No. _____

In The
Supreme Court of the United States

SERGE ANTONIN,

Petitioner,

V.

BALTIMORE POLICE DEPARTMENT,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

APPENDIX

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IN THE COURT OF APPEALS OF MARYLAND

* Petition Docket No. 226
September Term, 2018

(No. 443, Sept. Term, 2017 *Court of Special Appeals)

SERGE ANTONIN

v.

BALTIMORE POLICE DEPT.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Mary Ellen Barbera
Chief Judge
DATE: September 28, 2018

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 443

September Term, 2017

BALTIMORE POLICE DEPARTMENT

v.

SERGE ANTONIN

Woodward, C,J., Eyler, Deborah S., Reed, JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 1, 2018

A hearing board for the Baltimore Police Department ("BPD") found Officer Serge Antonin guilty of general misconduct and use of excessive force. The BPD Police Commissioner terminated Antonin' s employment.

On judicial review, the Circuit Court for Baltimore City reversed the final agency decision and ordered that Antonin be reinstated. It found that the BPD had erred by denying Antonin's request to be tried before a hearing board composed of non-BPD officers. It also found that the BPD did not adhere to its own administrative policy regarding use of force, in violation of the *Accardi*

doctrine[1], and that Antonin suffered prejudice as a result.

The BPD noted a timely appeal and presents two questions for review, which we have rephrased:

> I. Did the BPD improperly deny Antonin's request for a hearing board composed of non-BPD officers?
>
> II. Did the BPD violate the *Accardi* doctrinc, causing prejudice to Antonin?

We answer each question in the negative. Accordingly, we shall reverse the judgment of the circuit court and reinstate the final agency decision terminating Antonin from employment.

FACTS AND PROCEEDINGS

At about 6: I0 p.m. on July 29, 2013, BPD officers in marked vehicles responded to reports of a stolen car being driven south on Belair Road in northeast Baltimore City. The driver of the car later was identified as fourteen-year-old David Wilson. When Wilson saw that he was being chased by the police, he sped up, veered off the road, and crashed into two parked cars in a corner lot. A news helicopter for WBAL-TV videotaped the police chase and its aftermath.

Multiple police units arrived at the scene of the crash and officers surrounded the stolen car. The front end of the car was damaged, and Wilson had moved to the passenger's seat. Officers Theodore

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[1] *See United States ex rli. Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954).

Galfi and Gersham Cupid approached the passenger side door and pulled Wilson out of the vehicle.[2] They placed him on the ground in a prone position and began to handcuff him. Wilson resisted initially, but neither officer felt threatened and both thought that Wilson was e1Tectively detained after being put on the ground.

Antonin was toward the end of the line of police vehicles in the chase, driving a prisoner transport wagon from the Northeast District. He arrived on the scene as Officers Galfi and Cupid were detaining Wilson. By then he knew the chase had ended in the Eastern District, so the suspect would be transported by a wagon from that district and not by him.

When Antonin arrived, about six officers were clustered around Officers Galfi and Cupid, who were standing over Wilson. Antonin got out of his wagon, quickly made his way through the group of officers to approach Wilson, and hit Wilson on the head with an open hand. Wilson was not handcuffed at that point. Antonin stepped away from Wilson after he was handcuffed. Seconds later, Antonin approached Wilson a second time, grabbed him, and hit him several more times on the head with an open hand.

That evening, WBAL-TV aired footage of the chase and Wilson's arrest, which showed Antonin hitting Wilson on the head. Shortly after WBAL-TV released the footage, then-Deputy Commissioner Jeronimo Rodriguez gave the following statement to the news station:

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[2] Officer Cupid attained the rank of Sergeant before this case proceeded to a hearing board. For consistency, we shall refer to him as Officer Cupid.

> We did not like what we saw. We are not waiting for anyone to initiate a personnel complaint. At the Commissioner's request we have initiated a personnel complaint and we are looking at this incident thoroughly from the beginning, during this incident, and immediately after.

At around II :30 p.m., Sergeant Christopher Warren, acting under the order of then-Colonel Darryl DeSousa, Chief of Patrol, suspended Antonin from duty with pay pending further investigation into the incident.

At 1 :30 a.m. on July 30, 2013, Sergeant Warren briefed a detective with the BPD Internal Affairs Division ("IAD") about the incident. IAD began its investigation that day into Antonin's use of force to determine whether he had 1) engaged in general misconduct in violation of General Order C-2 Rule 1[3] and 2) used excessive force in violation of General Order C-2 Rule 1, Section 6.[4] Between July

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[3] General Order C-2 Rule 1 provides:
Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member of the Department, either within or outside the City of Baltimore, which tends to undermine the good order, efficiency or discipline of the Department, or which reflects discredit upon the Department or any member thereof, or which is prejudicial to the efficiency and discipline of the Department, even though these offenses may not be specifically enumerated or laid down, shall be considered conduct unbecoming a member of the B[PD], and subject to disciplinary action by the Police Commissioner.

[4] General Order C-2 Rule I, Section 6 provides:
Every member of the Department is prohibited from using unnecessary force or violence and shall not strike a prisoner or

30 and November 5, 2013, IAD detectives interviewed fourteen officers who were on the scene when Wilson was arrested. Of the fourteen, only Officers Galfi and Cupid actually saw Antonin hit Wilson. Both stated that Antonin hit Wilson alter Wilson had been handcuffed. IAD detectives also obtained the WBAL-TV footage of the incident. Because Antonin faced the possibility of criminal charges, IAD detectives delayed interviewing him.

On July 28, 2014, Antonin was charged with second-degree assault and two counts of misconduct in office, based on the incident involving Wilson. In an article about the charges, the *Baltimore Sun* quoted Deputy Commissioner Rodriguez as saying, "We will not tolerate the actions of any officer that breaks the law in order to enforce the law." In April 2015, while Antonin's criminal case was pending, Deputy Commissioner Rodriguez retired.

On October 5, 2015, Antonin entered an *Alford* plea to one charge of misconduct in office, and the State dismissed the remaining two charges against him. He was given probation before judgment, with one year of unsupervised probation. He completed all terms of his probation satisfactorily.

Following the disposition of Antonin's criminal case, the IAD resumed its investigation. On March 10, 2016, IAD Detective Jeffrey Thomas interviewed Antonin. Antonin acknowledged hitting Wilson twice. He said he hit him the first time to make him submit to being handcuffed. He said he hit him the

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any other person, except in self-defense. However, members must be firm and resolute, and if they are resisted, they may repel force with force, using only such force as is necessary to take a prisoner into custody.

second time because he had to "take him to my wagon" and he overheard Officer Cupid say something to the effect of "don't spit" or "stop spitting." Later in the same interview, he explained that he hit Wilson the second time because "I thought he was going to spit on me[.]"[5] Antonin admitted to being upset about Wilson's reckless driving and to yelling at Wilson, "you could have killed somebody .... "

On March 26, 2016, the IAD issued to the BPD Charging Committee its written report of investigation and finding on the allegations against Antonin. The report summarized the witness interviews and the evidence the IAD had reviewed, including the WBAL-TV videotape of the incident, and found:

> In his recorded statement, Officer Antonin admitted to striking Mr. Wilson twice with an open hand, during the events that occurred on July 29, 2013. Officer Antonin claimed that the first slap was meant to neutralize the ongoing threat of Mr. Wilson's evasion of arrest and escape, and the second slap was the [sic] deter any attempt by Mr. Wilson to spit on Officer Antonin. Officer Antonin insisted that his actions were taken all in reasonable attempts to control Mr. Wilson. [n spite of his claims, video footage of this incident shows that Officer Antonin was clearly not in control of his actions, considering the manner in which he hurriedly runs toward Mr. Wilson, slaps him

[5] Neither Officer Cupid nor Officer Galfi made any mention in their IAD interviews of Wilson spitting or threatening to spit.

> twice in rapid succession, and then briskly walks away in the footage. This behavior is more so characteristic of an emotional frenzy as opposed to a controlled response to a rebellious combatant. Furthermore, witness statements as well as Officer Antonin' s own admission relayed that he was upset during this incident, further discrediting the notion that he was in full control of his actions during this incident.
>
> Additionally, regardless of whether or not Mr. Wilson was handcuffed at the time of Officer Antonin's arrival, there was sufficient police presence at the time to adequately control his movements and any use of force would have been excessive. This is evidenced by the fact that Sergeant Christopher Warren, upon observing Sergeant Jason Bennett displaying his taser, quickly admonished Officer Bennett, knowing that this situation was controlled enough that the use of a taser would have been inappropriate. For the same reason that Officer Bennett's use of a taser would have been unwarranted, any use of force performed by Officer Antonin, likewise, was unwarranted, especially considering the fact that Officer Antonin used force after Officer Bennett had holstered his taser.

The IAD found "that the allegations of **Misconduct/General** and **Excessive Force** pertaining to Officer Serge Antonin are rendered **Sustained.**"

Antonin was charged administratively and chose to proceed before a hearing board. Pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"), Md. Code (2003, 2011 Repl. Vol.), sections 3-101 to 3-113 of the Public Safety Article ("PS"), hearing boards in law enforcement officer disciplinary matters are to consist of at least three members who "are appointed by the chief and chosen from law enforcement officers within th[e] law enforcement agency [that initiated the investigation], or from law enforcement officers of another law enforcement agency with the approval of the chief of the other agency[.]" PS S 3-107(c)(I)(i). One week before Antonin's hearing board was to begin, his lawyer requested in writing that the hearing board be composed of non-BPD officers. He argued that Deputy Commissioner Rodriguez's statements after the WBAL-TV footage aired and after Antonin was charged criminally showed that it was "highly improbable that officers selected by the [BPD] to sit in judgment of the officer [Antonin] are neutral and unbiased and not influenced by the administration." The request was denied by BPD Police Commissioner Kevin Davis.

Antonin's hearing began on October 26, 2016, and lasted two days. The members of the hearing board were BPD Major Robert Jackson, BPD Major George Clinedinst, and BPD Officer Bobbie Gilliam. As a preliminary matter, counsel for Antonin argued that the hearing board did not have jurisdiction over his case because the BPD had not followed its own procedure for investigating his use of force. He explained that "nobody did a use of force investigation or report [pursuant to BPD General Order K-15] as required under *Accardi*. . .. In other

words, S[ergeant] Warren was supposed to do certain things, reports were supposed to be generated immediately. It wasn't done," Counsel for the BPD responded that the BPD may "independently investigate any actions of its members" and that its "independent investigation can go forward without a formal use of force or excessive force charge being filed by the Department and/or its members." The hearing board rejected Antonin' s argument, and the hearing proceeded.[6]

The Board watched the WBAL-TV footage of the incident and heard testimony from seven witnesses, including Antonin, Detective Thomas, and Officers Galfi and Cupid.[7] It took Antonin's *Alford* plea into consideration. The Board found Antonin guilty of general misconduct and use of excessive force, explaining that "Antonin unnecessarily used force and struck ... Wilson several times with an open hand after he was effectively detained by other police officers." It recommended termination. On November 8, 2016, Commissioner Davis adopted the recommendation and terminated Antonin.

In the Circuit Court for Baltimore City, Antonin filed a timely action for judicial review. He argued, among other points, that the BPD violated his due process rights by denying his request to have

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[6] Antonin unsuccessfully renewed his motion to have the hearing board members replaced with non-BPD officers.

[7] The hearing board also heard from Sergeant Freddie Bland, who first reported the stolen vehicle, and Officers Rebecca Small and Elsie McCray, who pursued Wilson during the chase. (At the time of the incident and when she was interviewed by the IAD, Officer Small's last name was Ward.) None of them saw the interaction between Antonin and Wilson in which Antonin hit Wilson.

his case heard by non-BPD officers and by failing to adhere to its own administrative procedure on use of force, to his prejudice. The court agreed with Antonin on those two grounds. In deciding that Antonin was entitled to a hearing board composed of non-BPD members, the court opined, "based on the statements of Deputy Commissioner Rodriguez and the media attention surrounding [Antonin's] conduct, the ... hearing board, composed of BPD officers, was not neutral." It found that Deputy Commissioner Rodriguez's statement on the day of the incident "demonstrates that the BPD had already condemned [Antonin's] conduct, prior to any investigation or criminal charges." It further found that Deputy Commissioner Rodriguez's two statements together "demonstrate the position of the BPD: [Anton in] was guilty of excessive force before a conviction or a hearing."

The court also found that "the BPD did not comply with its internal policies," specifically, that one of Antonin's supervisors should have issued a use of force report about the incident, pursuant to General Order K-15, and that Antonin was prejudiced by the absence of a use of force report.

> Although a report by the first rank supervisor may have indicated that [Antonin] did violate the Use of Force policy, it could also have indicated that he did not. Such a report could have significantly altered the findings of the ... board.
>
> . . . A report from a supervisor who had investigated this almost immediately after the incident would have been invaluable for

> both sides as evidence to present at the hearing.
>
> [T]he majority of witnesses were not interviewed until some 90 days after the conduct occurred. Had BPD complied, these witnesses to the incident would have been interviewed shortly after the [Antonin)'s conduct occurred. Of the fourteen officers interviewed by IAD, ten were interviewed between October 28, 2013 and November 5, 2013. These interviews occurred after statements by [Deputy] Commissioner Rodriguez had been made, the footage had aired on WBAL, and the interviews were conducted by IAD, not the first rank supervisor. ... In addition, [Anton in] was not interviewed until almost two and a half years after the incident. Although BPD argued that IAD wanted to wait to interview [Anton in] until after the criminal case concluded, [Antonin] entered the *Alford* plea on October 5, 2014, yet IAD did not interview [Anton in] until a year and a half later on March 10, 2016.[8]

The court ruled that the final agency action could not stand under *Accardi.*[9]

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[8] Officer Antonin entered his *Alford* plea on October 5, 2015, not 2014. Accordingly, IAD interviewed Officer Antonin five months after his *Alford* plea.

[9] In its order, the court stated that if the BPO "decides to retry this matter, it must use a hearing board comprised of officers of a different law enforcement agency[.]" It did not explain,

The BPO noted this timely appeal.

STANDARD OF REVIEW

The standard of review in a LEOBR case "'is that generally applicable to administrative appeals. "' *Coleman* v. *Anne Arundel Cty. Police Dep 't.,* 369 Md. 108, 121 (2002) (quoting *Montgomery Cty.* v. *Stevens,* 337 Md. 471, 482 (1995». We are tasked with determining whether the administrative agency, as opposed to the circuit court, erred. *Baltimore Police Dep 't.* v. *Ellsworth,* 211 Md. App. 198, 207 (2013) (citing *Bayly Crossing, LLC* v. *Consumer Prot. Div., Office of Atty. Gen.,* 417 Md. 128, 136 (2010)). Accordingly, "'we bypass the judgment of the circuit court and look directly at the administrative decision."' *Id.* (quoting *Salisbury Univ.* v. *Joseph M Zimmer, Inc.* 199 Md. App. 163, 166 (20 II ».

"'In reviewing an administrative agency decision, we are limited to determining if there is substantial evidence in the record as a whole to support the agency's finding and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Id.* (quoting *Mehrling* v. *Nationwide Ins. Co.,* 371 Md. 40, 57 (2002». While we review an administrative agency's conclusion of law *de novo, Coleman,* 369 Md. at 122, "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Bd. 01 Physician Quality Assur.* v. *Banks,* 354 Md. 59, 69 (1999) (citing

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however, how the *Accardi* doctrine violation could be cured by a new hearing board.

Lussier v. *Maryland Racing Comm 'n,* 343 Md. 681, 696-97 (1996)).

DISCUSSION

I.

Antonin contends the BPO violated his procedural due process rights because the hearing board was composed of BPO members, and BPO members could not be impartial. He argues that the

> two separate statements [that] were made by Deputy Commissioner Rodriguez ... demonstrated that it was the [BPO],s belief that A[ntonin] was guilty of excessive force before there was any hearing conducted nor any determination of A[ntonin]'s guilt as a matter of law. There was also significant media coverage generated after the release of the video.

He maintains that *Sewell* v. *Norris,* 148 Md. App. 122 (2002), supports his position (and the circuit court's ruling in his favor on this issue).

The BPO contends this case differs significantly from *Sewell* and the circuit court's ruling was in error. Specifically, the two statements by Deputy Commissioner Rodriquez were not such as would lead BPO hearing board members to believe that only one outcome-against Antonin-would be acceptable to the command leadership and, in any event, there had been a complete turnover in the command leadership by the time of the hearing board.

"[P]rocedural due process in an administrative proceeding 'requires that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them. '" *Coleman,* 369 Md. at 142 (quoting *Gigeous* v. *Eastern Corr. Inst.,* 363 Md. 481, 509 (2001)). As such, parties appearing before an administrative hearing board are entitled to a board that consists of impartial members. *Sewell,* 148 Md. App. at 136 ("A necessary component of a fair trial is an impartial judge.") (citation omitted).

The Court of Appeals has explained, however, that

> [T]here is a strong presumption in Maryland ... and elsewhere ... that [decision makers in judicial and quasi-judicial proceedings] are impartial participants in the legal process, whose duty to preside when qualified is as strong as their duty to refrain from presiding when not qualified. ... The recusal decision, therefore, is discretionary ... and the exercise of that discretion will not be overturned except for abuse.

Regan v. *State Bd. of Chiropractic Examiners,* 355 Md. 397,410-11 (1999) (quoting *Jefferson-El* v. *State,* 330 Md. 99, 107 (199)). In determining whether a decision-maker is impartial, we look for an appearance of impropriety rather than "'delving into the subjective mindset of the challenged'" decision maker. *Id.* at 411 (quoting *Surrat* v. *Prince George's Cty.,* 320 Md. 439, 468 (1990». Thus, the test is objective: "'whether a reasonable member of the public knowing all the circumstances would be led to

the conclusion that the [decisionmaker]'s impartiality might reasonably be questioned.'" *Id.* (quoting *In re Turney,* 3 I I Md. 246, 253 (1987)).

In *Sewell,* the BPD Internal Affairs Integrity Unit conducted a "random undercover sting operation" designed to expose "dirty" officers. 148 Md. App. at 126. From what was observed, BPD Officer Sewell was thought to have planted drugs on a suspect. He was indicted for perjury and misconduct in office. His "criminal charges received extensive publicity, including thirty-three newspaper articles that appeared in the *Baltimore Sun"* in a five-week period. *Id.* at 127.

A few months later, the Baltimore City State's Attorney's Office dismissed the criminal charges against Sewell. This produced heated negative reactions from then-BPD Commissioner Edward Norris and then-Mayor Martin O'Malley. The *Baltimore Sun* reprinted a statement by Commissioner Norris, made on the day of Sewell's arrest, that described Sewell's conduct as "a horrible breach of the public trust[.]" *Id.* at 128. It further quoted Commissioner Norris as saying:

> "We are extremely disappointed in the State's Attorney's decision not to move forward with [Sewell's] case, but defer to their judgment in doing so," [and that the decision to drop the criminal case] "will certainly not deter the efforts of the ... Department in its commitment to root out corrupt police officers and to restore the integrity of the agency."

Id. The *Baltimore Sun* recounted Mayor O'Malley's unvarnished commentary as follows:

> "I think the failing in these cases to not go forward, and I'll be goddamned if we're going to stop doing integrity cases and doing stings just because we have a prosecutor who's afraid to go forward and try them," said [the Mayor], who has been critical of [the State's Attorney] in the past. "Maybe we'll find a prosecutor with a little bit of guts to go forward," he said. "I talked to her before she dropped this case ... begged her, pleaded with her and tried to persuade her to go forward with this case. She said, 'No, too many red herrings.' I think the poor woman must have been attacked by red herrings when she was a child. She sees red herrings everywhere."
>
> [The Mayor] said he and the Police Department are considering finding a way to prosecute integrity cases without [the State's Attorney], if possible. *He also noted that Sewell has to appear before a departmental trial board.*
>
> *"He's not going to serve in my Police Department,"* [the Mayor] said.

Id. at 127 n. 5 (emphasis in *Sewell).*

Sewell was charged administratively. Before his hearing board took place, he filed a petition to show cause in the circuit court, asking the court to order the BPD to select members for the hearing

board from a law enforcement agency other than the BPD. The court denied that request on the ground that it did not have authority to grant it.

Sewell noted an appeal to this Court, challenging the denial of his request.[10] We reversed. Reasoning that procedural due process mandates fair tribunals, we held that the circuit court had authority to direct that the BPD select non-BPD members for Sewell's hearing board and, under the facts of the case, it erred by not doing so. As to the latter, we explained:

> [D]ue process ... is not a rigid concept .... [It] is flexible and calls only for such procedural protections as the particular situation demands. ... [I]n determining what process is due, the Court will balance the private and government interests affected. . .. In that regard, we apply the following balancing test developed by the Supreme Court in *Mathews [v. Eldridge],* 424 U.S. [319,] 335 ... [(1976)], to assist us in our endeavor:
>
> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if

[10] After the court denied Sewell's petition to show cause, the hearing board went forward. The hearing board found against him, and he was terminated by the Commissioner. He filed an action for judicial review which was stayed pending the outcome of the appeal from the circuit court's ruling.

> any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 134-35 (quoting *Coleman,* 369 Md. at 143-44) (some quotations omitted). We observed that the LEOBR allows a hearing board to be composed of officers from another agency, with approval of the police chief of that agency, and that "[i]t is obvious that the deliberate selection of a hearing board that is biased against an officer would constitute a violation of the procedural safeguards required by the due process clause." *Id.* at 135.

We considered the *Mathews* factors, and decided that they weighed in favor of requiring non-BPD officers on Sewell's hearing board. We concluded that because of the intense public comments against Sewell by the Commissioner and Mayor, BPD officers selected to serve on Sewell's hearing board would fear adverse employment action if they were to find in Sewell's favor. Therefore, Sewell's "right to due process was violated by the selection of a hearing board comprised of B[]PD officers." *Id.* Moreover, selecting non-BPD officers would "bolster public confidence in the board's decision," *id.;* the cost of having non-BPD officers hear Sewell's case was minimal; and the BPD did "not have a particularly strong interest in trying" Sewell. *Id.* at 136.

As noted, "'[d]ue process ... is not a rigid concept .... [It] is flexible and calls only for such procedural protections as the particular situation

demands.'" *Id.* at 134 (quoting *Coleman,* 369 Md. at 143). In the instant case, Deputy Commissioner Rodriguez's two statements to the press were measured. He made the first statement in response to the television broadcast of the videotape clearly showing a BPD police officer (later identified as Antonin) slapping a suspect who is on the ground. Deputy Commissioner Rodriguez said, "We do not like what we [saw]," obviously referring to the slapping, and explained the immediate investigative process the BPD planned to undertake. He did not say or imply that the officer was guilty of a crime, insist that the officer be terminated, question the officer's integrity, or suggest that it was imperative that the officer be disciplined. He gave an even-tempered reaction to footage of an officer striking a detained suspect on the head. Deputy Commissioner Rodriguez's second statement, made in response to the filing of criminal charges against Antonin, communicated what should be obvious, that the BPD does not approve of officers breaking the law to enforce the law, *i.e.,* that officers are not immune from the law. This also was not a statement implying guilt.

The BPD media statements in this case were completely unlike those in *Sewell.* In the media statements in *Sewell,* the Commissioner and the Mayor condemned Sewell for engaging in misconduct and made clear that they did not want him in the BPD. Commissioner Norris accused him of "a horrible breach of the public trust" by "outrageous" conduct, *id.* at 127 n.4, and Mayor O'Malley, observing that Sewell would be going before a hearing board, announced flat-out that "[h]e's not going to serve in my Police Department. "' *id.* at 138.

All members of the BPD, and therefore any member who might be selected for Sewell's hearing board, would have known that their boss (the Commissioner) and their boss's boss (the Mayor) wanted Sewell out of the BPD and that, if a hearing board did not make findings that would enable Sewell's termination, there would be a price to pay.

In the case at bar, by contrast, Deputy Commissioner Rodriguez's statements could not reasonably be taken to mean that a disciplinary finding in favor of Antonin would be met with disapproval by the BPD command leadership. Both statements were benign, non-accusatory observations. Neither statement passed judgment on Antonin and neither statement implied that it would not behoove officers on a hearing board to find in favor of Antonin.

Moreover, Deputy Commissioner Rodriguez and much of the BPD command leadership had departed from the BPD before Antonin's hearing board was held. As the BPD points out, even if Deputy Commissioner Rodriguez's statements could be read to demand a negative hearing board outcome against Antonin (which they cannot), with that turnover, a hearing board composed of BPD members "had no incentive to render a particular decision to satisfy the expectations of a departed administration and had no cause to believe that their current leadership preferred one outcome over another."

As noted, Antonin asserts that his case generated "significant media coverage." In *Sewell,* we observed that there was extensive publicity about the criminal charges against the officer, including 33 articles in the *Baltimore Sun,* and the "intense

publicity about the statements made by the Commissioner and by the Mayor who appointed him" likely would have influenced members of the hearing board. *Id.* at 135. There was no such risk here. As stated earlier, the comments made by Deputy Commissioner Rodriguez were benign. Furthermore, there is no indication in the record that this case garnered the widespread media attention seen in *Sewell*. The circumstances here did not create actual or apparent partiality from a hearing board composed of BPD members.

After weighing the risk of actual or apparent partiality due to Deputy Commissioner Rodriguez's statements against the countervailing strong presumption of impartiality, we hold that the BPD did not abuse its discretion by denying Antonin's request to have his case heard by non-BPD members.

II.

The BPD's procedural policy regarding "Use of Force" is set forth in written General Order K-15. The stated purpose of the policy is "to thoroughly investigate and document all uses of force by members of the agency." The policy directs that "[u]se of deadly and less than deadly force, including strikes with fists or hands, shall conform with the methods, tactics and guidelines adopted by the [BPD]" and "[a]ny use of force must be reasonable and no more than necessary to effect a lawful purpose." General Order K-15, lists examples of "REPORTABLE FORCE," including "[a]ny striking of a suspect and/or arrestee with hands or feet."

General Order K-15 details the actions that are required after a reportable use of force has occurred. The member, *i.e.,* the officer, must "[i]mmediately notify)' your supervisor" and "[s]ubmit a written Use of Force Report whenever you use reportable force."[11] The Use of Force Report **"must** be submitted **before** the end of your tour of duty."

The "First Line Permanent Rank Supervisor" is required to take action in two situations. First, "[w]hen notified of a reportable use of force by a member under your supervision[,]" the supervisor must respond to the scene, attend to any injured people, and initiate a Use of Force investigation, including speaking with witnesses and collecting evidence. This did not apply here because Antonin did not notify Sergeant Warren, the first line permanent rank supervisor, of a reportable use of force (or any use of force).

Second, and pertinent here, when a member has not reported a use of force, but an allegation of excessive force by a member has "arise[n]," the first line permanent rank supervisor must "[t]ake appropriate investigative measures:' This includes "[r]equest[ing] that the involved member submit an administrative report with facts relevant to the Use of Force incident" and "[o]rdering all witnessing members to submit administrative reports of the incident" unless they invoke their right to remain silent. In addition, the first line permanent rank supervisor must complete a Use of Force Summary Report; provide it to the commanding officer; and ensure proper reporting. The policy does not provide

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[11] The policy refers to a separate policy that is to be followed if the reported force involves the discharge of a weapon.

deadlines. In addition, it states that the BPO may "pursue an administrative investigation" even if the person alleging excessive force fails to timely do so.

Upon review of the "Use of Force Summary Report," the commanding officer must "[d]etermine if the involved member's actions were consistent with departmental policies and procedures and whether the actions were within the legal scope of the member's authority." The commanding officer then must create a "Use of Force package," which includes the Use of Force Summary Report, the member's Use of Force Report, any witness reports, and any prior Use of Force Reports involving the member. The Use of Force package is forwarded to the Chief of the IAD, who initiates a more thorough investigation into the matter.

The circuit court found that General Order K-15 was not followed after the incident in this case. Specifically, Sergeant Warren did not prepare a Use of Force Summary Report or conduct a Use of Force investigation. As noted, the court concluded that the BPD's failure to follow its own procedure invalidated the final agency decision under the *Accardi* doctrine.

The *Accardi* doctrine "requires, with some exceptions, an administrative agency to generally follow its own procedures or regulations," *Pollock* v. *Patuxent Inst. Ed. of Review,* 374 Md. 463, 467 n.1 (2003). Its genesis was *United States ex reI. Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), in which the Supreme Court "vacated a deportation order of the Board of Immigration Appeals because the procedure leading to the order did not conform to the relevant regulations." *Montilla v. Immigration and Naturalization Service,* 926 F.2d 162, 167 (2d Cir.

1991). The *Accardi* doctrine is not uniform across jurisdictions, state or federal. For example, some courts require the aggrieved person to show that he has been prejudiced by the agency's departure from its procedure, whereas other courts reject the prejudice requirement. *See Leslie* v. *Atty. Gen. of the United States,* 611 F.3d 171, 177 (3d Cir. 2010) (providing examples).

In *Pollock,* Maryland adopted its own variation of the *Accardi* doctrine. The Court of Appeals examined how the doctrine was applied by courts inside and outside of Maryland, before settling on the following framework:

> [A]n agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This adoption is consistent with Maryland's body of administrative law, which generally holds that an agency should not violate its own rules and regulations.
>
> In so holding we nonetheless note that not every violation of internal procedural policy adopted by an agency will invoke the *Accardi* doctrine. Whether the *Accardi* doctrine applies in a given case is a question of law that ... requires the courts to scrutinize the agency rule or regulation at issue to determine if it implicates *Accardi* because it affects individual rights and obligations or whether it confers important procedural

> benefits or, conversely, whether *Accardi* is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict agency compliance with internal procedural rules adopted for the orderly transaction of agency business, *i.e.,* not triggering the *Accardi* doctrine.
>
> * * *
>
> Where the *Accardi* doctrine is applicable, we are in accord with the line of cases arising from the Supreme Court and other jurisdictions which have held that prejudice to the complainant is necessary before the courts vacate agency action. In the instances where an agency violates a rule or regulation subject to the *Accardi* doctrine, *i.e.,* even a rule or regulation that affects individual rights or obligations or affords important procedural benefits upon individuals, the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down.

Id. at 503-04 (quotations omitted).

Thus, a Maryland agency's decision will be vacated under the *Accardi* doctrine when three conditions are satisfied. First, the agency must have violated its own regulations or procedures. Second, those regulations or procedures must affect individual rights and obligations or confer important procedural benefits, and not have been adopted merely for the orderly transaction of agency

business.[12] Finally, the party alleging a violation must show that the violation resulted in prejudice to him or her.

In this case, Antonin asserts that the BPO failed to comply with General Order K-15 because, even though an allegation of use of excessive force had arisen, the first line permanent rank supervisor (Sergeant Warrant) did not undertake an investigation, including interviews of witnesses, and did not prepare a Use of Force Summary Report. Antonin acknowledges that he did not submit a Use of Force Report himself, as General Order K-15 required, but argues that that was unnecessary because Officer Cupid, who was an Officer-in-Charge, witnessed him strike Wilson, and Sergeant Warren was present, although he did not see Antonin strike Wilson. Antonin maintains that he was prejudiced because the witness interviews that would have been undertaken pursuant to General Order K-15 would have happened soon after the incident, not roughly three months later, when many of the IAD interviews took place, and therefore would have more accurately preserved the evidence. He asserts that the Use of Force Summary Report could have shown, based on promptly collected evidence, that he did not use excessive force. He also

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[12] A violation of a regulation or procedure adopted for the orderly transaction of agency business may be grounds to vacate a decision of an agency under the Maryland Administrative Procedure Act ("APA"), Md. Code (1984, 2014 Repl. Vol.), sections 10-101 to 10-305 of the State Government Article, if the party alleging a violation can "show prejudice to a substantial right due to the violation of the" internal administrative regulation or procedure. *Pollock,* 374 Md. at 504. That vacation would be pursuant to the APA, however-not *Accardi.*

complains that he "was not interviewed until two and a half years after the incident."

The BPD asserts that it did not violate General Order K-15 because it was Antonin's responsibility to initiate the Use of Force process; that General Order K- I5 does not trigger the *Accardi* doctrine because it is a procedure adopted merely for the orderly transaction of business; and that Antonin failed to show that he was prejudiced by any failure of the BPD to follow General Order K-15. We need not decide whether the BPD failed to comply with General Order K-15 or whether that policy embodies a procedure that bestows an important procedural benefit, triggering the *Accardi* doctrine. Even if we assume those issues in Antonin's favor, we conclude that the record evidence before the hearing board was legally insufficient to prove that Antonin suffered prejudice due to the BPD's failure to follow General Order K-15.

Dep'l of Pub. Safety and Corr. Servs. v. *Howard,* 339 Md. 357 (1995), is helpful in assessing the evidence for proof of prejudice. There, two correctional officers assaulted an inmate. The Department of Corrections investigated the assault and completed that investigation less than a month later. Ten-and-a-half months after the investigator issued his findings, the Department filed charges for removal against the correctional officers. Eventually, they were terminated from employment. On judicial review, the circuit court reversed, ruling in part that the "investigation had grossly exceeded the 90-day period provided for in the regulations."[13] *Id.* at 365.

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[13] The court mistakenly understood that filing charges was part of the investigation process.

The Court of Appeals granted *certiorari* before the appeal was heard by this Court. The officers argued that the circuit court's reversal should be upheld because the delay in charging them was arbitrary and capricious and had prejudiced them. The Court disagreed and reversed. In holding that the Department did not act arbitrarily or capriciously by waiting ten-and-a-half months after the investigation ended before charging the correctional officers, the Court observed,

> [T]he record does not reflect any prejudice to the officers that was caused by the delay. . . . They have not pointed to any witnesses whose memory has faded or who has become unavailable. They argue, without citing specific examples, that they have been prejudiced because witnesses' memories have faded and evidence has become stale. Ten and a half months, however, is not an extraordinary length of time to preserve evidence.

Id. at 370.

In the case at bar, Antonin likewise has provided no concrete examples of how the lack of a Use of Force Summary Report and investigation prejudiced him. He merely posits that an investigation conducted by Sergeant Warren "could have" produced a different result. There is nothing to suggest that it would have, however.

Officers Cupid and Galfi were interviewed (separately) by IAD on November 1, 2013, 95 days after the incident. Neither one had trouble remembering the pertinent facts-that they had

detained Wilson, that Antonin struck him multiple times, and that Antonin struck him after he was in handcuffs. Indeed, they gave detailed accounts of the chase and the events that transpired after Wilson crashed the stolen car. Their interviews were transcribed and were moved into evidence at the hearing board, before which they both testified. During Officer Cupid's testimony, the WBAL-TV videotape was played to assist him in determining whether Wilson already was handcuffed when Antonin slapped him. He testified that Wilson was not handcuffed when Antonin slapped him the first time but was handcuffed when Antonin slapped him the "second, third, and fourth times."

Officers Ward and McCray likewise recalled the chase and arrest in detail when they were interviewed by an IAD detective on October 29,2013, and November 4, 2013, respectively. They, too, testified before the hearing board, explaining that they were the first unit to arrive at the scene of the crash and that they positioned themselves on the driver's side of the stolen car. From that position, they could not see Antonin's interactions with Wilson.

From the investigation carried out by IAD and the testimony of witnesses at trial, there is no reason to believe that if witness interviews were conducted immediately after the incident, the witnesses' memories would have differed from what they were when they were interviewed by IAD detectives approximately three months after the incident. Like the *Howard* Court, we conclude that in this case three months was "not an extraordinary length of time to preserve evidence," including recollections by witnesses. 339 Md. at 370. Furthermore, Sergeant

Warren, as the first line permanent rank supervisor, did not have a deadline for completing a Use of Force investigation. Had Antonin reported his use of force to Sergeant Warren immediately, Sergeant Warren could have interviewed witnesses at the scene and called a mobile crime laboratory technician to collect evidence and take photographs. Antonin did not do so, however, and Sergeant Warren first learned about the use of force hours later, after WBAL- TV ran its story. By then, Sergeant Warren could not immediately investigate, and General Order K-15 does not provide a timeframe for the completion of Use of Force investigations that are triggered by allegations of someone other than the officer. Thus, there is no reason to think that a Use of Force investigation under General Order K-15 would have been conducted more quickly than the IAD investigation.

In addition, the Board relied in part on the WBAL-TV footage to conclude that Antonin was guilty of using excessive force. As the BPD correctly notes, this footage "was impervious to effects of bias, the passage of time, or any other nefarious influence Antonin may blame for his termination." The videotape clearly shows Antonin rapidly approach the group of officers surrounding Wilson, slap Wilson on the head, retreat, and return and slap Wilson several more times on the head. The only fact about which Officer Cupid's memory was not clear, and may have been clear had he been interviewed immediately, was whether Wilson was handcuffed the first time Antonin slapped him. By viewing the videotape, Officer Cupid was able to clarify that the handcuffs had not been applied when Antonin first slapped Wilson but were in place when Antonin

returned and slapped him several more times. Moreover, that fact was not material, because (as the hearing board found) Wilson was effectively detained by the officers surrounding him before the handcuffs were applied.

Finally, Antonin's claim that he was prejudiced because he "would clearly have the most knowledge of the force used in this case, [and] was not interviewed until two and a half years after the incident" lacks merit. Antonin was facing the possibility of being criminally charged and, in fact, eventually was charged. As a matter of policy, IAD detectives did not interview Antonin in order to avoid putting him in the position of making a self-incriminating statement. Moreover, when Detective Thomas interviewed Antonin after the resolution of his criminal case, the only part of the incident that Antonin could not recall was whether Wilson had said anything to him. Other than that, Antonin was able to give a thorough account of the incident.

For all these reasons, Antonin was not prejudiced by the BPD's failure to carry out a Use of Force investigation pursuant to General Order K-15.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE TO BE REMANDED TO THAT COURT TO ENTER ORDER AFFIRMING THE FINAL AGENCY DECISION. COSTS TO BE PAID BY THE APPELLEE.

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No.: 24-C-16-006333

IN THE MATTER OF THE PETITION OF
SERGE ANTONIN

MEMORANDUM AND ORDER

Pending before this Court is Petitioner Serge Antonin's Notice of Petition for Judicial Review, appealing the decision of the Law Enforcement Officer Bill of Rights ("LEOBR") hearing board, regarding his termination from Respondent Baltimore Police Department ("BPD"), for use of excessive force on July 29, 2013. This Court heard oral argument on April 18, 2017 at 9:00 a.m.

I. Factual and Procedural Background

On July 29, 2013, Petitioner responded to a pursuit of a stolen car. Petitioner and several other officers pursued this car, until the stolen car crashed and they pulled the suspect out of the car. Once he exited the car, the suspect, 15-year-old David Wilson, initially resisted being handcuffed. To handcuff the suspect, Petitioner hit the suspect with an open hand. Then, officers handcuffed Mr. Wilson. Shortly thereafter, Petitioner struck Mr. Wilson again. Petitioner alleges that Mr. Wilson was threatening to spit at the police officers, which is why Petitioner struck Mr. Wilson.

On that same day, a helicopter camera from WBAL filmed the pursuit and Petitioner's conduct at

the scene. WBAL thcn played the footage on the news. Shortly after the footage aired, then Deputy Commissioner Jeronimo Rodriguez stated on WBAL; "We did not like what we saw. We are not waiting for anyone to initiate a personnel complaint. At the Commissioner's request we have initiated a personnel complaint and we are looking at this incident thoroughly from the beginning, during this incident, and immediately after." The case was then turned over to the Internal Affairs Division (IAD).

IAD began its investigation of this incident on July 30, 2013, when it interviewed four officers on the scene regarding the incident and Petitioner's use of force. Then, IAD attempted to interview the suspect, Mr. Wilson, who was also the victim of the force. However, Mr. Wilson could not be interviewed, as his guardian could not be reached. Almost 90 days later, between October 28, 2013 and November 5, 2013, ten other officers who were on the scene were interviewed.

One year after the incident, on July 28, 2014, the Office of the State's Attorney for Baltimore City filed a Criminal Information in the Circuit Court for Baltimore City, charging Petitioner with one count of assault and two counts of misconduct in office. After, Petitioner was charged, Deputy Commissioner Rodriguez was quoted in the *Baltimore Sun* saying that the Department would not, "tolerate the actions of any officer that breaks the law, in order to enforce the law." On October 5, 2014, after coming to a negotiated plea agreement, Petitioner entered an *Alford* plea to one count of misconduct. The Honorable Alfred Nance convicted the Defendant of the misdemeanor, immediately struck the guilty

verdict and entered a Probation Before Judgment disposition.

On March 10, 2016, IAD interviewed Petitioner regarding his alleged use of excessive force. After this, on April 22, 2016, the LEOBR hearing board charged Petitioner with violations of General Order C-I, Rule I, for unnecessary use of excessive force. On October 19, 2016, prior to the hearing, counsel for the Petitioner made a pre-trial motion to appoint non-members of the BPD to the hearing board. The hearing board was composed of Acting Major Robert Jackson from the Southwestern District, Acting Major George Clinedinst from the Southeastern District, and Officer Bobbie Gilliam from the Southwestern District. This motion was denied over the phone and denied on the record at the hearing. At the hearing, Petitioner made two other pre-trial motions (I) to exclude evidence of the related criminal matter, and (2) that the Petitioner should not be charged with excessive force because the BPD did not follow its own procedures when investigating the incident, namely General Order K-IS - Use of Force '("K-IS"). After hearing argument on these pre-trial motions, the LEOBR hearing board denied both.

At the hearing on October 26,2016 and October 27, 2016, BPD presented evidence of the WBAL video footage, in addition to the testimony of five officers and the IAD detective. The testimony of two officers, Officer Galfi and Sergeant Cupid, matched the events captured on the tape, specifically that Mr. Wilson was detained when Petitioner struck him. Additionally, at oral argument before this Court, counsel for the Petitioner indicated, and the transcript confirms; that evidence of Petitioner's

Alford plea was used by Respondent in Respondent's opening argument, lines of questioning, and in closing. Following the hearing, on November 8, 20 16, Police Commission Kevin Davis approved the recommendation to terminate Petitioner. Petitioner filed the Notice of Petition for Judicial Review with this Court on November 29, 2016.

II. Standard of Review

In reviewing an agency's factual findings, the question for the reviewing court is, "whether reasoning minds could reach the same conclusion from the facts relied upon by the Board." *Dep't of Labor v. Hider,* 349 Md. 71, 78 (1998). Further, the court awards deference to the expertise of the administrative agency, so the reviewing court, "refrain[s) from making our own independent findings of fact or substituting our judgment for that of the agency when the record contains substantial evidence supporting the agency's determination." *Marsheck v. Bd. of Trustees oj Fire & Police Employees' Retirement System of City of Baltimore,* 358 Md. 393,402 (2000).

A reviewing court however, "may always determine whether the administrative agency made an error of law. Therefore, ordinarily the court reviewing a final decision of an administrative agency shall determine (I) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision." *Pollock v. Patuxent Inst. Bd. of Review,* 374 Md. 463,476 (2003) (citing *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.,* 369 Md. 439, 449-52 (2002)).

III. Law

a. Intcrnal Policy

Administrative agencies are required to follow their own rules and regulations. *u.s. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260,266 (1954). The *Accardi* doctrine dictates that rules and regulations of administrative agencies may not be disregarded or suspended in a particular case. *Id.* at 266. Maryland courts apply the *Accardi* doctrine if the policy at issue affects individual rights and obligations or confers important procedural benefits upon individuals. *Pollock,* 374 Md. at 485. However, if the agency policy is adopted for the "orderly transaction of agency business,': then the *Accardi* doctrine exception will apply. *Id.*

In *Pollock,* the Court of Appeals analyzed the *Accardi* exception, where "A failure to comply with a published statement of 'policy,' or 'internal documents' to guide employees, or agency 'guidelines,' has been held not to invalidate agency action, absent a showing of prejudice." *Id* at 483 (quoting *Bd. of School Comm'rs of Baltimore City v. James,* 96 Md. App. 401, 421-22 (1993)). In that case, the Court determined that the violation of chain of custody procedures by the Maryland Division of Corrections for urinalysis testing when it failed to note the correct inmate number on a urine sample did not trigger the *Accardi* doctrine, but the *Accardi* exception. *Id.* at 501. The Court indicated that the violated policies were merely internal directives "that applied generally within the institution, and not just specifically to parole revocation or renewal hearings thus departing in a minimal way from an

internal directive relating, not to fundamental rights but to evidentiary matters." *Id.* The Court held that there was no prejudice by failure to follow these procedures because the results of the urinalysis test were not affected by this error and petitioner could not demonstrate prejudice. *Id.* at 504.

b. Neutral Hearing Board

Generally, quasi-judicial administrative decision makers such as the Board have a strong presumption of impartiality. *Regan v. State Bd. of Chiropractic Examiners,* 355 Md. 397, 410-11 (1999).

A LEOBR hearing board, pursuant to the Law Enforcement Officer Bill of Rights, consists of three voting members who, "(i) arc appointed by the chief and chosen from law enforcement officers within that law enforcement agency, or from law enforcement officers of another law enforcement agency with the approval of the chief of the other agency; and (ii) have had no part in the investigation or interrogation of the law enforcement officer." Md. Code Ann., Public Safety § 3-107(c)(1).

In *Sewell v. Norris,* the Court of Special Appeals explained when appointing law enforcement officers from another agency, per Md. Code Ann., Public Safety § 3-107(c)(1), is appropriate. 148 Md. App. 122, 127-28 (2002). In that case, a police officer requested that his hearing board include non-members of the BPD, because his case had been highly publicized (thirty-three articles appeared in the *Baltimore Sun)* and prior to his hearing, the Police Commissioner held a news conference referring to the officer's conduct as "a horrible breach of the public trust." Additionally, Mayor

Martin O'Malley stated the officer was "not going to serve in my Police Department." *Id.* at 128. Based on the widespread media coverage and statements from Baltimore City officials, The Court of Special Appeals agreed with the officer, that his right to due process was violated in that he did not have an impartial hearing board. *Id.* at 134-35. The Court concluded, "From those public statements made and the facts of this case, it is highly probable that any Baltimore City Police Officer would find against appellant if chosen to serve on his hearing board. The appearance of justice was simply not satisfied by the selection of a hearing board comprised of BCPD officers." *Id.* at 138.

c. Admission of *Alford* Plea

In LEOBR hearings, "Evidence with probative value that is commonly accepted by reasonable and prudent individuals in the conduct of their affairs is admissible and shall be given probative effect." Md. Code Ann., Public Safety § 3-107(f)(1). Guilty findings are permissible in administrative hearings as evidence, but may not be given conclusive effect. *Maryland Aviation Administration* v. *Powell,* 336 Md. 210, 217 (1994).

Maryland courts have also analyzed whether certain types of judgments and pleas are admissible in administrative hearings. For example, the Court of Appeals determined that an *Alford* plea has the same effect as a guilty plea. *Jamison* v. *Maryland,* 450 Md. 387, 397 (2016). Additionally, in *Maryland Aviation Administration v. Powell,* the Court of Appeals determined that a criminal disposition of probation before judgment could be used against the

Maryland Aviation Administration employee in the administrative hearing regarding his misconduct. *Id.* at 220-22.

IV. Reasoning

a. Internal Policy

In the instant case, the BPD did not comply with its internal policies, which prejudiced the Petitioner. In following the *Accardi* doctrine, first it is necessary to identify the policy at issue, then whether the policy was followed, and, if the policy was not followed, whether the failure to follow the policy resulted in prejudice. *See Pollock,* 374 Md. at 503.

Here, the policy at issue is General Order K-15 - Use of Force. K-15 details the procedure to be followed once force has been used, and the timing of the commanding officer's actions:

> REQUIRED ACTION
>
> Member
> • Immediately notify your supervisor whenever you use reportable force.
> • Submit a written Use of Force Report whenever you use reportable force, other than firearms discharging.
> • Your Use of Force Report must be submitted before the end of your tour of duty.

First Line Permanent Rank Supervisor
• When notified of a reportable use of force by a member under your supervision:
• Immediately respond to the scene and attend to the well-being of any injured member and/or civilian. Ensure injuries to members and civilians are documented. For injuries to prisoners, adhere to reporting requirements in accordance with General Order K-14, "Persons in Police Custody."
• Conduct a Use of Force investigation. (See Guidelines for Administrative Reports - Annex A.) Promptly identify citizens who may have witnessed the use of force and obtain statements from these witnesses.
• Ensure that a Mobile Crime Laboratory Technician takes photographs of injuries and/or lack of injuries sustained by any party.
• Contact the Internal Affairs Division (410-396-2300), Monday through Friday, 0800-2400 hours, for a list of the involved member's prior uses of force history ...

Commanding Officer
• Review the first line permanent rank supervisor's Use of Force Summary Report, submitted via channels. Determine if the involved member's actions were consistent with departmental policies and procedures and whether the actions were within the legal scope of the member's authority. (See Guidelines for Administrative Reports- Annex A.)

> • **Do not** include in your report a recommendation for, or against, disciplinary action.
> • Retain the original Use of Force package and forward a copy of the Use of Force package to the Chief, Internal Affairs Division, and to the Director, Educations and Training Section, within 48 hours. If the Internal Affairs Division or Education and Training Section are closed, the Use of Force package should be submitted on the next business day by 1600 hours.

In the present case, no Use of Force report was ever submitted. BPD asserts that the investigation and report were not conducted because it is the duty of the officer who used force to report the use of force to his supervisor, and Petitioner never reported this conduct to his supervisor. This argument is unavailing. When asked by this Court who Petitioner would have reported his use of force to, counsel replied that it would have been Sergeant Warren and Sergeant Cupid (on the date of the incident, then-Officer Cupid). Not only did the video footage air on WBAL the night of the incident, but Sergeant Warren and Sergeant Cupid, Petitioner's direct supervisors, were present at the incident. Either of these supervisors could have initiated the report.

BPD cites *Pollock,* asserting that the K-15 policy is one that the department uses for the orderly transaction of business, and this policy does not implicate a substantive right of Petitioner. Therefore, BPD contends that K-15 falls within the *Accardi* exception. BPD argues that Petitioner

cannot demonstrate prejudice from BPD's failure to follow this policy as required under the *Accardi* exception, because IAD conducted a timely investigation, continuing from July 31, 2014 to March 10,2016, and the incident was captured on video by WBAL. These arguments are unpersuasive. Unlike in *Pollock,* where the mislabeling of the urine had no impact on the results of the urinalysis test and therefore no effect on the hearing board's ruling, here the failure in conducting the use of force investigation pursuant to K-15 could have affected the results of the LEOBR hearing. Although a report by the first rank supervisor may have indicated that Petitioner did violate the Use of Force policy, it could also have indicated that he did not. Such a report could have significantly altered the findings of the LEOBR hearing board.

Further, the K-15 policy references "Annex A - Guidelines for Administrative Reports." This annex is particularly instructive as to how the failure to prepare this report prejudiced Petitioner: Annex A states, "The first line permanent rank supervisor shall be the one to report the member's actions and render an opinion as to whether the Use of Force incident was consistent with departmental policy and training." As Petitioner asserted at oral argument, when BPD failed to follow this policy, Petitioner was prejudiced, because this report could have been presented by Petitioner at his LEOBR hearing. As Petitioner notes in his brief, Petitioner "had the right to anticipate a prompt and thorough investigation, to record the facts of the use of force for better or worse." A report from a supervisor who had investigated this almost immediately after the

incident would have been invaluable for both sides as evidence to present at the hearing.

Additionally, the majority of witnesses were not interviewed until some 90 days after the conduct occurred. Had BPD complied with K-15, these witnesses to the incident would have been interviewed shortly after the Petitioner's conduct occurred. Of the fourteen officers interviewed by IAD, ten were interviewed between October 28, 2013 and November 5, 2013. These interviews occurred after statements by Commissioner Rodriguez had been made, the footage had aired on WBAL, and the interviews were conducted by IAD, not the first rank supervisor. Of the five officers who testified at the LEOBR hearing, only one, Sergeant Freddie Bland, was interviewed within 48 hours of the incident, on July 30, 2013. The rest were all interviewed about 3 months later. In addition, the Petitioner was not interviewed until almost two and a half years after the incident. Although BPD argued that IAD wanted to wait to interview Petitioner until after the criminal case concluded, Petitioner entered the *Alford* plea on October 5, 2014, yet IAD did not interview Petitioner until a year and a half later on March 10, 2016.

Had the Use of Force investigation by the Petitioner's first rank supervisor been conducted, witness accounts of the incident would have been preserved almost immediately. Further, the testimony of these witnesses would have been less likely to be subject to influence by the reports from both WBAL and the *Baltimore Sun* that came out after the incident. Petitioner had the right to have the facts recorded under this report per BPD's own policy.

This Court finds that under *Accardi* and its exception, BPD's failure to conduct a Use of Force investigation pursuant to its own General Order K-15, resulted in prejudice to the Petitioner.

b. Neutral Hearing Board

Petitioner's LEOBR hearing board was composed of Acting Major Robert Jackson, Acting Major George Clinedinst, and Officer Bobbie Gilliam, in compliance with the requirements of Md. Code Ann., Public Safety § 3-I07(c). However, based on the statements of Deputy Commissioner Rodriguez and the media attention surrounding Petitioner's conduct, the LEOBR hearing board, composed of BPD officers, was not neutral.

First, Deputy Commissioner Rodriguez made a statement to WBAL immediately following the release of the footage of the incident. He stated, "We did not like what we saw. We are not waiting for anyone to initiate a personnel complaint. At the Commissioner's request we have initiated a personnel complaint and we are looking at this incident thoroughly from the beginning, during this incident, and immediately after." This statement, similar to that of the Commissioner in *Sewell,* demonstrates that the BPD had already condemned Petitioner's conduct, prior to any investigation or criminal charges.

Additionally, after Petitioner was charged, Deputy Commissioner Rodriguez stated that the BPD would not "tolerate the actions of any officer that breaks the law, in order to enforce the law." These statements were made before the Petitioner had entered his *Alford* plea and before IAD had

finished conducting its investigation of Petitioner's conduct. Taken together, both of these statements demonstrate the position of the BPD: Petitioner was guilty of excessive force before a conviction or a hearing.

Further, this case is also analogous to *Sewell* in the media coverage it garnered. Although the *Baltimore Sun* did not write thirty-three articles, this incident made the local and national news, including reports by WBAL, the *Baltimore Sun,* and Yahoo.com. The publicity of this case, coupled with the statements by the Deputy Commissioner, demonstrates that BPD, leadership and employees included, had already judged Petitioner's conduct. Such statements and wide publicity would have logically reached BPD employees including, Acting Major Robert Jackson. Acting Major George Clinedinst, and Officer Bobbie Gilliam, Petitioner's hearing board. This would have made it likely that any BPD officer would find against Petitioner.

In both their brief and at oral argument, BPD distinguished *Sewell,* arguing that in *Sewell,* the statements by then-Mayor O'Malley were far more egregious than that of Deputy Commissioner Rodriguez. *See Sewell,* 148 Md. App. at 128. However, the Deputy Commissioner's statements, like the Mayor's statements, were severe enough to indicate that the BPD already believed Petitioner to have used excessive force without any investigation. Further, although not thirty-three newspaper articles were written about the incident, there was sufficient media coverage so that the hearing board members from the BPD would have been exposed to the comments and media narrative regarding this incident.

At oral argument, BPD argued that at the time of the LEOBR hearing, there was both a new Deputy Commissioner and new Commissioner; therefore, the LEOBR hearing board could not have been influenced by Deputy Commissioner Rodriguez's statements. However, the BPD's stance on Petitioner's conduct was clear, regardless of who the Deputy Commissioner and Commissioner were at the time of hearing.

This Court finds that the statements by BPD's leadership, as well a~ the media coverage, would not have allowed for a LEGBR hearing board made of BPD officers to be neutral.

c. Admission of *Alford* Plea

Petitioner's *Alford* plea and subsequent Probation Before Judgment were properly admitted as probative evidence before the LEGBR hearing board.

Under Md. Code. Ann., Public Safety § 3-107(f)(I), evidence with probative value is permissible. Petitioner's plea and Probation Before Judgment disposition is probative of his conduct on July 29, 2013. The LEOBR hearing board did not appear to give this conclusive effect, but used this as one piece of evidence in reaching its ultimate decision.

This Court finds that similarly to *Powell,* evidence of the criminal proceedings may be used in the LEOBR hearing, and BPD appropriately introduced this as evidence for the board to consider.

V. Conclusion

Accordingly, it is this 19 day of April 2017, hereby:

ORDERED that the decision .of the LEOBR hearing board is reversed, and it is further

ORDERED that Petitioner Serge Antonin is reinstated to the Baltimore Police Department, and it is further

ORDERED that if Respondent Baltimore Police Department decides to retry this matter, it must use a hearing board comprised of officers of a different law enforcement agency, pursuant to Md. Code Ann., Public Safety § 3-107(c)(1)(i).

TRUE COPY

/S/ MARILKYN BENTLEY, CLERK

4/19/17

IN THE MATTER OF SERGE ANTONIN

BALTIMORE CITY POLICE
IID NO: 2013-0431

ADMINISTRATIVE HEARING AND ORDER
INTRODUCTION

On October 26th, 2016 @ 9:00 am, an administrative hearing was convened to hear the charges against Officer Serge Antonin. The attorneys for the parties were:

DEPARTMENTAL PROSECUTOR
Linda Shields, Esquire
Associate Legal Counsel
Baltimore City' Law Department
Office of Legal Affairs
100 N. Holiday Street
Suite 101
Baltimore, Maryland 21202
410-396-2495

DEFENSE ATTORNEY
Clarke Ahlers, Esquire
Attorney at law
10450 Shaker Drive
Columbia, Maryland 21045
410-740-1444

MEMBERS OF THE BOARD
Major Robert Jackson
Major George Clinedinst
Officer Bobbie Gilliam

ADMINISTRATIVE CHARGES

It is alleged that on July 29, 2013, Officer Serge Antonin subjected Mr. David Wilson to excessive force by striking him several times with an open hand at the conclusion of a vehicle pursuit.

PRE-TRIAL MOTIONS

Defense entered a Not Guilty Plea to all charges asked for an acquittal, motion was denied by members of the board.

EVIDENCE PRESENTED

(Witnesses that testified and a short summary of their testimony and all exhibits received.)

Defense Motions: Exhibit #1- Letter Request from defense Counsel to The Baltimore City Police Department requesting NON-MEMBERS of The Baltimore City Police Department to hear the case against his client pursuant to Maryland Code, Public safety, 3-107(c)(1).

Request Denied by the board and the department.

Defense entered into discovery that he did not have access to any interviews of Mr. David Wilson and no sworn complaint was filed by Mr. David Wilson.

Request was heard and denied.

The department called the following witnesses:

At 11:17am Sgt. Fred Bland of the Regional Auto Theft Task force; testified to observing a stolen vehicle on Belair Road in Baltimore City. Sgt. Bland called for more units as well as "Fox Trot" to assist in stopping the aforementioned vehicle as it traveled south on Belair Road. The stolen vehicle subsequently crashes on the southwest corner of Belair and Sinclair Lane. The driver later identified as David Wilson was extracted by police from the vehicle and placed into handcuffs.

Departments Exhibit #:1- Police Reports under Central Complaint # 13G13972 documented on 7/29/13 @ 6:10pm.

Sgt. Bland testified to signing reports authored by Officer Ronald Wilson of the BPD.

Departments Exhibit #2 -Internal Affairs Statement of Sgt. Freddie Bland given on July 30th, 2013 at 10:35 am.

Sgt. Bland testified that he did not observe Mr. Wilson being handcuffed; nor did he observe Officer Antonin strike Mr. Wilson.

Departments Exhibit #3 - WBAL helicopter video footage

Exhibit #3 was shown at 11:45am

Cross Examination by Defense: Defense pointed out the error in initial reporting of the suspect fleeing on foot; however this error was corrected in a follow up (supplement) indicating that he did not attempt to

flee on foot, it was patrol officers removing him from the vehicle. Defense counsel also stated that there were no signs of injury to Mr. Wilson even with the air bags deployed and that officers on scene had weapons drawn.

SGT. FREDDIE BLANDS TESTIMONY ENDS AT 11:45AM

TESTIMONY OF OFFICER REBECCA SMALL AT 11:45AM

Officer Small testified that she and her partner Officer Elsie McCray responded to assist (RATT) in a stolen auto following southbound on Belair Road. Officer Small followed the vehicle until it crashed at Belair and Sinclair lane. She exited her marked patrol and secured the driver's side of the stolen vehicle as other officers removed the driver from the passenger's side door. She did not see which officers handcuffed the suspect; nor did she see Officer Antonin strike the suspect.

Departments Exhibit #4- Internal Affairs Statement of Officer Rebecca Small.

Cross Examination by Defense: Defense council asked Officer Small if the scene was safe: she stated she believed it was.

OFFICER SMALL'S TESTIMONY ENDED AT 12:00PM

TESTIMONY OF OFFICER ELSIE McCRAY; AT 12:05PM

Officer McCray testified that she and her partner Officer Rebecca Small responded to assist (RATT) with a stolen auto on Belair Road. She stated she observed the vehicle crash at Belair and Sinclair, she also stated that she had no interaction with the suspect, did not see who handcuffed but heard someone state “he’s cuffed”.

Departments Exhibit #5 -Internal Affairs Statement of Officer McCray

OFFICER McCRAYS TESTIMONY ENDED AT 12:23PM

TESTIMONY OF OFFICER THEODORE GALFI AT APPROX. 12:25

Officer Galfi testified that he and his partner Officer Gersham Cupid responded to assist (RATT) in a stolen case on Belair Road. He stated that they were the second police vehicle and observed the suspect vehicle crash at Belair and Sinclair. He and Officer Cupid exited their vehicle following the crash and approached the passenger side and removed the suspect from the vehicle. The suspect was subsequently handcuffed.

He never felt threatened by the suspect; as the suspect was still on the ground and cuffed he observed Officer Serge Antonin strike the suspect with his hand while the suspect was on the ground and handcuffed.

He also stated that he did not hear and verbal exchange between the suspect and Officer Antonin;

however in departments exhibit # 6, he stated that he thinks there were couple words exchanged, but didn't recall exactly what was said.

Departments Exhibit #6 - Internal Affairs Statement of Officer Galfi

Cross examination by Defense at 12:43PM

Departments Exhibit # 3 (WBAL Video) shown to Officer Galfi.

(16) Seconds into video crash observed

(33) Seconds into the video Officer Galfi testified that he felt no threat

(35) Seconds into the video Officer Galfi testified that the suspect was handcuffed

BOARD REQUEST AT RECESS AT 1:10PM

CASE RECONVENED AT 13:43PM (Officer Galfi's testimony)

Officer Galfi testified that he did not search; nor did he cuff the suspect

TESTIMONY OF OFFICER GALFI CONCLUDED AT 1:56PM

TESTIMONY OF SERGEANT CUPID AT 1:57PM

Sergeant Cupid testified that he and his partner Officer Galfi responded as back up for (RATT) in a

stolen auto incident. He observed that stolen vehicle crash at Belair and Sinclair, he and Officer Galfi went directly to the passenger side door and removed the suspect from the vehicle and subsequently handcuffed the suspect.

He testified to more units responding including Officer Antonin, he observed Officer Antonin in an "altercation" with the suspect. He heard Officer Antonin say something to the suspect then observed Officer Antonin strike the suspect. Sergeant Cupid testified that the suspect was handcuffed at the time of Officer Antonin's arrival and that he felt the suspect was detained. He also testified that he did not see the suspect spit and any time.

Cross examination by Defense at 2:15PM

Sergeant did not report any force used.

Sergeant was shown Departments Exhibit #3 (WBAL Video)

Once Sergeant Cupid was shown the video he stated that he was 50% sure the suspect was cuffed prior to Officer Antonin striking the suspect for the first time

Defense Exhibit#2 GENERAL ORDER K-15 (USE OF FORCE)

Departments Exhibit #7 - Internal Affairs Statement by Sergeant Cupid

Re-cross by Department:

Sergeant Cupid stated the suspect was not 100% handcuffed but was under control. He also stated that the only force he used was when he physically removed the suspect from vehicle. He finally stated that the suspect was not fully cuffed after the first strike by Officer Antonin, but the suspect was during the second-fourth strike.

TESTIMONY OF SERGEANT CUPID CONCLUDES AT 2:43PM

TESTIMONY OF DETECTIVE JEFFREY THOMAS AT 2:55PM

Detective Jeffrey Thomas testified that he was assigned this case in 2014; the case was initially assigned to Detective Lisa Cornish in 2013.

Departments Exhibit #8-Blue Team Entry by Sgt. Chris Warren

Departments Exhibit #9 -Subpoena for WBAL Video footage

Departments Exhibit #10- Administrative report authored by Det. Thomas regarding interview of Mr. David Wilson

Departments Exhibit #11- Notification of Accused to Officer Serge Antonin

Departments Exhibit #12 ... Internal Affairs Statement of Officer Serge Antonin

Departments Exhibit #13 - Internal Affairs Case Findings Report

Departments Exhibit #14- Maryland Judiciary Case Search for Officer Antonin Court case on 10/5/15 (Alford Plea) entered

Departments Exhibit #15 Audio recording of (Alford Plea) on 10/5/15

CASE RECESSED FOR THE DAY AT 3:53PM ON (10/26/16)

CASE RECONVENED AT 12:28PM ON (10/27/16)

CONTINUATION OF DETECTIVE JEFFREY THOMAS TESTIMONY

Detective Thomas testified that an "Alford" Plea was entered in the Maryland Court by Officer Antonin on 10/5/15. He also testified that five hours following the incident on 7/20/13 an investigation was initiated by Colonel DeSousa following the airing of the WBAL video footage, as no officers or supervisors took action in documenting the incident. He also stated that the testimony of Mr. Wilson, was not necessary to the totality of this case.

Department Exhibit# 3 (WBAL Video Footage)

Detective Thomas testified to at least (8} other police on scene of the incident and appears that the suspects was handcuffed 35 seconds into the footage and Officer Antonin approaches approximately 57 seconds into the incident.

Detective Thomas testified that at 1 minute into the video is the first strike by Officer Antonin, at 1:05; Officer Antonin stands up over the suspect, at 1:09 Officer Antonin bends back down closer to the suspect and at 1:18 he strikes the suspect again. At 1:26 Officer Antonin walks away from the suspect.

Re-cross by Defense:

Detective Thomas testified suspect being "effectively detained" and/or completely handcuffed.

TESTIMONY OF DETECTIVE THOMAS ENDED AND DEPARTMENTS RESTS ITS CASE AT 1:43PM

BOARD REQUESTS RECESS AT 1:43PM

CASE RECONVENED AT l:55PM

TESTIMONY OF OFFICER SERGE ANTONIN AT 1:55PM

Officer Antonin testified that he is a 15 year veteran of the Baltimore police Department. He is assigned to the Northeast District, a member of the Field Training Officer program and has trained approximately 40 police officers. He also stated he has received several departmental commendations.

His purpose on the scene was to do the prisoner transport. He admitted to striking the suspect because he "believed" the suspect was going to spit on him and he "believes" that he did the right thing.

TESTIMONY OF OFFICER SERGE ANTONIN CONCLUDED AT 2:20PM

ALL TESTIMONY CONCLUDED

FINDINGS OF FACT

Based on the testimony and evidence presented at the hearing, the hoard makes the following findings of *fact,* based on the preponderance of evidence.

On July 29, 2013; Officer Serge Antonin subjected Mr. David Wilson to excessive force by striking him several times with an open hand at the conclusion of a vehicle pursuit. On this date, Officer Serge Antonin did strike Mr. David Wilson with an open hand after he was effectively detained by other officers. On July 29, 2013; Officer Serge Antonin unnecessarily used force And struck Mr. David Wilson several times with an open hand after he was effectively detained by other police officers.

CONCLUSION OF LAW

Charge 1 - General Order C-2, Rule 1 Conduct
GUILTY

Charge 2 - General Order C-2, Rule 1, Section 6
GUILTY

RECOMMENDATION OF PUNISHMENT

Following the Board's findings of fact and conclusions of law, and consideration of evidence

presented as to punishment the Hearing Board recommends the following punishment to Police Commissioner Kevin Davis: **Termination.**

/s/
Chairman