupree in the first week of September, as he said he did, one could reasonably question why the department devoted any resources at all to investigating Ms. Perry's subsequent complaint, or why it took another month to act on the decision, or why the chief did not announce the decision until just after he learned that Officer Dupree had engaged counsel and was asserting rights under the LEOBR.

Sommerfelt, 144 Md. App. at 484) in opting not to entertain new, fact-based arguments about the nature of Ms. Perry's complaint – particularly arguments about things like general orders, which Officer Dupree could have presented at the show cause hearing itself.

In summary, we have no basis to conclude that the court's discretionary decision not to revise its initial ruling was "so egregiously wrong" "as to constitute a clear abuse of discretion." *Stuples v. Baltimore City Police Dep't*, 119 Md. App. at 231.

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