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Statutory Construction: Maryland State Police Ordered To Obey Agency's Own Regulation

By Professor Byron L. Warnken

In *Zeigler v. Maryland State Police*,¹ the Circuit Court for Baltimore County, applying principles of statutory construction, ordered the Maryland State Police to follow the agency's own regulation regarding the appointment of disciplinary hearing boards. At the same time, Judge Edward A. DeWaters, Jr., resolved an issue of jurisdiction in favor of the plaintiff, resolved issues of severance and attorney's fees in favor of the defendant, and provided some guidance on a constitutional issue based on due process.

FACTS

The plaintiff, First Sergeant John M. Zeigler, assigned to the Maryland State Police Academy, was administratively charged with knowingly submitting a false report,² endorsing an incomplete report,³ interfering with cases assigned to other officers,⁴ and neglecting duty by failing to take appropriate action.⁵ All charges were based on allegedly concealing information relating to a sexual relationship between another member of the academy staff and a recruit. The State Police also charged a captain with three violations and a first lieutenant with two violations.

The permanent chair of the disciplinary hearing board issued Special Order 01-87-260, which provided, in pertinent part, the following:

This board consists of five members who will hear the entire case against all three defendants and participate in the

decision making process pertaining to motions, evidence, etc. However, the decision on verdict and penalty on each defendant will be decided on upon [sic] by Major ["A"], Captain ["B"] and the member of the board equal in rank to the defendant being considered at the time, i.e., Major ["A"], Captain ["B"] and Captain ["C-1"] will decide the verdict and penalty in the case of [accused captain "X"]; Major ["A"], Captain ["B"] and First Lieutenant ["C-2"] will decide the verdict and penalty in the case of [accused lieutenant "Y"]; and Major ["A"], Captain ["B"] and First Sergeant ["C-3"] will decide the penalty and verdict in the case of First Sergeant Zeigler.

Zeigler filed a motion to have the three cases tried separately, each before a separate three-member hearing board. The motion was denied by the chair of the five-member hearing board. Zeigler then filed, pursuant to the Law Enforcement Officers' Bill of Rights (LEOBOR),⁶ an application for a show cause order⁷ in the Circuit Court for Baltimore County. An accompanying memorandum of law made two arguments, one statutory and one constitutional.

The essence of the statutory construction argument was as follows: The Superintendent of the Maryland State Police, pursuant to a delegation of authority from the legislature, promulgated an ad-

ministrative regulation mandating that the permanent hearing board chair shall appoint a three-member hearing board. The only discretion provided by the regulation is whether the permanent chair will serve on a given board. Nonetheless, the permanent chair appointed a five-member hearing board in this case. The failure of the State Police to comply with its own mandatory regulation renders invalid any action taken by the improperly constituted board.

The essence of the constitutional argument was as follows: Administrative agency due process is determined by balancing (1) the private interest affected by official action, (2) the risk of depriving that interest through the procedures used and the availability of remedial procedures, and (3) the public burden in affording the private remedy. In this case, the procedure would make a fair hearing almost impossible. All five members of the hearing board, simultaneously hearing three separate cases, would collectively make all legal rulings in the three cases. Then, three three-member sub-boards, with two members common to all sub-boards, would resolve the issue of guilt, and, in the event of a guilty finding, recommend punishment. Every finder of fact sub-board would be tainted by (1) two original participants then removed, (2) two finders of fact simultaneously serving on two other boards, (3) one finder of fact not serving on two other boards but who has heard the two other cases for which he was not on the board, and (4) two finders

of fact in the second and third cases influenced by knowledge of their verdicts in whichever case was previously decided. The readily available remedy, with virtually no burden on the State Police, would be to appoint a separate three-member hearing board for each of three separate hearings.

JURISDICTION

The State Police argued that the circuit court lacked jurisdiction because Zeigler (1) failed to exhaust administrative remedies, and (2) failed to allege a violation of the LEOBOR. Zeigler responded by arguing that the circuit court obtained jurisdiction under the "show cause" provision of the LEOBOR, which provides:

Any law enforcement officer who is denied any right afforded by this subtitle may apply at any time prior to the commencement of the hearing before the hearing board, . . . to the circuit court of the county where he is regularly employed for an order directing the law enforcement agency to show cause why the right should not be afforded.⁸

Section 734B provides that "this subtitle shall supersede any State, county or municipal law, ordinance, or regulation that conflicts with [its] provisions. . . ." The court of special appeals recognized the legislature's intent in *Prince George's County v. State Commission on Human Relations*,¹⁰ and stated that the legislature, in order "to be certain that all conflicts among prior statutes and the [LEOBOR] could be readily resolved, . . . established the superiority of the [LEOBOR] in section 734B. . . ."¹¹

In *Chief, Baltimore County Police Department v. Marchsteiner*,¹² the court addressed the same issue raised by the first contention of the State Police. The court found that the rights in the LEOBOR are enforced through section 734 and that the statute "contains no hint of any necessity of exhausting administrative or grievance procedures as a precondition to access to the courts."¹³ The court of special appeals held that "a legislative purpose in enacting the LEOBOR was to provide an exclusive and self-contained procedure in the circuit court for assertion of a denial of the administrative procedure rights embodied in it."¹⁴

The defendant's alternative theory was that even if the court had jurisdiction, the plaintiff had not alleged an LEOBOR violation for the court to remedy. Zeigler argued that if jurisdiction were dependent upon an enumerated LEOBOR provision, the court could look to section 727(d) (1)

(the hearing board definition section),¹⁵ section 730 (the administrative hearing section),¹⁶ and section 733 (the incorporation of constitutional rights section).¹⁷ The statutory construction approach of Zeigler's claim was based on a violation of a mandatory State Police regulation, which was promulgated to implement sections 727(d) (1) and 730.¹⁸ Enabling statutes and their implementing regulations are in pari materia and the regulations become an extension of the statute.¹⁹ He argued that to find a failure to assert an LEOBOR violation would require a hypertechnical reading of his application and supporting memorandum.

However, even assuming no allegation of an enumerated LEOBOR violation, Zeigler argued that the defendant's position was fatally flawed by the recent case of *Cochran v. Anderson*.²⁰ In that case, the Maryland-National Capitol Park and Planning Commission adopted regulations governing proceedings under the LEOBOR.²¹ The circuit court ordered a termination of all LEOBOR proceedings because the agency failed to comply with

"the Superintendent promulgated the administrative rules and regulations. . . ."

its own regulations. The Commission appealed, alleging a lack of jurisdiction because section 734 does not authorize the circuit court to terminate an LEOBOR proceeding. In rejecting this argument, the court of special appeals found that section 734 was designed to enable the circuit court to provide broad judicial equitable relief. "It is a very special provision, allowing resort to the court 'prior to the commencement of the hearing before the hearing board.' The purpose of that provision obviously is . . . to assure that the police agency will do what the law requires."²² The court held that the circuit court has wide-ranging authority under section 734 to fashion an appropriate remedy, even to the point of terminating a LEOBOR hearing, and such remedy may be invoked in response to the agency's violation of its own rules.

Judge DeWaters ruled that the Circuit Court for Baltimore County had jurisdiction in *Zeigler v. Maryland State Police*.

STATUTORY CONSTRUCTION

The LEOBOR provides that a disciplinary hearing "shall be conducted by a hearing board."²³ However, the legislature did not set forth in the "hearing" section (section 730) any size or composition requirements for hearing boards other than the implicit incorporation of the definitional section. The definitional section (section 727 (d) (1)) defers the hearing board decision to the administrative agency, subject to a minimum size requirement of three and a composition requirement of at least one member of equal rank to the accused.²⁴ The legislature has otherwise delegated the hearing board size and composition decision to the Superintendent of State Police.²⁵

Pursuant to this delegation, the Superintendent promulgated the administrative rules and regulations contained in the Maryland State Police Administrative Manual. Chapter 5, section V, subsection 3-2b provides in pertinent part as follows:

The permanent chairman of the hearing board shall, with the Superintendent's authority, appoint . . . a three-man^[26] board which shall consist of at least one commissioned officer and one member of a rank equal to that of the accused. The permanent chairman, in his discretion, may serve as a sitting member of any such board and in those cases when he chooses not to sit, one of the appointed commissioned officers shall be designated as the board chairman. . . .²⁷

Thus, under subsection 3-2b, as to hearing board size and composition, "[t]he permanent chairman of the hearing board shall . . . appoint . . . a three-man board which shall consist of at least one commissioned officer and one member of a rank equal to that of the accused."²⁸

Administrative regulations have the same force of law as the enabling legislation authorizing the agency to promulgate.²⁹ As the federal district court for Maryland stated, "once an administrative agency has promulgated a regulation, even in instances where it is not required to do so, that administrative agency is bound to follow its regulation. This is particularly true where the regulation uses unambiguous, mandatory language."³⁰ Quoting the Supreme Court's decision in *United States ex rel. Accardi v. Shaughnessy*,³¹ the court of special appeals stated, in *Williams v. McHugh*,³² that "[a]n agency of the

government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.”³³ In *Vitarelli v. Senton*,³⁴ the Supreme Court struck down the adverse personnel action of a federal agency because it failed to follow its own regulation. Justice Harlan held that “the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulation he could have discharged petitioner summarily.”³⁵

In interpreting administrative regulations, the Court of Appeals of Maryland employs the same principles of construction that are used to determine the meaning of statutes.³⁶ “Whenever the word ‘shall’ is used it is *mandatory*. Why else would this word be used?”³⁷ The term “shall” establishes an imperative obligation upon the agency and forecloses its exercise of discretion.³⁸ Such a regulation creates a mandatory limitation on the agency, prohibiting action to the contrary.³⁹ This is so even when the reviewing court believes that the mandatory language is unwise or its impact is harsh.⁴⁰

Assuming *arguendo* that the State Police could convince the court that subsection 3-2b’s double use of the term “shall” in the first sentence does not automatically make the regulation mandatory, any doubt must be eliminated by the subsection’s striking change of expression from “shall” to “may.”⁴¹ Although the first sentence of subsection 3-2b provides that the permanent chair “shall” appoint a three-member board and “shall” have at least one commissioned officer and one member of the defendant’s rank, the second sentence provides as follows: “The permanent chairman, *in his discretion, may* serve as a sitting member of any such board and in those cases when he chooses not to sit, one of the appointed commissioned officers *shall* be designated as the board chairman.”⁴² The leading treatise on statutory construction includes the following:

Where both mandatory and directory verbs are used in the same statute, or in the same section, paragraph, or sentence of a statute, it is a fair inference that the legislature realized the difference in meaning, and intended that the verbs used should carry with them their ordinary meanings. *This is especially true where “shall” and “may” are used in close juxtaposition under circumstances that would indicate that a different treatment is intended for the predicates following them.*⁴³

Not only are “shall” and “may” juxta-

posed in subsection 3-2b, the only time that “may” is used, it is accompanied by the words “in his discretion,” whereas whenever “shall” is used, the accompanying extension of discretion is conspicuous by its absence. A maxim of statutory construction is *expressio unius est exclusio alterius*, meaning that the expression of one thing is the exclusion of others. This maxim is most applicable when the drafter included in one place that which was omitted in another, on the theory that if the drafter wished to include, the drafter would have done so, and the failure to include, particularly after inclusion in the same section, will never be deemed inadvertent.⁴⁴

Once determined to be a mandatory regulation, any doubt that the mandate is for a board of three members — not more and not less — must be resolved by again applying the principle of *expressio unius est exclusio alterius*. Subsection 3-2b’s manda-

*“A maxim of
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exclusio alterius*”*

tory requirements for board size and composition are as follows: “The permanent chairman of the hearing board shall . . . appoint . . . a *three-man* board that shall consist of *at least one* commissioned officer *and one* member of a rank equal to that of the accused.”⁴⁵ When the Superintendent intended to give the permanent chair the option to select a given number or more than that number, he provided “at least X.” However, when he intended only “X,” the phrase “at least” is conspicuous by its absence. Thus, the size of the hearing board shall be three.⁴⁶

Zeigler argued that resolving the interpretation of subsection 3-2b could not be more straightforward. The first sentence places a mandate upon the permanent hearing board chair to appoint a three-member hearing board. The language is plain on its face. The result is the same, whether reached by examining the mandatory language of the first sentence standing alone or by examining the first sentence by way of contrast to the permissive language in the second sentence.

The State Police countered with its own

statutory construction argument. Chapter 5, section V, subsection 3-0 of the Maryland State Police Administrative Manual provides as follows:

The rules and regulations in this subsection define policy for the imposition of discipline within the Agency. These rules and regulations are guides for handling disciplinary actions and generally should be followed. In unusual situations not covered by these rules and regulations, or where strict adherence to these rules would work an injustice, deviations from the rules and regulations are permitted.

The hearing board chairman and the other members of the board should be flexible and should not apply these rules, regulations and rules of evidence mechanically.⁴⁷

The State Police argued that subsection 3-0 demonstrated the Superintendent’s intent to make subsection 3-2b merely directory. “These rules and regulations are *guides*. . . The hearing board . . . should be *flexible* and should not apply these rules mechanically.”⁴⁸ Moreover, the regulation specifically provides for “deviations” when encountering “situations not covered by these rules” or when the rules “would work an injustice.”⁴⁹ The State Police took the position that this case fell within both exceptions: (1) it was a complex case with three defendants and thus a situation not covered by the rules; (2) with three co-defendants allegedly acting in concert, the permanent chair could have concluded that the interests of justice would be best served by a combined trial heard by five members.

Zeigler argued that his case did not come within either exception. First, the rules expressly cover every case on the issue of board size, i.e., “shall . . . appoint . . . a three-man board . . .”⁵⁰ Second, the exception to avoid injustice could only have been intended to inure solely to the benefit of the officer, not the agency. Judge DeWaters ruled that subsection 3-2b mandated a three-member board and that nothing in subsection 3-0 undermined that mandate in this case.

DUE PROCESS OF LAW

Having resolved the case on statutory construction grounds, the court had no need to rule on the constitutional issue. Nonetheless, the court addressed due process briefly.

Zeigler had requested the court to order three three-person boards. Although the court ordered a three-person board, it

refused to sever the case into three separate boards. Judge DeWaters noted that nothing in either the LEOBOR or the Maryland State Police Administrative Manual controls the situation. He stated that this could best be ruled on by the hearing board, using the same considerations that a court uses in granting or denying severance to criminal defendants. However, he recognized the strength of the due process argument and stated: "I think the Board has to be extremely careful in making [the severance] decision . . . , because if there is any kind of conflict, anything that will work any injustice resulting of him being tried with one or two of the others, then it's going to get here on appeal⁵¹ and be sent back for an independent hearing because of that conflict . . ."⁵²

In *Mathews v. Eldridge*,⁵³ the Supreme Court enunciated a three-part balancing test for ascertaining whether an administrative agency has satisfied the requirements of due process. The Court stated:

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 any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the preparation involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.⁵⁴

This test involves balancing costs and benefits to determine what kind of hearing due process requires.⁵⁵ The greater the potential harm, the heavier the burden on the administrative agency to provide a procedurally fairer hearing. Similarly, the smaller the burden on the agency, the less need for potential harm before requiring the agency to accommodate.

Zeigler argued that the special order established a hearing procedure that (1) had a high degree of risk of unfairness in the fact finding process, (2) had an appearance of unfairness in the fact finding process, and (3) violated the Administrative Procedure Act (APA).⁵⁶ Moreover, he argued that the administrative burden imposed on the State Police to eliminate these three problems and provide due process was de minimus. An examination of each of the three parts of the Supreme Court's test resulted in the following:

(1) The private interest affected by the official action.

A non-probationary public employee

has a constitutionally protected property interest requiring due process of law.⁵⁷ The Supreme Court stated that police officers "are not relegated to a watered-down version of constitutional rights. . . ."⁵⁸ In *Nichols v. Baltimore Police Department*,⁵⁹ the court of special appeals described the legislative intent of the LEOBOR as follows: "The purpose of the LEOBOR is to guarantee to those law-enforcement officers embraced therein procedural safeguards during investigation and hearing of matters concerned with disciplinary action against the officer. . . . In enacting the LEOBOR, the Legislature vested in law-enforcement officers certain 'rights' not available to the general public."⁶⁰

(2) The risk of deprivation through the procedures used and the probable value of additional or substitute procedural safeguards.

The special order established a five-member hearing board to hear simultaneously three separate cases, involving different charges, against three different defendants. Moreover, the order provided for three separate, yet greatly overlapping, trier of fact panels to simultaneously hear three cases. Multiple triers of fact for simultaneously tried defendants is highly disfavored.

In *Scarborough v. State*,⁶¹ two defendants were tried jointly, with a separate jury empaneled to hear each case. Although finding no reversible error in that case,

"The purpose of the LEOBOR is to guarantee . . . procedural safeguards. . ."

nevertheless, the court stated that such a procedure has too many risks of prejudice to a fair trial, concluding that "we join the other courts in strongly condemning the use of dual juries."⁶² This condemnation has been implicitly extended to any jointly tried defendants having different triers of fact. In *Nair v. State*,⁶³ the court of special appeals relied upon *Scarborough* to "strongly disapprove of the practice of conducting joint and simultaneous trials of co-defendants" when one has the court as

trier of fact and one has a jury.⁶⁴

Zeigler argued that his case presented a procedure considerably worse than that in *Scarborough* in two ways. First, in his case, the triers of fact also would be the triers of law, i.e., the court. By the very nature of the process, the five board members would commingle their thoughts about the case as it progressed. The special order provided that the "five members. . . will hear the entire case against all three defendants and participate in the decision making process pertaining to motions, evidence, etc."

Second, not only were the board members intended to commingle their thoughts while serving as the triers of law, they were intended to commingle their thoughts while serving as triers of fact. In *Scarborough*, no finder of fact ever deliberated on the merits of the case with a finder of fact from the other panel. In Zeigler's case, on the other hand, every finder of fact would always deliberate with a finder of fact who served on another defendant's panel. Moreover, in this case, the prosecution was asserting that there was one cover-up with complicity among three officers. Consequently, there would be a subtle, yet strong, pressure to render consistent verdicts. Upon deliberation on the cases of whichever officers were resolved second and third, two of the three members of the board would deliberate knowing the verdict in the preceding cases, having just rendered them.

Both the "judge of law versus judge of fact" problem and the "judge of fact in multiple cases" problem would be exacerbated in Zeigler's case by the fact that the members of the board would be lay personnel. Although a judge can be expected to fulfill these roles simultaneously, differentiating and excluding mentally, as necessary, a non-judge cannot be expected to accomplish this task. In short, the hearing board procedure made a fair hearing unrealistic, if not almost impossible.⁶⁵

It is true that *Scarborough* was a criminal case and that Zeigler is an administrative adjudicatory hearing. Nonetheless, the Supreme Court has recognized that because an administrative agency does not follow rules as strict as the judiciary, the need to measure the adjudicatory proceedings against the requirements of due process is even greater. In *Ohio Bell Telephone Co. v. Public Utilities Commission*,⁶⁶ Justice Cardoza stated:

Regulatory commissions have been invested with broad police powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper

deference from courts when it has been reached with due submission to constitutional restraints. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of "the rudiments of fair play" assured to every litigant by the fourteenth amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.⁶⁷

The Court has also stated that whenever the administrative agency's action is adjudicatory, "it is imperative [to] use the procedures which have been associated with the judicial process."⁶⁸

Due process is not only concerned with the risk of unfairness but also the appearance of unfairness. In *Marshall v. Jerrico, Inc.*,⁶⁹ the Supreme Court stated that the "Due Process Clause . . . helps to guarantee that life, liberty, or property will not be taken on the basis of erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness. . . ."⁷⁰ In *Fleck v. King County*,⁷¹ the Court of Appeals of Washington, in applying the "appearance of fairness doctrine," stated the following:

The administrative tribunals which perform judicial or quasi-judicial functions must be as above suspicion and reproach as courts themselves. When the circumstances are such that the conduct of one member of a tribunal may have infected the independent decision making process of others on the tribunal, the potential exists for the weakening of public confidence in the operation of the agency, and actions taken by boards, commissions, tribunals or agencies under such a cloud must disappear. . . . A petitioner or litigant is entitled to a decision arrived at by the separate members of the body uncommitted, unallied, and unfettered at the commencement of their deliberations.⁷²

Zeigler argued that the risks that were soundly denounced in *Scarborough* were so greatly multiplied in his case as to unconstitutionally deprive him of due process of law, particularly when examining

the value of additional or substitute procedural safeguards. The appointment of a separate three-member hearing board for each of three separate hearings would resolve the constitutional defect.

Additionally, the fact finding process established by the special order violated the Administrative Procedure Act (APA).⁷³ To the extent that the APA does not conflict with the LEOBOR,⁷⁴ it controls police department disciplinary hearing boards.⁷⁵ Section 10-207(b) provides that when hearing a contested case, "[t]he hearing officer shall: (1) conduct the hearing; and (2) submit in writing to the agency, official, or employee who delegated the authority: (i) proposed findings of fact; and (ii) proposed conclusions of law."⁷⁶ This section requires a hearing officer to perform both the function of conducting the

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hearing and that of deciding (or recommending decision on) the merits. In Zeigler's case, the special order assigned five members to conduct the hearing under subsection (b) (1) but only three members to render a decision on the merits under subsection (b) (2). Any procedure in which one number of hearing officers conducts the hearing and a different number decides the merits of the case can easily distort the "majority rule" decision making process.⁷⁷

Moreover, section 10-213(a) (1) of the APA provides that "an individual who is not authorized to participate in the decision making process of a contested case may not communicate ex parte with an individual who is involved in the process with regard to any issue of law or fact in the contested case."⁷⁸ In this case, two of the five hearing board members were "not authorized to participate in the decision making process" as to the merits of each of the three cases, yet these two members were instructed by the special order to "communicate ex parte with [the three in-

dividuals who were] involved in the process with regard to [motions, evidence, etc.]" This violation would invalidate the proceeding.⁷⁹

(3) The fiscal and administrative burdens that the additional or substitute procedural requirements would entail for the governmental agency.

The administrative burden in constituting three separate three-member hearing boards is de minimus, both in the abstract and when weighed against the harm in the Zeigler case. The court in *Scarborough* recognized that the potential problems caused by a multiple fact finder scenario greatly outweigh any administrative ease that such a procedure may afford. The court stated that "appropriate safeguards necessary to protect the rights of defendants in such a trial would be more time consuming than if separate trials were ordered."⁸⁰ In *Hoyt v. Police Commissioner*,⁸¹ the Baltimore City Police Department, following the 1974 police strike that involved 901 officers, conducted disciplinary hearings against 130 officers. A separate hearing board was constituted for each officer. Certainly, the formation of two additional three-member hearing boards would be a small administrative price to pay to ensure due process of law.

ATTORNEY'S FEES

In *Gardner v. Broderick*,⁸² the Supreme Court prohibited placing a chilling effect on the constitutional rights of law enforcement officers. Section 733 of the LEOBOR prohibits creating a chilling effect on LEOBOR rights.⁸³

Zeigler asked the court to award reasonable attorney's fees, arguing that without such an award there was an economic chilling effect upon his ability to even seek that to which he was entitled. He noted that the judicial relief sought in this case under the show cause provision was requested administratively in writing seven months earlier. Law enforcement agencies are represented by government-employed attorneys. Consequently, the cost of litigation receives relatively little consideration by the agency. Zeigler argued that even if he prevailed on the merits, he would still be penalized an amount equal to the cost of attorney's fees. Only by an award of attorney's fees could the court place him in the position of being afforded his rights without being penalized for their assertion.

In *Cochran v. Anderson*,⁸⁴ the court of special appeals stated that "[t]he purpose of [section 734] obviously is . . . to assure that the police agency will do what the law

requires.”⁸⁵ *Anderson* vested in the circuit courts broad judicial equitable relief. Zeigler urged the court to fashion its remedy broadly enough so that he would not receive severe economic punishment, imposed indirectly by the State Police by forcing him to litigate to make the agency obey its own rules. Moreover, such a remedy may have the effect of making the agency think twice before similarly denying a constitutional, statutory, or regulatory benefit to one of its officers.

Judge DeWaters denied attorney’s fees, stating that “the situation is sufficiently complicated and has sufficient merit on each side that it does not warrant the Court to award attorney’s fees.”⁸⁶

CONCLUSION

Law enforcement officers play a vital role in society. Their responsibilities are great and their compensation is small. The problems of law enforcement should not be exacerbated by an adversarial relationship between law enforcement agencies and law enforcement officers. Agencies have consistently denied constitutional, statutory, and regulatory protection to their own officers. As a last resort, officers are litigating to obtain their rights. Court decisions, such as *Zeigler v. Maryland State Police*, ordering law enforcement agencies to respect the rights of their officers, may produce the necessary balance between agency and officer that will enable them to concentrate less on each other and more on their vital mission.

Notes

- ¹ No. 87-CG5089 49/159 (Cir. Ct. Balto. County, Md., Mar. 16, 1988).
- ² Md. State Police Admin. Manual ch. 5, § I-15-4 (2d ed. 1977 & Supp. 1984).
- ³ *Id.* § I-15-5.
- ⁴ *Id.* § I-19-2.
- ⁵ *Id.* § I-28-3.
- ⁶ Act of May 31, 1974, ch. 727, 1974 Md. Laws 2471-77 (codified as amended at Md. Ann. Code art. 27, §§ 727-734D (1987)).
- ⁷ Md. Ann. Code art. 27, § 734.
- ⁸ *Id.*
- ⁹ *Id.* § 734B.
- ¹⁰ 40 Md. App. 473, 392 A.2d 105 (1978), *vac. on other grounds*, 285 Md. 205, 401 A.2d 661 (1979).
- ¹¹ *Id.* at 486, 392 A.2d at 113-14.
- ¹² 55 Md. App. 108, 461 A.2d 28 (1983).
- ¹³ *Id.* at 115, 461 A.2d at 32.
- ¹⁴ *Id.* at 116, 461 A.2d at 32.
- ¹⁵ See *infra* text accompanying note 24.
- ¹⁶ *Id.*
- ¹⁷ See *infra* notes 51-81 and accompanying text.
- ¹⁸ See *infra* notes 26-50 and accompanying text.
- ¹⁹ See *infra* notes 26-29 and accompanying text.
- ²⁰ 73 Md. App. 604, 535 A.2d 955 (1988).
- ²¹ *Id.* at 613, 535 A.2d at 956-57.
- ²² *Id.* at 613, 535 A.2d at 959 (emphasis in original).
- ²³ Md. Ann. Code art. 27, § 730(d).
- ²⁴ *Id.* § 727(d)(1).
- ²⁵ See *id.* art. 88B, § 15 (1985 & Supp. 1987).

- ²⁶ The “three-man board” requirement could pose constitutional problems under the Maryland Equal Rights Amendment (ERA). Md. Const., Decl. Rights art. 46. Acts of the legislature almost always satisfy the ERA because “[u]nless the General Assembly specifically provides otherwise in a particular statute, all words in this Code importing one gender include and apply to the other gender as well.” Md. Ann. Code art. 1, § 7 (1987) (emphasis added). Unlike state statutes, which are virtually always gender neutral as a result of article 1, section 7, the State Police administrative regulations are more restrictive or at least more ambiguous. “Use of the masculine gender herein includes, where applicable, the female gender.” Md. State Police Admin. Manual ch. 1, § III-2-1 (2d ed. 1977 & Supp. 1982).
- ²⁷ Md. State Police Admin. Manual ch. 5, § V-3-2b.
- ²⁸ *Id.* (emphasis added).
- ²⁹ *Southern Maryland Hosp. Center v. Fort Washington Community Hosp.*, 308 Md. 323, 332, 519 A.2d 727, 731 (1987); *Staley v. Board of Educ.*, 308 Md. 42, 47 n.4, 517 A.2d 349, 351 n.4 (1986).
- ³⁰ *Francis v. Davidson*, 340 F. Supp. 351, 365-66 (D. Md.), *aff’d*, 409 U.S. 904 (1972) (citations omitted); *accord Horizon Mut. Sav. Bank v. Federal Sav. & Loan Ins. Corp.*, 674 F.2d 1312, 1315-16 (9th Cir. 1982).
- ³¹ 347 U.S. 260 (1954).
- ³² 51 Md. App. 570, 444 A.2d 475 (1982).
- ³³ *Id.* at 573, 444 A.2d at 477; see *Prince George’s County v. Zayre Corp.*, 70 Md. App. 392, 401, 521 A.2d 779, 784 (1987); *Hopkins v. Maryland Inmate Grievance Comm’n*, 40 Md. App. 329, 391 A.2d 1213 (1978) (increased case loads did not justify the agency’s failure to comply with its own “72-hour rule”); see also Note, *Violations by Their Own Regulations*, 87 Harv. L. Rev. 629 (1974).
- ³⁴ 359 U.S. 535 (1959).
- ³⁵ *Id.* at 540.
- ³⁶ E.g., *Maryland Port Admin. v. John W. Brawner Contracting Co.*, 303 Md. 44, 60, 492 A.2d 281, 289 (1985) (state contracting regulation); *Dorsey v. Beads*, 288 Md. 161, 176, 416 A.2d 739, 747 (1980) (federal truth-in-lending regulation); *Messite v. Colonial Mortgage Serv. Co. Assoc.*, 287 Md. 289, 293, 411 A.2d 1051, 1053 (1980) (VA loan origination fee regulation and agency load guaranty directive); see 1A Sutherland Statutory Construction § 31.06 (Sands 4th ed. 1985) [hereinafter Sutherland].
- ³⁷ *Harvey v. State*, 51 Md. App. 113, 116, 441 A.2d 1094, 1097 (1982) (emphasis in original).
- ³⁸ See *Johnson v. State*, 282 Md. 314, 321, 384 A.2d 709, 713 (1978); *Tranen v. Aziz*, 59 Md. App. 528, 534, 476 A.2d 1170, 1173 (1984), *aff’d*, 304 Md. 605, 500 A.2d 636 (1985).
- ³⁹ *Office & Professional Employees Int’l Union v. Mass Transit Admin.*, 295 Md. 88, 96, 453 A.2d 1191, 1195 (1982); see *Lamb v. Hammond*, 308 Md. 286, 309, 518 A.2d 1057, 1068 (1987). Moreover, the failure to include a sanction for non-compliance does not convert a mandatory provision into one that is merely directory in nature. See *Moss v. Director, Patuxent Inst.*, 279 Md. 561, 566, 369 A.2d 1011, 1013-14 (1977).
- ⁴⁰ See *Bright v. Unsatisfied Claim & Judgment Fund Bd.*, 275 Md. 165, 169, 338 A.2d 248, 250 (1975).
- ⁴¹ See generally W. LaFave & A. Scott, Jr., *Criminal Law* § 2.2(g) (2d ed. 1986).
- ⁴² Md. State Police Admin. Manual ch. 5, § V-3-2b (emphasis added).
- ⁴³ 2A Sutherland, *supra* note 36, § 57.11 (emphasis added); e.g., *Scannell v. City of Seattle*, 97 Wash. 2d 701, 648 P.2d 435, 438 (1982) (the use of “shall” twice and “may” once in two consecutive sentences of the same section resulted in

- “shall” being construed as mandatory and “may” as permissive”); *In re Fasi*, 63 Haw. 624, 639 P.2d 98, 101 (1981) (with “shall” used twice and “may” used once in two consecutive paragraphs of the same section, “[s]uch close proximity of the contrasting verbs ‘may’ and ‘shall’ require[d] a mandatory effect for the term ‘shall’”); *State ex rel. Public Disclosure Comm’n v. Rains*, 87 Wash. 2d 626, 555 P.2d 1368, 1373 (1976) (when there is one “shall” and one “may” in the same sentence, “the intent of [the] legislature is demonstrated by no more than the language of the sentence itself, [with] a different meaning . . . intended to attach to each word”).
- ⁴⁴ See 2A Sutherland, *supra* note 36, § 47.23; see, e.g., *Commonwealth ex rel. Hancock v. Ruckelshaus*, 362 F. Supp. 360, 365 (W.D. Ky. 1973); *In re Adoption of Voss*, 550 P.2d 481, 485 (Wyo. 1976). This is especially true, when, in the natural association of ideas, that which is expressed (the “in his discretion” with “may”) is so contrasted with that which is omitted (no reference to discretion with “shall”) that the contrast dictates opposite and contrary treatment. *Board of Dental Examiners v. King*, 369 So. 2d 311, 315 (Ala. Civ. App. 1977). In *Office & Professional Employees Int’l Union v. Mass Transit Admin.*, 295 Md. 88, 96, 453 A.2d 1191, 1195 (1982), the Court of Appeals held that when an administrator was provided discretion to act in only one place, the administrator lacked discretion in all other places. See also *Burner v. Jefferson County Fiscal Court*, 239 Ky. 613, 40 S.W. 2d 271, 273 (1931) (“[p]owers not conferred are just as plainly prohibited as those expressly forbidden”).
- ⁴⁵ Md. State Police Admin. Manual ch. 5, § V-3-2b (emphasis added).
- ⁴⁶ Although not at issue in the case, there is ambiguity in the regulation as to whether “at least” modified “one commissioned officer” or “one commissioned officer and one member of a rank equal to that of the accused.” If the former, there can be only one member of equal rank; if the latter there could be one, two, or three members of equal rank. See 2A Sutherland, *supra* note 36, §§ 47.26, .33-34.
- ⁴⁷ Md. State Police Admin. Manual ch. 5, § V-3-0.
- ⁴⁸ *Id.* (emphasis added).
- ⁴⁹ *Id.*
- ⁵⁰ *Id.* § V-3-2b.
- ⁵¹ Hearing board decisions may be appealed to the circuit court and then to the court of special appeals. Md. Ann. Code art. 27, § 732.
- ⁵² Record at 1-4 to 1-5. It appears highly unlikely that the State Police will consolidate these cases. Even though not ordered to do so, the agency will probably sever the cases because of the combined effect of (1) Judge DeWaters’ ruling, (2) the LEOBOR and the Maryland State Police Administrative Manual, (3) the stated personnel policy decision of the State Police, and (4) practical considerations. First, Judge DeWaters ruled that any board must consist of three individuals. Second, both the LEOBOR, Md. Ann. Code art. 27, § 727(d)(1), and the Maryland State Police Administrative Manual, Md. State Police Admin. Manual ch. 5, § V-3-2b, require “one member of a rank equal to that of the accused.” In light of the ranks of the defendants, a consolidated board must be composed of one captain, one first lieutenant, and one first sergeant. Third, the State Police proffered to the court that it was the agency’s policy never to permit a disciplinary hearing in which the guilt and punishment of an officer would be decided by an officer of lesser rank. A consolidated hearing board would violate this policy with regard to two of the three defendants. Fourth, as Judge

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than having the U.C.C. govern check processing and collection by electronic fund transfers, perhaps a better alternative would be the establishment of such a system by contract as designed by the parties. At present, the relationship between the bank and its customers under the Uniform Commercial Code, superseded in part by application of Regulation J, creates unnecessary problems that can be avoided by uniform procedures among all parties.

NOTES

- ¹ U.C.C. § 4-103(1) (1987).
- ² U.C.C. § 4-103(3) (1987).
- ³ U.C.C. § 4-103(2) (1987).
- ⁴ 12 C.F.R. § 210.1 (1987).
- ⁵ 12 C.F.R. § 210.6(a) (1) (1982); U.C.C. § 4-201 (1) (1972).
- ⁶ 12 C.F.R. § 210.3(b) (1987).
- ⁷ 12 C.F.R. § 210.3(a) (1987).
- ⁸ 12 C.F.R. § 210.3(b) (1987).
- ⁹ *Community Bank v. Federal Reserve Bank of San Francisco*, 500 F.2d 282 (9th Cir. 1974).
- ¹⁰ 12 C.F.R. § 210.5 (1987).
- ¹¹ 12 C.F.R. § 210.3(b) (1987).
- ¹² 12 C.F.R. § 210.5 (1987).
- ¹³ 12 C.F.R. § 210.6 (1987).
- ¹⁴ 12 C.F.R. § 210.5 (1987).
- ¹⁵ *Id.*
- ¹⁶ 12 C.F.R. § 210.6 (1987).
- ¹⁷ 12 C.F.R. § 210.12 (1987).
- ¹⁸ 12 C.F.R. § 210.13 (1987).

Regulation

(continued from page 13)

DeWaters stated, there are too many potential due process problems with a consolidated hearing and thus the State Police would face too great a risk of reversal on appeal.

- ¹⁹ 424 U.S. 319 (1976).
- ²⁰ *Id.* at 335.
- ²¹ See 2 K. Davis, *Administrative Law Treatise* § 13:12 (2d ed. 1979) [hereinafter Davis]; H. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).
- ²² Md. State Gov. Code Ann. §§ 10-101 to 10-803 (1984 & Supp. 1987); see also Model State Admin. Procedure Act, 14 U.L.A. 357 (1980 & Supp. 1988).
- ²³ See generally J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* § 13.5(d) (3d ed. 1986); Davis, *supra* note 55, § 11:6.
- ²⁴ *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
- ²⁵ 53 Md. App. 623, 455 A.2d 446, cert. denied, 296 Md. 111 (1983).
- ²⁶ *Id.* at 626-27, 455 A.2d at 448-49.
- ²⁷ 50 Md. App. 276, 278-81, 437 A.2d 672, 676-79 (1981), cert. denied, 292 Md. 639 (1982).
- ²⁸ *Id.* at 281, 437 A.2d at 676; accord *State v. Hernandez*, 163 N.J. Super. 283, 394 A.2d 883, 885 (1978) ("[t]here are too many opportunities for error"); see also *State v. Watson*, 397 So. 2d 1337, 1339-42 (La. 1981), cert. denied, 454 U.S. 903 (1982) (procedure discouraged because of lack of necessary guidelines).
- ²⁹ 51 Md. App. 234, 442 A.2d 196, cert. denied, 293 Md. 617 (1982).
- ³⁰ *Id.* at 239, 442 A.2d at 199.
- ³¹ Whenever the procedures are questionable and pose a due process issue, courts do not give their usual deference to the judgment of the administrative agency, unless there has been an express delegation of authority to so act. In *Greene v. McElroy*, 360 U.S. 474, 506-07 (1959), the Su-

- ¹⁹ 12 C.F.R. § 210.12 (1987).
- ²⁰ Summers, *Correspondent Services, Federal Reserve Services, and Cash Management Policy*, Economic Review, Federal Reserve Bank of Richmond 32-33 (November/December 1978).
- ²¹ "on us" checks are checks which a payee deposits at the drawee banks.
- ²² Board of Governors of the Federal Reserve System, 1979 Annual Report 300 (1979).
- ²³ 28 U.C.C. Rep. Serv. (Callaghan) 1440 (1980).
- ²⁴ *Id.* at 1441.
- ²⁵ 459 F.Supp. 1366 (W.D. Mich. 1978).
- ²⁶ 394 F.Supp. 550 (W.D. Mo. 1975).
- ²⁷ *United States Fidelity and Guaranty Co. v. Federal Reserve Bank*, 590 F.Supp. 486 (S.D.N.Y. 1984).
- ²⁸ 19 U.C.C. Rep. Serv. (Callaghan) 211 (1976).
- ²⁹ U.C.C. § 4-301 (1)(b) (1972).
- ³⁰ 12 C.F.R. § 210.6(a) (1987).
- ³¹ 12 C.F.R. § 210.2(e) (1987).
- ³² 488 F.Supp. 283 (D. Mass. 1980).
- ³³ 12 C.F.R. § 210.6(a) (1) (1987).
- ³⁴ *Childs v. Federal Reserve Bank*, 719 F.2d 812 (5th Cir. 1983).
- ³⁵ *Id.*
- ³⁶ 708 F.2d 290 (7th Cir. 1983).
- ³⁷ 500 F.2d 282 (9th Cir. 1974).
- ³⁸ *Id.* at 283. (emphasis in original)
- ³⁹ 497 F.Supp. 1227 (D. Mass. 1980).
- ⁴⁰ 21 Ill. App. 3d 1046 (1974).
- ⁴¹ 29 U.C.C. Rep. Serv. (Callaghan) 1566 (1980).
- ⁴² 614 S.W.2d 338 (Tenn. 1981).
- ⁴³ *Id.* at 340.
- ⁴⁴ Wolkowitz, *Reducing Federal Reserve Float*, 65 Federal Reserve Bulletin 944-46 (1979).
- ⁴⁵ D. Sith, *Return Item Notification Procedures*,

preme Court rejected the argument of the Secretary of Defense that security interests permitted a relaxation of procedural safeguards. Moreover, even if the procedures were otherwise constitutional, they were questionable enough that the Court would not defer to the agency without an express delegation of authority to conduct such a procedure. Chief Justice Warren stated: "[The eight cited Supreme Court cases] reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the [legislature], even in areas where it is possible that the Constitution presents no inhibition." *Id.* at 508.

- ⁶⁶ 301 U.S. 232 (1937).
- ⁶⁷ *Id.* at 304-05 (citations omitted).
- ⁶⁸ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).
- ⁶⁹ 446 U.S. 238 (1980).
- ⁷⁰ *Id.* at 292; accord *In re Murchison*, 349 U.S. 133, 136 (1955) ("to perform its high function in the best way 'justice must satisfy the appearance of justice'").
- ⁷¹ 16 Wash. App. 668, 558 P.2d 254 (1977).
- ⁷² 558 P.2d at 256-57.
- ⁷³ Md. State Gov. Code Ann. §§ 10-101 to 10-803.
- ⁷⁴ See *supra* notes 9-14 and accompanying text.
- ⁷⁵ *Kasfman v. Taxicab Bureau, Baltimore City Police Dep't*, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849 (1965).
- ⁷⁶ Md. State Gov. Code Ann. § 10-207(b) (emphasis added).
- ⁷⁷ See *Howard County v. Bay Harvestore System*, 60 Md. App. 19, 23, 478 A.2d 1172, 1173-74 (1984); see also *United States v. L.A. Tucker Truck Lines*, 349 U.S. 33, 38 (1952) (any defect in the appointment of members of a hearing board invalidates the action of that board under the APA).
- ⁷⁸ Md. State Gov. Code Ann. § 10-213(a)(1).
- ⁷⁹ See *id.* § 10-213(d).
- ⁸⁰ *Scarborough*, 50 Md. App. at 279, 437 A.2d at

- p. 3.
- ⁶⁶ Pub. L. No. 100-86, § 609, 10 Stat. 552 (1987).
- ⁶⁷ 12 C.F.R. § 210.27(a) (1987).
- ⁶⁸ 4 J. Reitman, *Banking Law* §§ 82.02[4], 82-17 (1986).
- ⁶⁹ 12 C.F.R. § 210.34 (1987).
- ⁷⁰ 464 F.Supp. 989 (S.D.N.Y. 1979), *aff'd* 609 F.2d 1047 (2nd Cir. 1979).
- ⁷¹ Vergar, *Negotiable Instruments and The Payment Mechanism*, American Institute of Banking 248-49 (1976).
- ⁷² *Id.* at 250. (emphasis in original).
- ⁷³ Vergar, *Latent Legal Repercussions in Electronic Financial Services and Transactions*, 5 Comp. L. J. 177, 194 (1984).
- ⁷⁴ 15 U.S.C. §§ 1693. See also *Eura Corp. v. Swiss Banking Corp.*, 673 F.2d 951 (7th Cir. 1982) *rev'g* 522 F.Supp. 820 (N.D. Ill. 1981); *Delbrueck and Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2nd Cir. 1979).

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674-75 (quoting *State v. Corsi*, 86 N.J. 172, 430 A.2d 210 (1981)); see Gaynes, *Two Juries/One Trial Panacea of Judicial Economy or Personification of Murphy's Law*, 5 Am. J. Trial Adv. 285 (1981) ("but for the most unusual case, the ever present need for judicial economy is outweighed by requirements of due process and fundamental justice").

- ⁸¹ 279 Md. 74, 367 A.2d 924 (1976).
- ⁸² 392 U.S. 273 (1968); see also *Griffin v. California*, 380 U.S. 609, *reh'g denied*, 381 U.S. 957 (1965).
- ⁸³ Md. Ann. Code art. 27, § 733.
- ⁸⁴ 73 Md. App. 604, 535 A.2d 955 (1988).
- ⁸⁵ *Id.* at 613, 535 A.2d at 959.
- ⁸⁶ Record at 1-5 to 1-6.

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For other articles addressing the rights of law enforcement officers, see *Warnken, Smith v. Howard County*, Permanent Injunction Against "Chilling" Fifth Amendment Rights, 17 U. Balt. L. Forum 3 (No. 3, 1987); *Warnken*, The Law Enforcement Officers' Privilege Against Compelled Self-Incrimination, 16 U. Balt. L. Rev. 452 (1987).