IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WARREN C. MCGEE,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N12A-12-001 DCS
	)	
COUNCIL ON POLICE TRAINING	)	
	)	
Appellee.	)	

Submitted: October 15, 2013
Decided: January 17, 2014
Corrected*: March 19, 2014

On Appeal from the Decision of the Council on Police Training of the State of Delaware – **REVERSED and REMANDED.**

MEMORANDUM OPINION

Stephani J. Ballard, Esquire, Law Offices of Stephani J. Ballard, LLC, Wilmington, Delaware, Attorney for Appellant Warren C. McGee

W. Michael Tupman, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, Attorney for Appellee Council on Police Training

STREETT, J.

* Footnote 118 has been corrected to complete the parenthetical citation.

Introduction

Appellant Warren C. McGee (the "Appellant") appeals the November 15, 2012 decision of the Council on Police Training (the "COPT" or "Appellee") that revoked his certification as a police officer in the State of Delaware pursuant to 11 *Del. C.* § 8404(a)(4)(e)(2). The revocation stemmed from Appellant's submission of an overtime sheet for two hours of court for which Appellant did not appear.

Appellant maintains that Section 8404(a)(4)(e)(2) is inapplicable because the section is triggered only after a Law-Enforcement Officer's Bill of Rights ("LEOBOR") hearing or waiver of a hearing and that he did not have or waive a LEOBOR hearing. Appellant further maintains that Section 8404(a)(4)(e)(2) requires a specific, alleged violation of the employing police agency's rules and regulations rather than speculation as to a possible administrative charge. Appellant also argues that his employer never brought any administrative charges prior to his retirement after a criminal investigation was closed.

In addition, Appellant asserts that the COPT procedurally erred in violation of his due process rights.

The Court finds that the decertification[1] process as applied to Appellant did not meet statutory or procedural requirements. For the reasons set forth below, the COPT's decision is reversed and the matter is remanded to the COPT.

[1] "Decertification" and "revocation" are referred to interchangeably.

Factual Background

Appellant, a Delaware State Police Trooper for 23 ½ years, was a Master Corporal assigned to the Traffic Uniform Division of Troop 3.[2]

On February 13 or 14, 2012, Appellant, per his usual custom, completed overtime sheets in advance of working extra shifts. During that week, the overtime sheets included an overtime sheet for two hours of court standby time on February 16, 2012, however, Appellant failed to appear in court on that date.[3]

On February 16, 2012, Sergeant Dave Weaver ("Sgt. Weaver"), Appellant's court liaison officer, sent voicemail and text messages to Appellant at 10:21 a.m. telling him to appear in court that day.[4] Appellant did not report for duty. Appellant, instead, had undergone a previously scheduled colonoscopy.[5] Upon returning home from the procedure around 2 p.m., Appellant replied to Sgt. Weaver's text messages and attempted to return the officer's phone call.[6]

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[2] Record at 051 (hereinafter "R. at ___."); Transcript of Hearing, 14 – 15 (Sept. 17, 2012) (hereinafter "Tr. at ___."). In his reply brief, Appellant states that he was not provided with a copy of the record. Appellant's Reply Br., n. 2 (Apr. 2, 2013). The Court notes that Appellee conventionally filed the record and transcript with the Prothonotary and that only the first page of each is available to view on the electronic docket. Therefore, the Court will refer to the record as well as to the specific documents that comprise the record.

[3] R. at 052; Tr. at 17 – 20.

[4] R. at 18; Photo. of Text Messages. *See also* R. at 053; Tr. at 22 – 23.

[5] R. at 052 – 053; Tr. at 20 – 21. This was Appellant's first colonoscopy and Appellant received anesthesia as part of the colonoscopy procedure. *See* R. at 017 & 053; Tr. at 21; Appellant's Medical Record, 1 (Feb. 16, 2012).

[6] R. at 18; Photo. of Text Messages. *See also* R. at 053; Tr. at 22 – 23 (His telephone call went to voicemail).

The following day (February 17, 2012), Appellant asked Trooper Jean to place his overtime sheets and subpoenas for the week of February 13th in Appellant's folder at Troop Headquarters because Appellant was not feeling well.[7] Appellant returned to work on February 19, 2012.[8]

Two days later, on February 21, 2012, Appellant's captain[9] called Appellant to inform him that he had been suspended for an unspecified criminal matter.[10] Appellant's captain did not advise him of the reason for his suspension.[11] Later that night, Detective Sponaugle called Appellant to tell him that he had been suspended for "an overtime sheet."[12] Appellant then realized that the February 16, 2012 overtime sheet, that he had completed in advance, had been (mistakenly) submitted.[13]

Approximately five weeks later, Appellant retired from the Delaware State Police (the "State Police") on March 30, 2012.

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[7] R. at 054; Tr. at 25 – 26.

[8] R. at 053; Tr. at 23.

[9] The captain was not identified in the record.

[10] R. at 054; Tr. at 27.

[11] *Id.*

[12] R. at 054; Tr. at 27 – 28.

Det. Sponaugle's role in Appellant's suspension is unclear. The record is silent as to whether Det. Sponaugle was acting on behalf of Appellant's captain or called based on a personal relationship with Appellant. However, Appellant testified that Det. Sponaugle is *not* from Internal Affairs.

[13] *Id*.

Prior to retirement, the matter of Appellant's submission of the overtime sheet was referred to the Criminal Investigation Unit of Troop 3 and to the Attorney General's Office for criminal investigation.[14] The State ultimately declined to prosecute Appellant and no criminal charges were brought against Appellant after he was interviewed by a criminal investigator, gave two voluntary statements, and provided medical documentation.[15] Sometime before March 30, 2012, Appellant's attorney informed him that the criminal investigation was closed.[16] The State Police did not pursue an Internal Affairs investigation and did not lodge any administrative charges prior to Appellant's retirement.[17]

Procedural Background

On July 12, 2012, more than three months after Appellant's retirement, Colonel Robert M. Coupe ("Col. Coupe") of the State Police signed a form letter and sent it to the COPT notifying the COPT of Appellant's retirement, effective March 30, 2012.[18] Col. Coupe placed an "X" next to a section in that letter indicating that Appellant "may be subject to the provisions of [Title 11], Section

[14] R. at 076 & 078; Stephani J. Ballard, Esq.'s Ltr. to Capt. Robert C. Hawkins, p. 2 (Oct. 12, 2012) (hereinafter "Written Exceptions"); W. Michael Tupman, Dep. Atty. Gen.'s Ltr. to Capt. Robert C. Hawkins (Oct. 15, 2012) (hereinafter "State Police's Response").

[15] R. at 054, 055 – 056 & 076; Tr. at 28, 31 – 33 & 34; Written Exceptions at 2.

The criminal investigator was not identified during the hearing and the date(s) of the interview(s), the content of the interview(s), and other details related to the interview(s) are not in the record. Additionally, the exact date that the Attorney General declined to prosecute is not in the record.

[16] R. at 056; Tr. at 34.

[17] R. at 054; Tr. at 28.

[18] R. at 001; Col. Coupe's Ltr. to Adminstr., Council on Police Training (July 10, 2012).

8404(a)(4) and may require action on the part of The C.O.P.T. for suspension or revocation in accordance with established guidelines."[19]

In a letter dated July 16, 2012, the COPT's Administrator (Captain Robert C. Hawkins, Jr.) notified Appellant that the COPT "learned that at the time of [Appellant's] retirement [Appellant was] the subject of an investigation" and that there were grounds for "de-certification" under 11 *Del. C.* § 8404(a)(4)(e).[20]

On July 27, 2012, Appellant's counsel, pursuant to procedure in the letter, requested a hearing before a three-member hearing board appointed by the COPT's Chairman.[21]

On September 17, 2012, a three-member COPT hearing board (comprised of Captain Quinton Watson of the New Castle County Police, Captain John Potts of the Newark Police Department, and Captain Christine Dunning of the Wilmington Police Department) held a hearing.[22]

At the hearing, a Deputy Attorney General (the "Deputy"), who represented

[19] *Id.*

[20] R. at 002; Adminstr.'s Ltr. to McGee (July 16, 2012).

[21] R. at 005; Stephani J. Ballard, Esq.'s Ltr. to Capt. Robert C. Hawkins (July 27, 2012).

[22] R. at 048; Tr. at 1.

the State Police, waived presenting an opening statement[23] and, in lieu of direct testimony, read from pages in a "hearing exhibit book."[24] Appellant then testified.

Appellant testified that it was his practice to complete his overtime sheets in advance.[25] Appellant stated that he, in fact, worked overtime shifts on February 13, 14, and 15, 2012.[26] Appellant further stated that he was scheduled to be off on February 16, 2012 and that he "completely overlooked, forgot about the standby" until he returned home from the colonoscopy and received Sgt. Weaver's voicemail and text messages.[27] When Appellant saw Sgt. Weaver at Troop Headquarters on February 19, 2012, Appellant stated that he apologized to him for missing court and that Sgt. Weaver responded that it was "no big deal."[28]

Appellant also presented evidence concerning the State Police policy and procedure pertaining to overtime for court appearances. Pursuant to the written

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[23] R. at 048 – 049; Tr. at 3 – 5.

> APPELLANT'S COUNSEL: I'm sorry. I don't really want to object and interrupt your opening, but you are presenting evidence at this point rather than an introduction?
> THE DEPUTY: I waive opening.
> APPELLANT'S COUNSEL: Oh, I didn't realize that.
> THE DEPUTY: Okay, well – So, anyway, if you look about halfway down the page, you will see Warren McGee –
> APPELLANT'S COUNSEL: So you are presenting the evidence yourself rather than through a witness?
> THE DEPUTY: *This is not a LEOBOR Trial Board*, and I'm going to present the case as I see fit. (Emphasis supplied.)

[24] R. at 051; Tr. at 13.

[25] R. at 051 – 052; Tr. at 16 – 17.

[26] R. at 052, 054; Tr. at 17 – 20, 25.

[27] R. at 052 – 053; Tr. at 20 – 23.

[28] R. at 053; Tr. at 23.

policy, an officer submits an overtime sheet to the court liaison officer who approves it and forwards it to the troop commander and the operations officer who must also approve the overtime request and then forward it to Human Resources for payment processing.[29] Appellant testified that if an officer is on standby but is not called to appear in court, the overtime sheet is submitted to the officer's sergeant who "then submits it up the chain of command."[30] Further testimony elicited that there was no procedure for an incorrect timesheet.[31]

Appellant denied knowingly submitting an inaccurate overtime sheet and said that his previous overtime submissions during his 20 years of working overtime had never been challenged.[32] Appellant also testified that he cooperated with the criminal investigation and that no criminal charges were filed against him.[33]

Appellant submitted his retirement on March 30, 2012, which the State Police announced that day.[34] Appellant testified that he decided to retire because he felt that the penalty that he received (loss of hours) for speeding while off duty

[29] R. at 028 – 029; DSP III-6-5 – 6-6: Overtime for Court of Common Pleas & Superior Court Appearances.

[30] R. at 057; Tr. at 38 – 39.
Capt. Logan testified that he could only "surmise" about DSP procedure and practice for submitting an overtime request when the officer does not appear in court. *See* R. at 061 – 062; Tr. at 56 – 57.

[31] R. at 056 – 057; Tr. at 35 – 37.

[32] R. at 055; Tr. at 29 – 30.

[33] R. at 054; Tr. at 28.

[34] R. at 054 – 055; Tr. at 28 – 29; 31.

two months prior to the overtime submission and a suspension for the overtime sheet were "unjust" and that he felt he was young enough to "find another career."[35] Appellant testified that he was admitted to the Association of Retired Delaware State Police ("ARDSP") "sometime in July [2012]," after the COPT Administrator's letter and before the hearing, and that a trooper must be in good standing in order to become a member.[36]

The hearing board then called Capt. Logan, the State Police Director of Professional Standards, who testified, in general, about State Police practices and procedures concerning investigations. Capt. Logan said that the State Police "bifurcate[s] the process" of conducting investigations.[37] He explained that a criminal investigation is conducted first and, when completed, then an administrative investigation is started by Internal Affairs. He also testified that the two separate investigations could be simultaneously conducted.[38] Capt. Logan did not provide any testimony concerning Appellant's criminal investigation.

[35] R. at 058 – 059; Tr. at 44 – 46.

[36] R. at 055; Tr. at 30.

Included in the record is an email to Appellant from Dave Clark (DSP Ret.), dated July 23, 2012, notifying Appellant that his membership application to the ARDSP was accepted on July 18, 2012. R. at 038 – 39.

[37] R. at 059; Tr. at 46.

[38] R. at 059, 060; Tr. at 46, 52.

Capt. Logan did not testify which State Police unit conducts the criminal investigation. The State Police's response to Appellant's written exceptions indicated that the Criminal Investigative Unit of Troop 3 conducted Appellant's criminal investigation. R. at 078; State Police's Response at 1.

Capt. Logan also said that an Internal Affairs administrative investigation would be "based off of what criminal investigation there was" and that a trooper is notified of an administrative investigation "within days" after the criminal investigation is complete.[39] He speculated that Internal Affairs "probably" would have provided Appellant with a courtesy email notice and then "an official notice"[40] if there was an administrative charge stemming from Appellant's inaccurate entry in violation of State Police Rule & Regulation #16 ("R&R 16")[41] which could be either a non-terminable or terminable offense[42]. However, Capt. Logan conceded that Appellant was not notified of any administrative investigation or administrative charges prior to Appellant's retirement.[43]

Capt. Logan also speculated that, had Appellant not retired, Internal Affairs would have questioned Appellant and possibly would have questioned Sgt. Weaver

[39] R. at 059; Tr. at 46 – 48.

Capt. Logan did not provide any information concerning a procedure if the criminal investigation found that a deviation was *de minimus* or lacked prosecutorial merit.

[40] Capt. Logan did not offer any testimony as to how the official notice would be sent.

[41] R. at 059 – 060; Tr. at 48 – 49 (CAPT. LOGAN: ". . . R&R 16 says 'No member shall knowingly make a false official report or knowingly enter or cause to be entered in any divisional book or record any inaccurate, false, or improper entries or misrepresentation of the facts'").

[42] The record reflects that the State Police referred to a case involving an officer who was terminated after admitting to knowingly falsifying a police report and deliberately misrepresenting a material fact. In contrast, Appellant consistently maintained that the submission of the inaccurate overtime sheet was a mistake.

There is a letter, included in the record, identifying that terminated officer as David Elwood. However, the letter does not indicate whether Mr. Elwood was charged as a result of an Internal Affairs investigation or whether Mr. Elwood's certification was suspended or revoked by the COPT pursuant to 11 *Del. C.* § 8404(a)(4)(e). *See* R. at 025-26; Ltr. Sec. Lewis D. Schiliro to James Liguori, Esq. & Michael Tupman, Dep. Atty. Gen. (Jan. 3, 2012).

Moreover, Capt. Logan did not testify that Mr. Elwood was administratively charged following an internal investigation or that the COPT decertified Mr. Elwood. *See* R. at 059 – 060; Tr. at 48 – 50.

[43] R. at 059; Tr. at 48.

as part of the administrative investigation, in order to determine whether the State Police could substantiate any alleged violation of R&R 16.[44] However, because Internal Affairs did not conduct an administrative investigation in Appellant's case, Capt. Logan conceded that he could not form an opinion as to whether Appellant would have been formally charged with a violation of R&R 16.[45]

The hearing board issued its written findings and recommendation on the hearing date.[46] The board concluded that there was substantial evidence in the record that: (1) Appellant knowingly and voluntarily waived his right to a LEOBOR hearing by retiring, (2) Appellant retired rather than face possible discipline for "alleged misconduct," and (3) "the alleged misconduct" would have been a legitimate ground for discharge.[47] The board recommended that the COPT "de-certify" Appellant pursuant to 11 *Del. C.* § 8404(a)(4)(e)(2).[48]

[44] R. at 059, 061; Tr. at 48, 53.

[45] R. at 061; Tr. at 53.

[46] R. at 042 – 047 & R. at 082 – 087; *In the Matter of Warren McGee* (Del. Council on Police Training Three-Member Hrg. Bd. Sept. 17, 2013) (hereinafter "Hrg. Bd.'s Recommendation"). Both copies of the recommendation in the record are electronically signed by the hearing board members.

[47] R. at 045 & R. at 085; Hrg. Bd.'s Recommendation at 4.

[48] R. at 047 & R. at 087; Hrg. Bd.'s Recommendation at 6.

On October 12, 2012, Appellant submitted written "exceptions, comments and arguments" to the hearing board's recommendation to the COPT's Administrator.[49]

Appellant contended that the State Police improperly referred the matter to the COPT, the hearing board erred when it held that Appellant was subject to the COPT's decertification jurisdiction pursuant to 11 *Del. C.* § 8404(a)(4)(e), the COPT's witness (Capt. Logan) confirmed that Internal Affairs had never opened an administrative investigation and never brought charges for any impropriety related to the submission of the overtime sheet, and that Appellant had not been paid for the overtime. Appellant maintained that the hearing board recommended his decertification "for (at most) being 'under suspicion' of some possible misconduct" which did not meet the statutory criteria of Section 8404(a)(4)(e).[50]

On October 15, 2012, the Deputy, on behalf of the State Police, submitted a response to Appellant's written exceptions to the COPT's Administrator.[51] The State Police asserted that the COPT had "jurisdiction to de-certify [Appellant]

[49] R. at 075 – 077; Written Exceptions. The written exceptions were made pursuant to 29 *Del. C.* § 10126(b) and were sent to the COPT's Administrator via email and U.S. mail on October 12, 2012. A copy of the written exceptions was also emailed to the Deputy. The COPT's date stamp indicates the written exceptions were received on October 18, 2012.

Appellant's counsel also noted in the letter that she did not receive the hearing board's recommendation until September 25, 2013 – eight days after it was issued.

[50] R. at 076; Written Exceptions at 2.

[51] R. at 078 – 080; State Police's Response. The response, which is not date stamped in the record by the COPT, was emailed to Capt. Hawkins with a copy of the hearing board's recommendation attached.

because all of the statutory elements for his de-certification [were] met"[52] and that Appellant knowingly and voluntarily waived his LEOBOR rights, including the right to a hearing, by choosing to retire rather than face potential charges and discipline.

The State Police further asserted that a criminal investigation "clearly involves an alleged breach of internal discipline" within the meaning of Section 8404(a)(4)(e).[53] The State Police also suggested, without elaboration and in contradiction of Capt. Logan's testimony, that a simultaneous Internal Affairs investigation would be unlikely because it could compromise the constitutional protections afforded to an officer in a parallel criminal investigation.

The following day (October 16, 2012), the COPT held a meeting. Meeting minutes show that the Deputy who represented the State Police before the three-member hearing board and in its response to Appellant's written exceptions now served as the attorney for the COPT. The Deputy recused himself from the COPT's meeting when the COPT discussed the hearing board's recommendation.[54] Col. Coupe and Appellant were in attendance.

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[52] R. at 080; State Police's Response at 3.

[53] R. at 078 – 79; State Police's Response at 1 – 2.

[54] R. at 088; C.O.P.T. Meeting Minutes at 1.

In his opening brief, Appellant questioned whether the Deputy, who represented the State Police before the COPT three-member hearing board, is permitted to represent the COPT in this appeal. Appellant's Opening Br., n. 6 (Feb. 25, 2013). The COPT responded that there is no conflict of interest in view of the fact that the Deputy recused himself when the COPT began to discuss Appellant's matter, and thus, the Deputy "did not appear as a

During the COPT meeting, the hearing board's three members discussed its September 2012 hearing concerning Appellant and its unanimous decision to vote for decertification.[55] Appellant then addressed the COPT, however the minutes do not reflect the content or length of Appellant's presentation. Thereupon, the COPT

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litigant before the body (the COPT) which de-certified [Appellant]." Appellee's Answering Br., n. 3 (Mar. 18, 2013).

According to the COPT, the Deputy is assigned to provide legal counsel to both the State Police and the COPT. Appellee's Supp. Br., 5 (Sept. 9, 2013) (hereinafter "Appellee's Supp. Br. #1"). When the State Police refer a trooper to the COPT, the Deputy "recuses himself from providing legal counsel to the [hearing board] and to the [COPT]." *Id.* The COPT contends that once it accepted the hearing board's recommendation to revoke Appellant's certification, "any interest of the [State Police] became perfectly aligned with the COPT, and [the Deputy] could resume his customary role to provide legal counsel to the COPT during this appeal." *Id.*

The law is clear that Deputy Attorneys General statutorily "provide legal advice, counsel and services to administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties . . . ." 29 *Del. C.* § 2504(2). In the context of an administrative board hearing and appeal, Deputy Attorneys General "must be mindful of the need to be independent." *Barbour v. Unemployment Ins. Appeal Bd.*, 1990 WL 199514, *7 (Del. Super. Oct. 26, 1990). Hence, this Court has found that it is not a conflict of interest for one Deputy Attorney General to assume a representative role on behalf of an employing agency while *another* Deputy Attorney General assumes an advisory role on behalf of an administrative board. *See Kopicko v. Del. Dept. of Servs. for Children, Youth, and Their Families*, 2003 WL 21976409, *5 (Del. Super. Aug. 15, 2003) (finding the appellant's contention of a possible conflict of interest did not overcome a presumption of honesty and integrity where one deputy represented DSCYF before the Merit Employee Relations Board which was advised by another deputy). *See also Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989); *Sokoloff v. Bd. of Med. Practice*, 2010 WL 5550692, *7 (Del. Super. Aug. 25, 2010) (holding that honesty and integrity are presumed where an administrative agency has both investigative and adjudicatory roles and one attorney presents evidence while another attorney represents the Board). However, it is "inappropriate" for a Deputy Attorney General to place himself in a position of acting on behalf of both the administrative board and the employing agency that appears before that board, including on appeal from the board's decision. *See Barbour v. Unemployment Ins. Appeal Bd.*, 1990 WL 251570, *3 (Del. Super. Dec. 4, 1990) (holding where the Department of Labor litigates before the Unemployment Insurance Appeal Board, which does not have an interest in appeals from its decisions, separate counsel is required and the Department's attorney "should handle the appeal").

In the instant case, the Deputy presented evidence on behalf of the State Police before the COPT's three-member hearing board while another Deputy Attorney General served as an advisor to the COPT during the hearing. Although the Deputy for the State Police asserted in an email to Appellant's counsel on February 6, 2013 that the State Police was the interested party to this appeal, that Deputy has altered his view and now maintains that "[t]he police department's role is in the nature of a records custodian rather than an advocate." Appellant's Supp. Br., Ex. 10 (Sept. 9, 2013) (hereinafter "Appellant's Supp. Br. #1"); Appellee's Supp. Br. #1 at n.3. *See also Conley v. State*, 2011 WL 113201, *5 (Del. Super. Jan. 11, 2011) (holding that the COPT's decision to decertify an officer "is not fairly attributable to [the] employer" because the employing police agency has a legal duty to notify the COPT of a change in an officer's employment status).

In view of the fact that the COPT's decision is reversed and remanded on the basis that the COPT did not meet the statutory criteria to revoke Appellant's certification, the Court will not further address this issue.

[55] R. at 091; C.O.P.T. Meeting Minutes at 4. A transcript of the hearing board's discussion was not included as part of the record on appeal.

unanimously voted to approve the hearing board's recommendation to revoke Appellant's certification.[56]

In a letter dated November 15, 2012, the COPT's Administrator informed Appellant that the COPT accepted the hearing board's decertification recommendation and that, as of October 16, 2012, Appellant was "no longer authorized to exercise any police powers in the State . . . or to be employed by any law enforcement agency in a police capacity."[57] Appellant received the letter on November 26, 2012.[58]

Appellant appealed the COPT's decision on December 3, 2012 and filed his opening brief on February 25, 2013. Appellee submitted its answering brief on March 18, 2013, and Appellant filed his reply brief in response on April 2, 2013.

The matter was referred to the Court on April 15, 2013 for a decision.

On July 10, 2013, the Court directed the parties to submit supplemental briefing on two issues that were raised in Appellant's opening and reply briefs.[59] Both parties submitted their supplemental briefs on September 9, 2013.

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[56] *Id.* ("Chairman Schiliro entertained a motion to approve the hearing board's decision and decertify Warren McGee. A motion was made by Chief Horvath . . . Seconded by Capt. Potts; none opposed").

[57] R. at 094; Capt. Robert Hawkins' Ltr. to McGee (Nov. 15, 2012).

[58] R. at 096; Appellant's Certified Mail Return Receipt (Nov. 26, 2012).

[59] The parties were directed to address: (1) whether the three-member hearing board's written recommendation constituted a case decision pursuant to 29 *Del. C.* § 10128 and (2) whether the Deputy Attorney General who litigates on behalf of a law enforcement agency before the hearing board may subsequently represent the COPT on appeal.

In addition, on September 25, 2013, the Court directed the parties to submit supplemental briefing on a third issue that Appellant raised in his opening brief.[60] Appellant submitted his response on October 10, 2013. Appellee submitted its response on October 15, 2013.

The briefing is now complete.

[60] The parties were directed to address whether the COPT had the statutory authority to revoke Appellant's certification in view of the fact that the State Police failed to notify the COPT of Appellant's retirement within five business days as required by the COPT's regulations.

In his opening brief, Appellant asserted that the State Police notified the Council of his separation more than three months after he retired, even though the form specified that notification would occur within five working days. Appellee responded that the State Police notified the Council on July 10, 2012 that Appellant retired effective March 30, 2012, as required by the Council's regulations.

1 *Del. Admin. C.* § 801-8.1.1 provides:

> Whenever a police officer required to be certified by the Council on Police Training retires, resigns, or otherwise voluntarily or involuntarily leaves his or her employing law enforcement agency, the chief of the employing agency shall advise the Administrator of the separation in writing within five (5) business days of the separation and identify the circumstances of the separation.

As to whether the delayed notification would divest the COPT of jurisdiction, Appellant contended that the "5 day rule" is mandatory and that timely notification is "critical" because "the accuracy and availability of evidence against the 'accused' officer can become compromised," that "the failure of [an employing police agency] to take adverse action against the [certification] for such a protracted period of time creates a reasonable expectation on the officer's part that no such action will be forthcoming," and that "a prolonged delay . . . calls into question the validity of the agency's position that the police officer's alleged conduct was so egregious as to warrant consideration for decertification." Appellant's Supp. Br., 3 – 4 (Oct. 10, 2013). Appellant further argued that the State Police failed to identify the circumstances of Appellant's separation when it notified the COPT that he retired, which was also mandated by the COPT's regulations.

Appellee responded that the "5 day rule" is "directory" and that a reporting delay does not divest the COPT of its authority to revoke an officer's certification. Appellee argues that a strict application of the COPT's regulations "would defeat the purpose of the COPT's statute: to promote public safety by ensuring that police officers meet professional standards required to hold a position of public trust." Appellee's Supp. Br., 4 (Oct. 15, 2013). Indeed, it references three other officers' cases where the COPT "self-initiated three de-certification proceedings after becoming aware, from other sources, that the officer had engaged in serious misconduct." *Id.*

However, upon review of the record, including the hearing transcript and Appellant's written exceptions to the hearing board's recommendation, it appears that this issue was raised for the first time on appeal and, thus, is outside of the record. Because the Court's review of an administrative appeal is limited, it "will not consider issues not raised before the agency." *Lewis v. State Dept. of Agriculture*, 2007 WL 315359, *4 (Del. Super. Jan. 31, 2007). *See also Rooney v. Del. Bd. of Chiropractic*, 2011 WL 208811, *4 (Del. Super. Apr. 27, 2011) (finding that a procedural due process claim that is not raised in the administrative proceeding below is deemed to be waived for the purpose of an appeal).

Contentions of the Parties

Appellant argues that a LEOBOR hearing or its knowing waiver is a condition precedent to the application of 11 *Del. C.* § 8404(a)(4)(e)(2) and that "there was no actual 'breach' of internal discipline 'alleged' . . . [at the time of his retirement] by which the [COPT's hearing board] could examine to make the necessary determination [whether Appellant could have been discharged from employment]" because he did not have a LEOBOR hearing or face any charges when he retired, no administrative investigation had ever been initiated, and the criminal investigation was closed.[61]

In addition, Appellant contends that "[t]he full COPT made no findings or legal conclusions of its own, but apparently adopted those of the hearing panel in their entirety"[62] in violation of the Administrative Procedures Act ("APA") and that remand for the purpose of correcting the procedural errors is unnecessary because the COPT did not have jurisdiction to revoke Appellant's certification under any of the Section 8404(a)(4) provisions.

Appellee maintains that it had the statutory authority to revoke Appellant's certification and that it correctly applied 11 *Del. C.* § 8404(a)(4)(e)(2). Appellee contends that retirement is tantamount to a knowing and voluntary waiver of a

[61] Appellant's Opening Br. at 17.

[62] *Id.* at 6; Appellant's Supp. Br. #1 at 3 – 4.

LEOBOR hearing, that the criminal investigation is substantial evidence to support its finding that "there was an alleged breach of internal discipline at the time [Appellant] retired," and that Appellant "could have been legitimately discharged by the [State Police] for falsifying official records."[63]

In addition, Appellee asserts that it was not required to issue a final decision in compliance with 29 *Del. C.* § 10128 because the APA does not apply to the COPT once the hearing before the hearing board has concluded. However, Appellee believes that the appropriate remedy, if the Court finds Section 10128 applicable to the COPT, is remand to issue a final order.

Standard of Review

Under Delaware law, a party who participates in a hearing before the COPT's three-member hearing board may appeal an adverse ruling by the full COPT to the Superior Court.[64] The Court reviews the COPT's decision as it would an administrative agency appeal.[65]

On appeal, the Court's role is "to determine whether [the COPT] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is

[63] Appellee's Opening Br. at 19, 21.

[64] 11 *Del. C.* § 8404A(3).

[65] *Maurer v. Council on Police Training*, 2007 WL 625903, *3 (Del. Super. Jan. 26, 2007).

based on sufficient substantial evidence and is not arbitrary."[66] Substantial evidence is "relevant evidence a reasonable mind might accept to support the conclusion."[67] The Court does not weigh the evidence, determine questions of credibility, or make findings of fact.[68] Questions of law[69] and questions of statutory interpretation[70] are reviewed *de novo*.

Reversal is proper if the COPT "committed an error of law or made findings of fact unsupportable by substantial evidence."[71]

Discussion

The Delaware General Assembly created the Council on Police Training.[72] The COPT is comprised of twelve members from various law enforcement

[66] *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 132 (Del. 2011) (quoting *Avallone v. State/Dept. of Health & Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011)); *Friday v. State*, 1991 WL 165858, *4 (Del. Super. Aug. 27, 1991). *See also Maurer v. Council on Police Training*, 2007 WL 625903 at *3 ("In the absence of statutory direction, the proper standard of review is whether the agency's decision is supported by substantial evidence and is free from legal error").

[67] *Del. Dept. of Health & Soc. Servs. v. Jain*, 29 A.3d 207, 211 (Del. 2011). *See also Maurer v. Council on Police Training*, 2007 WL 625903 at *3 (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[68] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[69] *Maurer v. Council on Police Training*, 2007 WL 625903 at *3 (finding *de novo* review of questions of law "requires the Court to determine whether the [Council] erred in formulating and applying legal precepts") (citing *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at *3 (Del. Super. Aug. 16, 2006)).

[70] *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d at 133. *See also Del. Dept. of Nat. Resources & Envtl. Control v. Sussex County*, 34 A.3d 1087, 1090 (Del. 2011) ("Statutory interpretation is a question of law"); *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 ("Statutory interpretation is ultimately the responsibility of the courts"); *Stoltz Mgt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

[71] *Olney v. Cooch*, 425 A.2d at 613 (internal quotation marks omitted) (quoting *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649 (Del. Super. 1973)).

[72] *See* Tit. 11, Ch. 84.

agencies throughout the State[73] to establish and oversee a police training program for Delaware police officers[74] who are required to be certified by the COPT[75]. Generally, once a certified police officer is separated from his or her employing law enforcement agency, the officer will be placed on "inactive status" pursuant to 1 *Del. Admin. C.* § 801-8.1.2.[76] The officer may be re-activated by the COPT in the future after completing all re-activation requirements[77] and provided that the COPT has not suspended or revoked the officer's certification[78].

Pursuant to 11 *Del. C.* § 8404(a)(4), the COPT "may . . . [s]uspend or revoke [a police officer's] certification in the event that an individual:

> a. Obtained a certificate by fraud or deceit;
> b. Has failed to successfully complete any in-service or advanced training required by the Council;

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[73] 11 *Del. C.* § 8402.

[74] 11 *Del. C.* § 8401(5) (LEOBOR defines a "police officer" as "a sworn member of a police force or other law-enforcement agency of this State or of any county or municipality who is responsible for the prevention and the detection of crime and the enforcement of laws of this State or other governmental units within the State").

[75] 11 *Del. C.* § 8403(a)(3) ("The Council may: [i]ssue certification of completion of police officer training prescribed under [Chapter 84]").

[76] *See* 1 *Del. Admin. C.* § 801-8.1.2 ("Upon receiving notice of a police officer's separation from law enforcement employment, the Administrator shall place that individual on inactive status in which status he or she is not authorized to exercise the powers of a police officer until such time as he or she meets the requirements for re-activation"); 1 *Del. Admin. C.* § 801-2.1 ("**'Inactive status'** means status assumed by a certified police officer upon termination of employment with a law enforcement agency").

[77] *See* 1 *Del. Admin. C.* § 801-8.1.3 ("The Administrator may re-activate the individual's certification upon written application from the individual that he or she has accepted another full-time police position with a law enforcement agency whose training is regulated by the COPT and provided that the individual is not the subject of a de-certification proceeding pursuant to [11 *Del. C.*] § 8404(4) and the individual meets all other criteria for re-activation which the Council has adopted in Regulation 8.2").

[78] *Conley v. State*, 2011 WL 113201 at *5 (noting that "the exclusive statutory power to suspend or revoke an individual's police certification" is among the COPT's powers enumerated in 11 *Del. C.* § 8403(a)).

> c. Has been convicted of a felony, or of a misdemeanor involving moral turpitude, or of any local, state or federal criminal offense involving, but not limited to, theft, fraud, or violation of the public trust, or of any drug law;
> d. Has been found, after examination by a licensed psychologist or psychiatrist, to be psychologically or emotionally unfit to perform the duties or exercise the powers and authority of a police officer;
> e. Has received a hearing pursuant to the Police Officer's Bill of Rights[79], or who has knowingly and voluntarily waived that individual's right to such a hearing and:
>
> > 1. Has been discharged from employment with a law enforcement agency for breach of internal discipline; or
> > 2. Has retired or resigned prior to the entry of findings of fact concerning an alleged breach of internal discipline for which the individual could have been legitimately discharged had the individual not retired from or resigned that individual's position prior to the imposition of discipline by the employing agency."[80]

Once the COPT suspends or revokes an officer's certification, the officer does not have any law enforcement authority in Delaware.[81] As such, "decertification of an [o]fficer is an extraordinary measure."[82]

In the instant case, the COPT misapplied 11 *Del. C.* § 8404(a)(4)(e)(2) when it revoked Appellant's certification. Under Section 8404(a)(4)(e), decertification can only occur if the officer had received a LEOBOR hearing or knowingly waived

[79] Section 8404(a)(4) refers to the "Police Officer's Bill of Rights," which is located in Title 11, Chapter 92 of the Delaware Code and is titled "Law-Enforcement Officer's Bill of Rights." A "police officer" is a "law-enforcement officer" for the purpose of LEOBOR. *See* 11 *Del. C.* § 9200(b) ("For the purposes of [Chapter 92] a 'law-enforcement officer' is defined as a *police officer* . . .") (emphasis supplied).

[80] 11 *Del. C.* § 8404(a)(4)(a) – (e).

[81] 11 *Del. C.* § 8410(a) ("Police officers of the State . . . which do not meet the requirements of this chapter and the criteria established by the Council shall not have the authority to enforce the laws of the State").

[82] *Maurer v. Council on Police Training*, 2007 WL 625903 at* 6.

such a hearing and had been discharged from employment or retired prior to entry of findings of fact for which he could have been discharged if he had not retired prior to the imposition of discipline. Suspension, alone, without a LEOBOR hearing prior to retirement, is insufficient to trigger application of Section 8404(a)(4)(e)(2). While Appellee's position is understandable, new or additional legislation could address circumstances where an officer is suspended without a LEOBOR hearing.[83]

Furthermore, the Administrator's two-paragraph letter, which notified Appellant of the COPT's decision to revoke his certification, failed to comply with the APA's requirements for a final order because the letter does not contain a summary of the evidence, findings of fact based on all of the evidence, or conclusions of law and it was not signed by a quorum of the COPT. However, remand for the purpose of issuing a final written order is not necessary because the record does not support Appellant's decertification under any of the Section 8404(a)(4)(e) provisions.

[83] *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) ("It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly").

I. The COPT does not have the authority to act pursuant to 11 *Del. C.* § 8404(a)(4)(e) if the officer did not have a LEOBOR hearing or if the officer did not knowingly and voluntarily waive such a hearing and if the officer was not charged with violating the police agency's administrative rules.

On appeal, the parties disagree upon whether the COPT has the statutory authority to revoke a police officer's certification under 11 *Del. C.* § 8404(a)(4)(e)(2) if the employing police agency suspends the officer, conducts a criminal investigation, closes that criminal investigation, and does not initiate an administrative investigation or charge the officer with a breach of internal discipline related to the closed criminal matter before the officer retires or resigns from the agency. Although the COPT construed Section 8404(a)(4)(e)(2) to permit it to revoke an officer's certification under such circumstances, the Court finds that the COPT exceeded the scope of its authority.

Section 8404(a)(4)(e) unambiguously authorizes the COPT to revoke or suspend a police officer's certification if the officer had a LEOBOR hearing or knowingly and voluntarily waived the right thereto *and* (1) was discharged for a breach of internal discipline or (2) resigned or retired before factual findings by a LEOBOR hearing tribunal with respect to an alleged breach of internal discipline for which the officer could have been legitimately discharged. Thus, Section 8404(a)(4)(e) expressly mandates that LEOBOR is a threshold requirement. "It is well-settled law in Delaware that the goal of statutory construction is to give effect

to legislative intent."[84] The Court "begins with the General Assembly's language" and considers the statute as a whole.[85] If the statute is clear and unambiguous, there is no need to interpret it and the Court will apply the literal meaning of the statute's words.[86] As such, Section 8404(a)(4)(e) must be read in conjunction with LEOBOR because Section 8404(a)(4)(e) is inextricably linked to a LEOBOR hearing.[87]

A. *Section 8404(a)(4)(e) decertification requires a LEOBOR hearing or, in the alternative, a knowing and voluntary waiver of the right to a hearing by retiring or resigning after formal charges are brought.*

In the instant case, it is clear that Appellant did not have a LEOBOR hearing.[88] However, the parties dispute whether Appellant knowingly and voluntarily waived the right to a LEOBOR hearing.

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[84] *Richardson v. Bd. of Cosmetology & Barbering of State*, 69 A.3d 353, 357 (Del. 2013). *See also Wyatt v. Rescare Home Care*, 2013 WL 6097901, * 5 (Del. Nov. 2013) (finding that the goal of statutory interpretation is to "determine and give effect to [the] legislative intent") (internal quotation marks and citation omitted).

[85] *Watson v. State*, 2010 WL 376882, *2 (Del. Jan. 6, 2010) ("Because a statute passed by the General Assembly is to be considered as a whole, rather than in parts, each section should be read in light of all others in the enactment") (quoting *Del. Bay Surgical Serv. v. Patrick Swier*, 900 A.2d 646, 652 (Del. 2006)).

[86] *Bd. of Adjustment of Sussex County v. Verleysen*, 36 A.3d 326, 331 (Del. 2012).

[87] *Richardson*, 69 A.3d at 357 (finding when a statute expressly references another statute, the "related statutes must be read together rather than in isolation" under the doctrine of *in pari materia*).

[88] *See* 11 *Del. C.* § 9205(b) (providing a LEOBOR hearing is "conducted within the department by an impartial board of officers" or before the Delaware Criminal Justice Council if an impartial board cannot be convened). *See also In re Massey*, 2002 WL 1343828, *2 (Del. Super. June 20, 2002) ("The heart of [LEOBOR] is that an officer will receive a fair hearing before an impartial board of police officers . . ."); *Knox v. City of Elsmere*, 1995 WL 339096, *3 (Del. Super. May 10, 1995) (finding a hearing before a board of three impartial officers is one of LEOBOR's enhanced procedural due process safeguards).

Here, Appellant had a hearing that was conducted by the COPT (not his employing police agency or the Delaware Criminal Justice Council) and concerned decertification (not discipline).

A LEOBOR hearing is a condition precedent in a Section 8404(a)(4)(e) decertification. Although Appellant had the right to a LEOBOR hearing because he was suspended, the State Police did not pursue, schedule, or provide such hearing. Moreover, Appellant did not knowingly and voluntarily waive his right to a LEOBOR hearing by retiring because Appellant had not been charged with violating any internal disciplinary rules.

An officer[89] "shall be entitled to a hearing which shall be conducted in accordance with [LEOBOR]" if the officer is "suspended for any reason . . . ."[90] The onus is on the employing police agency to notify an officer of a scheduled LEOBOR hearing, based on his suspension pursuant to 11 *Del. C.* § 9203, within a reasonable period of time after the date of the officer's suspension.[91] LEOBOR requires the agency to provide the officer with written notification of the time and place of the hearing.[92] The officer is not required to ask for a LEOBOR hearing to clear the officer's name or resolve any suspicion.[93]

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[89] 11 *Del. C.* § 9200(b) defines a law-enforcement officer as "a police officer who is a sworn member of [one of the enumerated agencies, including the Delaware State Police]."

[90] 11 *Del. C.* § 9203.

[91] 11 *Del. C.* § 9204 ("In the event an officer is entitled to a hearing, a hearing shall be scheduled within a reasonable period from the alleged incident, but in no event more than 30 days following the conclusion of the internal investigation . . ."). *See also Rosario v. Town of Cheswold*, 2007 WL 914899, *2 – 3 (Del. Super. Mar. 2, 2007) (finding that "scheduling and holding of a hearing is a nondiscretionary duty" because "the statute places the onus on the employer . . . to schedule a hearing"), *aff'd*, 2008 WL 853541 (Del. Apr. 1, 2008).

[92] 11 *Del. C.* § 9204 (" . . . The officer [entitled to a LEOBOR hearing] shall be given written notice of the time and place of the hearing . . .").

[93] *In re Massey*, 2002 WL 1343828 at *2.

Here, there is nothing in the record to indicate that the State Police intended to ever initiate a LEOBOR hearing concerning a suspension, schedule a hearing, or provide Appellant with written notification of the time and place for a suspension hearing. Moreover, while the Appellee may argue that Appellant "game[d] the system by the timing of his retirement"[94], Appellee does not suggest that a suspended officer is required to request a LEOBOR hearing prior to his retirement. Based on the totality of the circumstances, Appellant did not knowingly and voluntarily waive a non-existent LEOBOR hearing.

Furthermore, written notification of a LEOBOR hearing includes advising the officer of the charges against him or her by specifying the facts surrounding the officer's alleged misconduct, the disciplinary rule allegedly violated, and the recommended course of action.[95] Upon receiving written notice of a scheduled LEOBOR hearing, a police officer who has been "charged" with violating a disciplinary rule may waive the hearing in writing.[96]

Those are not the facts in the instant case. Here, the State Police did not give Appellant any notice (written or oral) of a LEOBOR hearing after his

[94] Appellee's Answering Br. at 13.

[95] 11 *Del. C.* § 9204 (" . . . The officer shall be given written notice of . . . the issues involved including a specification of the actual facts that the officer is charged with having committed; a statement of the rule, regulation or order that those facts are alleged to violate; and a copy of the rule, regulation or order. The *charge* against the law-enforcement officer shall advise the officer of the alleged facts and that the violation of the rule constituted a basis for discipline, and shall specify the range of applicable penalties that could be imposed") (emphasis added).

[96] *Town of Cheswold v. Rosario*, 2008 WL 853541, *1 (Del. Apr. 1, 2008) (holding that 11 *Del. C.* § 9204 "makes plain [that] waiver of a scheduled hearing can only occur by written consent").

February 21, 2012 suspension, a specified charge, the disciplinary rules allegedly violated, or the recommended course of action. Appellant did not knowingly and voluntarily waive his right to a LEOBOR hearing by retiring because the State Police had not administratively charged Appellant with anything before he retired.[97] There was no pending investigation or scheduled LEOBOR hearing when he retired and his retirement letter is not a written waiver.

A knowing and voluntary waiver pursuant to Section 8404(a)(4)(e) may be found where the employing police agency provided the officer with written notice of that officer's right to a LEOBOR hearing on an alleged breach of internal discipline prior to the officer's retirement or resignation. In *Maurer v. Council on Police Training*[98], cited by both parties, a police officer had been administratively charged with five counts of misconduct and formally given a "Notice of Proposed Disciplinary Action" from his employing police agency advising him of his right to have or waive a LEOBOR hearing on the charges before he resigned. The officer then resigned. The officer claimed that he did not knowingly and voluntarily waive his right to a LEOBOR hearing because he did not sign the notice. The Court, however, found that the officer chose to resign after receiving written

[97] *Maurer v. Council on Police Training*, 2007 WL 625903 at *4 – 5. *See also Brittingham v. Town of Georgetown*, 2011 WL 2650691, *2 (Del. Super. June 28, 2011).

[98] *Maurer v. Council on Police Training*, 2007 WL 625903 at *4 – 5 ("The Smyrna Police Department served Mr. Maurer with a Notice of Proposed Disciplinary Action . . . [that] stated in relevant part: 'Pursuant to the provisions of 11 Del. C. Ch. 92, you have the right to a hearing on this matter . . . [or] you have the right to waive your rights [to a hearing] and to accept the sanctions as herein provided'").

notice. It also reasoned that he resigned so that he would "no longer face criminal and civil penalties" and would not have to "defend the allegations against him."[99] Appellant's situation is distinguishable from *Maurer*. Appellant never received notice and was never charged with violating the State Police's disciplinary rules before he retired.

Additionally, although the COPT hearing board found that Appellant's retirement occurred after he was advised that the Attorney General's Office would not criminally prosecute him[100], the COPT now attempts to insert new evidence for the Court's review by referencing the investigative narrative of the police report from Appellant's criminal investigation to refute the uncontradicted hearing testimony that was accepted by the board. The Court will not consider documents that are not part of the record. So too, because an administrative hearing is "an adversarial proceeding where the rules of evidence apply insofar as practicable,"[101] the Court will not consider information that was used to refresh Appellant's recollection (concerning the date that the criminal investigation ended) that was never moved into evidence and was disregarded by the hearing board.[102]

[99] *Id.*

[100] R. at 043 & 083; Hrg. Bd.'s Recommendation at 2.

[101] *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006).

[102] During Appellant's cross-examination, the Deputy read the investigative narrative of a police report into the record in an attempt to refresh Appellant's recollection of the date that he became aware that the criminal investigation ended. *See* R. at 055 – 056; Tr. at 32 – 33. Appellant's counsel objected four times on the basis that the State Police did not present a witness to testify regarding the content of the report.

Furthermore, the information that was used to refresh Appellant's recollection concerned a criminal investigation and is relevant to a subsection (c) of Section 8404(a)(4) rather than subsection (e), the section under which Appellant's decertification hearing was held.

The record shows that the State Police did not provide Appellant with any notice of a right to a LEOBOR hearing, the facts surrounding his alleged misconduct, the rule he purportedly violated, or its recommended course of action. Hence, because Appellant did not retire when facing administrative disciplinary charges and he had not been notified of a LEOBOR hearing, he did not knowingly and voluntarily waive his right to a LEOBOR hearing as required by Section 8404(a)(4)(e).

B. *A formal charge substantiated by an administrative investigation is required for an officer to be legitimately discharged within the meaning of Section 8404(a)(4)(e).*

While Appellant arguably retired under a cloud of suspicion, he did not retire facing any pending charges that could lead to a finding of fact "concerning an alleged breach of internal discipline for which [he] could have been legitimately

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The investigative narrative was never put into evidence. *See* D.R.E. 612(a) (permitting a testifying witness to use a writing or object to "refresh his memory"). There is also no indication in the record that the police officer who authored the investigative narrative was present at the hearing to authenticate the police report or available for cross-examination. *See Crooks v. Draper Canning Co.*, 1993 WL 189532 (Del. Super. May 12, 1993) (finding a police report introduced on cross-examination before the Industrial Accident Board appeared to be incompetent hearsay evidence because it "was not used to bolster or deflate testimony by the person who originally transcribed it"), *aff'd*, 1993 WL 370851 (Del. Sept. 7, 1993).

discharged had [he] not retired . . . prior to the imposition of any discipline."[103] Speculation that an administrative investigation would have been conducted and further speculation that such an administrative investigation would inevitably result in a charge but for the officer's retirement is insufficient for a determination that an officer could have been legitimately discharged within the meaning of Section 8404(a)(4)(e).

Section 8404(a)(4)(e) authorizes the COPT to decertify an officer only if the officer either has been discharged for a breach of internal discipline (following a LEOBOR hearing) *or* if the officer could have been legitimately discharged for an alleged breach of internal discipline had the officer not retired or resigned (prior to a LEOBOR hearing).

Here, Appellant's supervisors did not take any administrative action involving alleged violation of rules and regulations or breach of discipline or lodge charges.[104] So too, the COPT's witness, Capt. Logan, similarly testified that there was no (State Police Internal Affairs) administrative action or investigation of any potential charge and that Appellant was not notified of any investigation or actual charges prior to his retirement.

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[103] 11 *Del. C.* § 8404(a)(4)(e)(2).

[104] *See* R. at 061; Tr. at 54 – 55 (THE DEPUTY: "If it had gone to [Internal Affairs], the process had gone to a trial board or a superintendant's hearing or something like that, there would be a notation on the censure sheet, but there wouldn't be any of the underlying documentation . . ."). *See also* R. at 034 – 037; *Ark. Comm'n on Law Enforcement Stands. v. Davis*, 320 S.W.3d 23 (Ark. Ct. App. 2009) (affirming the revocation of a retired officer's certification after finding substantial evidence that the officer chose to retire while he was the subject of a pending internal investigation, initiated by the Arkansas State Police Division of Internal Affairs, into his failed drug test).

On the day that he retired, Appellant could not have been legitimately discharged because Internal Affairs had not conducted an administrative investigation that could lead to a charge. Legitimate police officer discharge involves enhanced procedural due process.[105] Enhanced procedural due process means that an employing police agency conducts an administrative investigation of a *potential* administrative charge that could result in the officer's dismissal and determines that there is substantial evidence derived from the administrative investigation to support that charge.[106] In addition, a LEOBOR hearing tribunal is the statutory body that determines whether the charge is substantiated by the facts and termination of employment is warranted.[107]

The Section 8404(a)(4)(e) standard for decertification does not include the word "suspension" and the courts "may not engraft upon a statute language which has been clearly excluded therefrom by the Legislature."[108] The LEOBOR statute

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[105] *Knox v. City of Elsmere*, 1995 WL 339096 at *3 (finding the LEOBOR statute "provides law-enforcement officers with enhanced procedural due process safeguards").

[106] 11 *Del. C.* § 9200(c)(3) (". . . No formal complaint against a law-enforcement officer seeking dismissal or suspension or other formal disciplinary action shall be prosecuted under departmental rule or regulation unless the complaint is supported by substantial evidence derived from an investigation by an authorized member of the department"). *See also Braun v. City of Los Angeles*, 2002 WL 31412724, *6 (Cal. Ct. App. Oct. 28, 2002) (affirming Board of Rights decision to terminate an LAPD officer based on the concern that others would challenge the officer's truthfulness in finding and handling evidence and taping statements because the board had been presented with substantial evidence that the officer made false statements during her deposition testimony in her workers' compensation hearing).

[107] 11 *Del. C.* § 9205(e) (providing an officer may not "be adjudged guilty of any offense unless the hearing tribunal is satisfied that guilt has been established by substantial evidence"). *See also Brittingham v. Town of Georgetown*, 2011 WL 2650691 at *2, 4 (finding a LEOBOR hearing tribunal is the statutory fact-finding body whose purpose is "to determine whether the charges [are] substantiated") (citing 11 *Del. C.* § 9207).

[108] *Alfieri v. Martelli*, 647 A.2d 52, 54 (Del. 1994) (quoting *Giuricich v. Entrol Corp.*, 449 A.2d 232, 238 (Del. 1982)).

clearly distinguishes between a suspension and circumstances involving violation of rules and regulations or a breach of discipline.[109] Here, Appellant had been suspended.[110] Although the State Police has suggested that Appellant should have delayed his retirement to await an administrative charge, that is not found in the law and is unrealistic. Appellant had been suspended for several weeks and the criminal investigation ended. He had no indication that an administrative investigation would ever be initiated or that administrative charges would be forthcoming. The State Police Internal Affairs apparently declined to investigate.

Absent an administrative investigation or actual charges, Capt. Logan's testimony that Appellant could have received notice from the State Police for an alleged violation of R&R 16 is contrary to the facts and conjectural. Moreover, the

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[109] *See* 11 *Del. C.* § 9203 ("If a law-enforcement officer is (1) suspended for any reason, *or* (2) *charged* with conduct alleged to violated the rules or regulations or general orders of the agency that employs the officer, *or* (3) *charged* with a breach of discipline of any kind, which charge could lead to any form of disciplinary action (other than a reprimand) which may become part of the officer's permanent personnel record, then that officer shall be entitled to a hearing which shall be conducted in accordance with [Title 11, Chapter 92] . . .") (emphasis supplied). Although the statute provides an exception for contractual disciplinary procedures, that exception does not apply in the instant case.

[110] On appeal, the COPT maintains that the "[State Police] suspended [Appellant] for an alleged breach of internal discipline." Appellee's Answering Br. at 4.

Appellant's testimony was that his captain called and told him that he was suspended and that it was a criminal matter. Appellant further testified that Det. Sponaugle subsequently called and told Appellant that he was suspended for an overtime sheet.

The record on appeal contains a "Notification of Suspension for McGee on 2/21/12." *See* R. at 041. This document lists previous administrative charges and penalties against Appellant which were resolved. "Notification of Suspension" and "Suspended with pay and benefits until further notice" is written at the bottom of the document. There are no charges or penalties listed under the "Notification of Suspension."

Based on the testimony before the hearing board, the "Notification of Suspension" appears to be Appellant's "censure sheet from his personnel file." After presenting the hearing board with Appellant's "censure sheet," the Deputy said, "And I have attached to the censure sheet as it's called, the summary disciplinary action form." R. at 061; Tr. at 54. The summary disciplinary action form was not included in the record submitted to the Court.

Thus, although the record is clear that Appellant had been suspended, the record does not support Appellee's contention that the State Police suspended Appellant for "an alleged breach of internal discipline."

COPT's contention that an employing police agency "would have to charge and try the [retired] officer *in absentia* in order to prove that the misconduct was a terminable offense"[111] is without merit.

Additionally, while the COPT maintains that construing Section 8404(a)(4)(e) to require written notice of a specified administrative charge would lead to "absurd and unreasonable results"[112], the statute is clear that a specific breach of internal discipline must be alleged prior to an officer's retirement or resignation.[113] There is no indication that the General Assembly intended to grant the COPT the authority to revoke or suspend an officer's certification pursuant to Section 8404(a)(4)(e) based upon a *speculative* breach of internal discipline.[114]

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[111] Appellee's Answering Br. at 13.

[112] *Id.* at 13.

[113] *See Del. Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (holding that "if a literal reading of the statute would lead to an absurd or unreasonable result not contemplated by the legislature[,]" the Court will apply the rules of statutory construction to resolve ambiguity) (quoting *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007)).

[114] The COPT contends that "[t]he Court does not have to speculate about what might or might not have happened if [Appellant] had not retired rather than face an Internal Affairs investigation. The COPT statute only requires that the officer resigned or retired 'facing potential discipline that **could have resulted** in his or her termination if the charges had proved true.'" Appellee's Answering Br. at 18 (quoting Del. S.B. 314 syn., 142d Gen. Assem. (2004)) (emphasis in Appellee's brief).

The COPT statute was amended in 2004 to add the threshold requirement that an officer facing decertification either had or knowingly and voluntarily waived the right to a LEOBOR hearing. The statutory synopsis cited by the COPT "make[s] clear that the officer is not entitled to a trial board hearing [before a three-member COPT hearing board] to determine whether the *charges* against him or her are proven by the evidence if the officer has already received a hearing under the Police Officer's Bill of Rights or has waived his or her right to such a hearing." R. at 23; Del. S.B. 314 syn. (emphasis supplied).

The statutory synopsis does not change the meaning of the Section 8404(a)(4)(e). *See Bd. of Adjustment of Sussex County v. Verleysen*, 36 A.3d at 332 (stating that the Court will look to a statutory synopsis if the statutory language is ambiguous, but the synopsis "cannot change the meaning of an unambiguous statute"). Section 8404(a)(4)(e) is unambiguous and requires that the officer be formally charged with a specified alleged breach of internal discipline.

Moreover, the criminal investigation concerning Appellant was closed and no civil, administrative investigation had been opened. Section 8404(a)(4)(e) applies where there is a civil, administrative investigation. So too, there is no indication that the General Assembly intended for Section 8404(a)(4)(e) to apply to *criminal investigations* (open or closed). The General Assembly created a separate provision authorizing the revocation or suspension of a police officer's certification if the officer is *criminally convicted*.[115] The General Assembly has not specifically included criminal *investigations* or criminal *charges* in the language of 11 *Del. C.* § 8404(a)(4). Here, Appellant was not criminally charged. This Court will not extend the statute where the legislature has made itself clear.[116]

Although the Appellee maintains that a *criminal investigation* "clearly involves an alleged breach of internal discipline"[117], that argument is contradicted by fact and by police procedure. Factually, the criminal investigation was closed and the Attorney General's Office determined that the matter lacked prosecutorial merit. Procedurally, a breach of internal discipline cannot be alleged by an employing police agency unless the agency first conducts an administrative investigation on a specified charge. Here, there was never an administrative

[115] *See* 11 *Del. C.* § 8404(a)(4)(c).

[116] *State v. Diaz*, I.D. No. 1304006496, 12 (Del. Super. Nov. 26, 2013) ("The Court will not impose such requirements where it is clear the legislature did not intend them to exist").

[117] Appellee's Answering Br. at 15.

investigation. All investigative bodies had apparently determined that there was no further need to investigate whether there may have been a breach of internal discipline.

Thus, in the absence of an administrative investigation and subsequent charge, the COPT had no basis upon which to determine that Appellant could have been legitimately discharged.

C. *The COPT's decision is not supported by substantial evidence in the record because it erroneously interpreted Section 8404(a)(4)(e) to apply under circumstances absent a LEOBOR hearing or waiver and an administrative investigation and charge.*

While an administrative board has the discretion to determine the weight to accord the evidence presented before it, "this discretion is not unchecked."[118] Administrative board decisions that are based on a statute must be supported by substantial evidence that meets statutory requirements.[119] Where one statute serves as the basis for a decision, and the Court finds that the board erroneously interpreted the statute to apply under the circumstances, the board's findings are not supported by the record.[120]

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[118] *Eckeard v. NPC Intern., Inc.*, 2012 WL 5355628, *5 (Del. Super. Oct. 17, 2012) (citing *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 – 43 (Del. Super. 1976)).

[119] *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 – 43 (Del. Super. 1976) ("The Board's discretion is not so wide that it may do whatever it deems to be equitable without regard to statutory requirements and the need for substantial evidence to meet statutory requirements").

[120] *See also Gillespie v. Bd. of Nursing*, 2011 WL 6034789, *2 (Del. Super. Nov. 17, 2011) (finding the Board of Nursing's decision to suspend the appellant's license was unsupported by the record and was without existing grounds to sanction the appellant because the board erred in its interpretation of the mandatory reporting statute), *aff'd*, 41 A.3d 423 (Del. 2012).

Here, the COPT erred in its interpretation of Section 8404(a)(4)(e) to permit it to revoke Appellant's certification under the facts of the instant case. As such, the COPT hearing board's written findings and recommendation[121], which were adopted by the full COPT, are not supported by substantial evidence in the record.

II. Remand for the purpose of correcting procedural errors in the COPT's final decision is unnecessary because there is insufficient evidence in the record to support the revocation of Appellant's certification under any of the 11 *Del. C.* § 8404(a)(4) provisions.

In addition to contending that the COPT lacked jurisdiction to revoke his certification, Appellant raised a procedural due process issue on appeal and asserts that, contrary to the APA, the Council did not base its final decision on the entire record or issue a final written order as required by 29 *Del. C.* § 10128.[122] The COPT counters that the APA does not apply once the matter before the COPT hearing board has concluded, and thus, Section 10128 is inapplicable.

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[121] Six prior COPT decisions are cited by the hearing board to show that its recommendation in the instant case is consistent with the COPT's previous decisions. The decisions were: *In the Matter of David A. Elwood* (Del. Council on Police Training July 30, 2012); *In the Matter of Albert Hicks* (Del. Council on Police Training Mar. 21, 2012); *In the Matter of Christopher Cooper* (Del. Council on Police Training Nov. 28, 2011); *In the Matter of Brian Grant* (Del. Council on Police Training Dec. 16, 2010); *In the Matter of Ismael Torres* (Del. Council on Police Training Aug. 26, 2008); *In the Matter of Cameron Maurer* (Del. Council on Police Training Mar. 7, 2007). Copies of these decisions were not included as part of the record in this case.

However, because neither the State Police nor the Appellant referred to the COPT's decisions in *Hicks*, *Cooper*, *Grant*, or *Torres* before the hearing board or in the written exceptions or response thereto, the COPT's reliance on these prior decisions is erroneous. *See Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998) ("Unlike judicial bodies, which may rely upon, and take instruction from, previous rulings for legal standards, [an administrative agency] should refrain from using cases from its own experience for factual comparison, unless invited by the parties to do so").

The COPT was permitted to rely upon the *Elwood* and *Maurer* decisions because the State Police invited the hearing board to do so. However, as indicated in n. 42, *supra*, and in the Court's discussion of *Maurer v. Council on Police Training*, the two decisions are factually distinguishable from the case at hand.

[122] 29 *Del. C.* § 10128 (Decision; final order) provides:

(a) The agency shall make its decision based upon the entire record of the case and upon the summaries and recommendations of its subordinates.

In *Maurer v. Council on Police Training*[123], the Court held that "the APA's Case Decision *rules*, Subchapter III of Chapter 101," apply to hearings held pursuant to 11 *Del. C.* § 8404A. The Court reasoned that, although the COPT is not one of the enumerated agencies in 29 *Del. C.* § 10161(a), Section 8404A(4) expressly provides that "[a]ll hearings shall be conducted in accordance with the Administrative Procedures Act [Chapter 101 of Title 29]."

The COPT does not dispute that two of the APA's rules governing case decisions (29 *Del. C.* §§ 10125[124] and 10126[125]) are applicable to its decisions. In fact, it notes that the three-member hearing board "allow[ed] [the parties] to make exceptions, comments, and arguments" to the hearing board's "decision" pursuant to 29 *Del. C.* § 10126(b).[126]

(b) Every case decision of any agency shall be incorporated in a final order which shall include, where appropriate:

(1) A brief summary of the evidence;
(2) Findings of fact based upon the evidence;
(3) Conclusions of law;
(4) Any other conclusions required by law of the agency; and
(5) A concise statement of the agency's determination or action on the case.

(c) Every final order shall be authenticated by the signatures of at least a quorum of all agency members, unless otherwise provided by law.

(d) Every final order shall immediately be mailed or delivered to each party and each other person requesting it.

(e) Every final order may be amended or modified by the same procedures used for the initial adoption of the order.

[123] *Maurer v. Council on Police Training*, 2007 WL 625903 at *6 (emphasis added).

[124] Section 10125 is titled "Conduct of public hearings; burden of proof; record."

[125] Section 10126 is titled "Proposed orders."

[126] Appellee's Supp. Br. #1 at 3.

However, there is no evidence in the record that the full COPT ever considered Appellant's written exceptions to the hearing board's recommendation or the State Police's response or that it reviewed the transcript of Appellant's hearing. Moreover, Appellant maintains that the transcript of Appellant's hearing before the three-member hearing board was not prepared until *after* the decision was appealed to this Court and, therefore, the full COPT could not have based its decision on the entire record as required by 29 *Del. C.* § 10128(a).[127]

It would render Section 8404A(4)'s express reference to the APA superfluous if the full COPT is not required to "make its decision based upon the entire record [including exceptions made pursuant to 29 *Del. C.* § 10126(b)][128] and upon the summaries and recommendations of its subordinates" as outlined in 29 *Del. C.* § 10128(a).[129] The hearing board's written recommendation is a proposed order and does not constitute the COPT's final decision.[130] While the full COPT may adopt the hearing board's recommendation (provided that the

[127] Appellee has not refuted this claim.

[128] *See* 29 *Del. C.* § 10127 ("With respect to each case, all notices, correspondence between the agency and the parties, all exhibits, documents and testimony evidence admitted into evidence and all recommended orders, summaries of evidence and findings and all interlocutory and final orders of the agency shall be included in the agency's record of the case and shall be retained by the agency").

[129] *See Michael v. Del. Bd. of Nursing*, 2012 WL 1413573, *3 (Del. Super. Feb. 16, 2012) (finding the Board of Nursing did not violate Section 10128 when in failed to issue a written decision after the appellant's first hearing because the Board reopened the matter and "did not issue a final decision until it had the opportunity to consider any mitigating circumstances presented by [the appellant]").

[130] *See Quaker Hill Place v. Saville*, 523 A.2d 947, 952 (Del. Super. 1987) (finding "a three member panel of the [State Human Relations] Commission [is a proposed order and] does not constitute a 'case decision' under the [APA]").

recommendation is supported by substantial evidence in the record), the COPT is required by 11 *Del. C.* § 8404A(4) *and* 29 *Del. C.* § 10128 to issue a final written order that includes a summary of the evidence, factual findings based on all of the evidence, conclusions of law, and a statement of the COPT's action.

Additionally, the final written order must be signed by a quorum of the COPT and "immediately" mailed or delivered to the parties pursuant to 29 *Del. C.* § 10128. In the instant case, the Administrator's letter does not meet these requirements. The two-paragraph letter to Appellant from the COPT's Administrator does not contain a summary of the evidence, findings of fact based on all of the evidence, or conclusions of law. Furthermore, the letter was only signed by the COPT's Administrator rather than the required quorum of the COPT.[131] Additionally, the Court notes that the letter was not immediately mailed or delivered to the parties because it was sent to Appellant almost one month after the COPT's meeting.

Although the form and content of the COPT's final order is at variance with 29 *Del. C.* § 10128, remanding the decision to the COPT for the purpose of issuing a final order consistent with APA requirements is unnecessary because there is

[131] *See* 11 *Del. C.* § 8403(a) (" . . . Seven members shall constitute a quorum [of the COPT] . . .").

insufficient evidence in the record to revoke Appellant's certification under any of the five provisions outlined in 11 *Del. C.* § 8404(a)(4).[132]

Once Appellant was notified of his right to a COPT decertification hearing pursuant to 11 *Del. C.* § 8404A[133], "due process entail[ed] providing the parties with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends."[134] Although "due process is flexible, its fundamental requirement in agency proceedings is fairness, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope."[135]

Consistent with Appellant's assertion that the COPT did not have the authority to revoke his certification under any of the Section 8404(a)(4) provisions, and because the COPT notified Appellant that it had grounds to revoke his certification pursuant to 11 *Del. C.* § 8404(a)(4)(e) and conducted a hearing under Section 8404(a)(4)(e), it would violate due process to remand the matter to the COPT for consideration of the applicability of other provisions, which would

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[132] *See Mitchell v. Del. Alcoholic Bev. Control Commn.*, 193 A.2d 294, 311 (Del. Super. 1963), *rev'd on other grounds*, 196 A.2d 410 (Del. 1963).

[133] 11 *Del. C.* § 8404A ("In all situations where the provisions of 8404(a)(4) . . . of this title are to be applied to or invoked against any agency or individual, that agency or individual is entitled to a hearing in the manner prescribed herein . . .").

[134] *Vincent v. Eastern Shore Mkts*, 970 A.2d 160, 164 (Del. 2009).

[135] *Id.* at 165.

exceed the scope of the COPT's notice to Appellant. Regardless of the procedural errors in the COPT's decision, the COPT simply did not have the authority to revoke Appellant's certification under the record of this case.

"Irrespective of whether the question of conclusiveness or finality of an administrative decision arises in a review proceeding or whether the question arises as one affecting the power of the administrative agency which has rendered such decision, the general rule seems to be that lack of jurisdiction in an administrative agency renders its decision absolutely void and deprives it of any conclusive effects whatsoever."[136] Thus, remand for the purpose of correcting any procedural errors in the COPT's decision is not required.

Conclusion

The COPT misapplied 11 *Del. C.* § 8404(a)(4)(e)(2), and the COPT's decision to revoke Appellant's certification is not supported by substantial evidence in the record. A Section 8404(a)(4)(e)(2) hearing is appropriate if two conditions are met. The first is LEOBOR hearing activity by the employing police agency or the employed police officer; the second is that the officer faced internal disciplinary charges prior to his or her retirement or resignation from the agency. In the instant case, the predicate LEOBOR hearing activity did not occur and, secondly, the employee was not facing charges when he retired. Suspension

[136] *Mitchell v. Del. Alcoholic Bev. Control Commn.*, 193 A.2d at 311.

without a hearing is insufficient for the purpose of Section 8404(a)(4)(e). Mere speculation that an administrative investigation and charges might be forthcoming is insufficient to decertify a law enforcement officer and contravenes the enhanced procedural due process in the provision's express reference to LEOBOR.

Furthermore, although the COPT's final decision diverges from APA requirements, remand is unnecessary because the record does not support Appellant's certification under any of the Section 8404(a)(4)(e) provisions.

For the foregoing reasons, the decision of the COPT is ***REVERSED*** and the matter is ***REMANDED*** to the Council on Police Training with the instructions to act consistently with this option and place Appellant on "inactive status" pursuant to 1 *Del. Admin. C.* § 801-8.1.2.

IT IS SO ORDERED.

Diane Clarke Streett
Judge

Original to Prothonotary

cc: Stephani J. Ballard, Esquire
W. Michael Tupman, Esquire, Deputy Attorney General