

Department of Legislative Services
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FISCAL AND POLICY NOTE
Revised

House Bill 599
Judiciary

(Delegate Dumais)

Judicial Proceedings

Law Enforcement Officers' Bill of Rights - Show Cause Order - Appropriate Relief

This bill requires a court to grant appropriate relief upon a finding that a law enforcement agency obtained evidence against a law enforcement officer in violation of Law Enforcement Officers' Bill Rights (LEOBR) provisions governing the investigation or interrogation of a law enforcement officer.

Fiscal Summary

State Effect: The bill is not expected to have a material impact on State operations or finances.

Local Effect: The bill is not expected to have a material impact on local government operations or finances. Any increase in show cause hearings in the circuit courts is expected to be few in number.

Small Business Effect: None.

Analysis

Current Law: LEOBR was enacted in 1974 to guarantee police officers specified procedural safeguards in any investigation that could lead to disciplinary action. It extends to police officers of 23 specified State and local agencies. It does not grant collective bargaining rights.

The investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal must be conducted in accordance with LEOBR.

The investigating officer or interrogating officer must be a sworn law enforcement officer or, if requested by the Governor, the Attorney General or a designee of the Attorney General. A complaint against a law enforcement officer alleging brutality in the execution of the officer's duties may not be investigated unless the complaint is sworn to, before an official authorized to administer oaths, by (1) the aggrieved individual; (2) a member of the aggrieved individual's immediate family; (3) an individual with firsthand knowledge obtained because the individual was present at and observed the alleged incident; or (4) if the alleged incident involves a minor child, the parent or guardian of the child.

Unless a complaint is filed within 90 days after the alleged brutality, an investigation that may lead to disciplinary action for brutality may not be initiated and an action may not be taken. The law enforcement officer under investigation must be informed of the name, rank, and command of the law enforcement officer in charge of the investigation, the interrogating officer, and each individual present during an interrogation. Before an interrogation, the law enforcement officer under investigation must be informed in writing of the nature of the investigation. If the officer is under arrest, or is likely to be placed under arrest as a result of the interrogation, the officer must be informed completely of all of the officer's rights before the interrogation begins.

Unless the seriousness of the investigation is of a degree that an immediate interrogation is required, the interrogation must be conducted at a reasonable hour, preferably when the officer is on duty. The interrogation is required to take place (1) at the office of the command of the investigating officer or at the office of the local precinct or police unit in which the incident allegedly occurred, as designated by the investigating officer or (2) at another reasonable and appropriate place. The officer under investigation may waive the right to have the interrogation take place at the office of the command of the investigating officer or at the office of the local precinct or police unit in which the incident allegedly occurred, as designated by the investigating officer.

All questions directed to the officer under interrogation must be asked by and through one interrogating officer during any one session of interrogation. This requirement must be consistent with a requirement that each interrogation session be for a reasonable period, allowing for personal necessities and rest periods as reasonably necessary.

The officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action. On request, the officer under interrogation has the right to be

represented by counsel or another responsible representative of the law enforcement officer's choice who must be present and available for consultation at all times during the interrogation. The interrogation must be suspended for a period of up to 10 days until representation is obtained. Within that 10-day period, the chief for good cause shown may extend the period for obtaining representation. The officer may waive this right to counsel. During the interrogation, the officer's counsel or representative may (1) request a recess at any time to consult with the officer; (2) object to any question posed; and (3) state on the record outside the presence of the law enforcement officer the reason for the objection.

A complete record must be kept of the entire interrogation, including all recess periods, of the law enforcement officer. This record may be written, taped, or transcribed. Upon completion of the investigation, and on request of the officer under investigation or the officer's counsel or representative, a copy of the record of the interrogation must be made available at least 10 days before a hearing.

The law enforcement agency may order the officer under investigation to submit to blood alcohol tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations that specifically relate to the subject matter of the investigation. If the law enforcement agency orders the officer to submit to a test, examination, or interrogation and the officer refuses to do so, the agency may commence an action that may lead to a punitive measure as a result of the refusal. If the law enforcement agency orders the officer to submit to a test, examination, or interrogation, the results are not admissible or discoverable in a criminal proceeding against the law enforcement officer.

If the law enforcement agency orders the officer to submit to a polygraph examination, the results of the examination may not be used as evidence in an administrative hearing unless the agency and the officer agree to the admission of the results. The officer's counsel or representative need not be present during the actual administration of a polygraph examination by a certified polygraph examiner if (1) the questions to be asked are reviewed with the or the counsel or representative before the administration of the examination; (2) the counsel or representative is allowed to observe the administration of the examination; and (3) a copy of the final report of the examination by the examiner is made available to the officer or the counsel or representative within a reasonable time, up to 10 days, after completion of the examination.

Upon completion of an investigation and at least 10 days before a hearing, the officer under investigation must be (1) notified of the name of each witness and of each charge and specification against the officer; and (2) provided with a copy of the investigatory file and any exculpatory information, if the law enforcement officer and the law enforcement

officer's representative agree to execute a confidentiality agreement with the law enforcement agency not to disclose any material contained in the investigatory file and exculpatory information for any purpose other than to defend the law enforcement officer and pay a reasonable charge for the cost of reproducing the material.

The law enforcement agency may exclude from the exculpatory information provided to a law enforcement officer (1) the identity of confidential sources; (2) nonexculpatory information; and (3) recommendations as to charges, disposition, or punishment. The agency may not insert adverse material into a file of the officer, except the file of the internal investigation or the intelligence division, unless the officer has an opportunity to review, sign, receive a copy of, and comment in writing on the adverse material. The law enforcement officer may waive this right.

When a LEOBR investigation or interrogation results in a recommendation of demotion, dismissal, transfer, loss of pay, reassignment, or similar action that is considered punitive, the law enforcement officer is entitled to a hearing on the issues prior to the imposition of the disciplinary action. An officer who has been convicted of a felony is not entitled to a hearing.

Evidence with probative value that is commonly accepted by reasonable and prudent individuals in the conduct of their affairs is admissible and must be given probative effect. The hearing board must give effect to the rules of privilege recognized by law and must exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Each record or document that a party desires to use must be offered and made a part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

The hearing board process is bifurcated. First, the board meets to determine guilt. If the officer is found guilty of the charges, a second hearing is held to determine the level of discipline.

A law enforcement officer who is denied a right granted by LEOBR may apply to the circuit court of the county where the law enforcement officer is regularly employed for an order that directs the law enforcement agency to show cause why the right should not be granted. The officer may apply for the show cause order (1) either individually or through the officer's certified or recognized employee organization and (2) at any time prior to the beginning of a hearing by the hearing board.

The bill shifts primary responsibility for remedying investigative violations under LEOBR from the administrative hearing officer to the circuit court.

Background: In 2006, Brian Miller, a corporal in the Baltimore County Police Department, was the subject of an internal investigation concerning a charge of disobeying a lawful order. During the course of the investigation, the department subpoenaed Miller's personal cell phone records from the service provider. The department used the contents of those records as evidence in its investigation and interrogation of Miller, which resulted in a "reprimand and disciplinary action report."

Disciplined officers, such as appellant, have a right to have the charges reviewed by a hearing board. In that event, the disciplinary action report serves as the charging document. After learning that his phone records had been subpoenaed, Miller filed a complaint and petition to show cause against the department, alleging that the department's issuance of the subpoenas violated his rights under LEOBR. The circuit court held the subpoenas to have been validly issued under LEOBR and dismissed Miller's complaint.

In *Brian Miller v. Baltimore County Police Department*, 179 Md.App.370 (2008), the Court of Special Appeals concluded that the department did not have the power to issue subpoenas during the course of an investigation of an internal disciplinary matter prior to charging a violation, and reversed the opinion of the circuit court. While Miller also sought a dismissal of the disciplinary action, the court concluded that dismissal of the disciplinary charge was not an appropriate remedy. The court further held that improperly subpoenaed investigative evidence nevertheless might be admissible and not necessarily subject to exclusion in the administrative hearing.

State Fiscal Effect: The Administrative Office of the Courts (AOC) advises that the bill is unlikely to have any significant fiscal impact on the Judiciary primarily because the bill is unlikely to cause a significant increase or decrease in trial court filings or caseloads. Under existing law, petitions for show cause orders under LEOBR are neither frequent nor numerous. LEOBR proceedings themselves are fairly uncommon. A 1999 survey of the 117 police agencies in Maryland then subject to the LEOBR (to which 106 agencies responded) reported only 146 LEOBR hearings statewide in 1995, 130 in 1996, and 104 in 1997.

Applications for show cause orders in relation to LEOBR proceedings are even more rare, and AOC assumes that such applications remain so under the bill.

Additional Comments: AOC notes two areas of concern: (1) the bill raises an uncertainty as to whether appropriate relief under the bill must be granted by a court before or after the issuance of a show cause order; and (2) the bill is not clear as to whether the appropriate relief granted by the court could include an order that the

administrative hearing agency must exclude the evidence at issue in the evidence-gathering violation.

Additional Information

Prior Introductions: None.

Cross File: SB 436 (Senator Frosh) - Judicial Proceedings.

Information Source(s): Garrett, Howard, and Montgomery counties; Judiciary (Administrative Office of the Courts); Department of Natural Resources; Department of General Services; Comptroller's Office; Department of State Police; Department of Public Safety and Correctional Services; Maryland Department of Transportation; University System of Maryland; Department of Legislative Services

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