

Circuit Court for Prince George's County
Case No. CAL18-08737

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3392

September Term, 2018

KEVIN BUTTERWORTH

v.

PRINCE GEORGE'S COUNTY POLICE
DEPARTMENT

Kehoe,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by: Eyler, J.

Filed: May 14, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In 2015, Kevin Butterworth, a Prince George’s County police officer, was terminated from his employment with the Prince George’s County Police Department (“the Department”), after the Department’s Administrative Hearing Board (“the Board”) found that he used unjustified force when striking a woman with his ASP baton. Officer Butterworth filed a petition for judicial review in the Circuit Court for Prince George’s County, which affirmed the Department’s decision to terminate Officer Butterworth’s employment.

The case was then appealed to this Court and, in an unreported opinion, we held that the Board’s findings and recommendations were not sustainable for the reasons stated by the Board. *Butterworth v. Prince George’s County Police Department*, No. 2150, Sept. Term 2015 (filed April 11, 2017). We therefore vacated the judgment and remanded to the circuit court with instructions to remand the case to the Prince George’s County Police Department for further proceedings.

On remand, the Board amended its report, and a Final Disciplinary Action was issued that affirmed Officer Butterworth’s termination.¹ Officer Butterworth filed a petition for judicial review of that action, and the circuit court affirmed.

This appeal followed, in which Officer Butterworth presents the following questions for our review:

¹ There are two versions of the amended report in the record extract, one dated December 11, 2017, and one dated December 14, 2017. They are identical, except that the first paragraph in the latter report contains the following explanation: “The Court of Special Appeals directed that certain issues be addressed and clarified: they are quoted verbatim in the italics below.”

1. Was the Administrative Hearing Board’s decision, as amended, sustainable on the findings and for the reasons stated [] in its report, or, in the alternative, did the Administrative Hearing Board have substantial evidence to find Butterworth guilty of Charge One (“Use of Force”)?
2. Did the Administrative Hearing Board resolve all significant conflicts in the evidence?

For the following reasons, we shall affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

Officer Butterworth was charged with seven violations of the Department policies, including two charges that he used unjustified force upon Sharon Speed. Charge One alleged that Officer Butterworth used unjustified force when he used his ASP baton to strike her, and Charge Two alleged that he used unjustified force when he “physically tackled [her] to the ground.”

Pursuant to the Law Enforcement Officer’s Bill of Rights² (“LEOBR”), the Board held an evidentiary hearing. Following the hearing, the Board issued a written report that set forth findings of fact and concluded that Officer Butterworth was guilty of Charge One and not guilty of Charge Two. The Board recommended that Officer Butterworth be terminated based on his record of 26 prior violations of the use of force policy. We summarized the evidence that was presented at the hearing in our unreported opinion as follows:

Officer Butterworth was charged with seven violations of the Department’s policy and procedure. Those charges arose out of an encounter he had at about 1 a.m. on November 21, 2013 with Justin Speed, Roger Jackson, and Mr. Speed’s mother, Sharon Speed. The only charge that is pertinent to this

² See generally, Md. Code (2003, 2011 Repl. Vol.), §§ 3-101 to 3-113 of the Public Safety Article.

appeal is that after Mr. Speed was arrested, Officer Butterworth engaged in a second encounter with Ms. Speed during which he used unjustified force when he struck her with his ASP baton.

Officer Butterworth testified to the following. When he responded to 5726 Camp Springs Avenue in Camp Springs to assist another officer, he saw Prince George’s County Police Officer Thomas Creek standing outside the driver’s side of a vehicle. Officer Creek directed Officer Butterworth to go to the passenger and “get him, arrest him.” As Officer Butterworth attempted to handcuff Mr. Speed, the passenger, an altercation ensued. Officer Butterworth pulled out his ASP baton and struck Mr. Speed on the upper left arm. At about the same time, Ms. Speed “jumped over the left side of [Officer Butterworth’s] shoulder” and grabbed the officer’s neck. Officer Butterworth struck Ms. Speed twice, “over his shoulder,” with his ASP baton. As Officer Butterworth turned around, Ms. Speed came toward him again, and he delivered two additional strikes with his baton. After Mr. Speed was arrested, Officer Butterworth went to Ms. Speed to arrest her for her assault on him. According to Officer Butterworth, he used a “joint manipulation technique” by which he twisted Ms. Speed’s arm and “escorted her to the ground so she could be arrested.” Officer Butterworth denied using his baton to make any other strikes on Ms. Speed and denied ever striking her in the back.

Ms. Speed testified to the following. At about 1:30 a.m., she was awakened by her daughter-in-law who told her the police were outside and wanted to verify that Mr. Speed lived there. Ms. Speed went outside and told Officer Creek that Mr. Speed lived there. Ms. Speed “walked back in the middle” of her yard, and Officer Butterworth pulled up. He “jumped out” of his police car, leaving the door open, ran over, and grabbed Mr. Speed by the shoulder. Officer Butterworth pulled out his baton and started hitting Mr. Speed with it. As he start[ed] hitting Mr. Speed, Officer Creek came over to assist in handcuffing Mr. Speed. Ms. Speed asked why they were hitting Mr. Speed, and Officer Butterworth turned around and hit her “a couple times” in her arms. She turned around and ran towards her house, but Officer Butterworth chased her and beat her in the back until she “hit the ground.” Ms. Speed went into her house and called her son, who is a Prince George’s County Police Officer, but she could not reach him. Ms. Speed went back outside, and as she stepped onto the front porch, Officer Butterworth pulled her down the steps and told her she was under arrest. Ms. Speed testified to what occurred as follows:

Soon I stepped on the front porch, he pulled me down the steps, said you’re under arrest. I said for what. He said for jumping on my back

and choking me. I said are you serious, I never put my hand on you. Shut up.

Then I say—he said get (inaudible), I said I’m not going to get on the ground, he said—so, so he hit me again until I fell on my knees and Butterworth came over to help him handcuff and he hit me a couple times on the ground and Butterworth handcuffed me.

Ms. Speed later clarified that when Officer Butterworth placed her under arrest, he hit her with his open ASP baton.

Justin Speed testified to the following. Initially, he saw Officer Butterworth chase his mother and hit her with his baton. Thereafter, Ms. Speed went into her house. Later, she came back outside. Officer Butterworth “went back over to her and I guess he tried to pull her down, told her to sit down because she was under arrest.” When asked if Officer Butterworth hit his mother when she came back outside, Mr. Speed replied, “[w]ell I couldn’t really see, but I, from what she told me, yes, he did.”

Sharve Gates, Mr. Speed’s girlfriend, testified to the following. Officer Butterworth hit Ms. Speed because “she wouldn’t shut up and he start hitting her and just hitting her with the baton.” Ms. Gates did not see Ms. Speed jump on Officer Butterworth’s back. Ms. Speed ran in the house to call her son Carlos, who is a police officer, and then came back outside. At that point, Officer Butterworth “pulls her down the steps and was hitting her again and was like you’re under arrest.” Ms. Gates stated:

And [Ms. Speed’s] like why, why am I under arrest. And he says because you assaulted me, but he was going back and forth hitting between, between all that he was going back and forth hitting Justin and [Ms. Speed].

Officer Butterworth hit Ms. Speed about three times before she went into her house. After Ms. Speed came back outside, Officer Butterworth pulled her to the ground and hit her another three to four times while she was on the ground.

Shirley Farkas, who lived across the street from Ms. Speed, testified as follows. She saw two police officers who had Mr. Speed “on the car” and heard Mr. Speed ask about his mother. One of the officers at the scene was tall, lean, and white, and three other officers were black. Only the white police officer hit Ms. Speed, while the three black officers struck Mr. Speed. Ms. Farkas observed Ms. Speed standing outside in her robe. Ms. Speed

walked up “by the car” “right behind the Officer” asking “what is going on.” As Ms. Speed attempted to go back inside her house, the white officer “started hitting her with a stick and he continued to hit her with that stick.” The officer then ordered Ms. Speed to sit down on the ground near her door steps.

Prince George’s County Police Officer Thomas Creek did not observe Officer Butterworth engage in any physical contact with Ms. Speed.

Prince George’s County Police Officer Mark Snoddy did not see Ms. Speed jump on Officer Butterworth’s back or attack him and did not see Officer Butterworth chase Ms. Speed or hit her in the back with his ASP baton. During the arrest of Mr. Speed, he saw Officer Butterworth strike Ms. Speed one time with his baton and “take [her] to the ground.” Officer Butterworth used his hands and did not use his baton when taking Ms. Speed to the ground.

Id. at 2-5.

The Board found that Officer Butterworth’s use of his baton during the second engagement with Ms. Speed was a violation of Department policy prohibiting the unnecessary use of force by a police officer, stating that “[b]y his own admission, Officer Butterworth wanted to go apprehend [Ms. Speed] for the earlier assault and struck her approximately 2 additional times with his ASP and ordered her to the ground.” The Board did not find that there was sufficient evidence to support a finding that Officer Butterworth tackled Ms. Speed, explaining as follows:

The Board was not convinced through testimony provided by the prosecution or the defense that Officer Butterworth tackled [Ms. Speed] to the ground. [Ms. Speed] testified that she was dragged by Officer Butterworth; Sharve Gates testified that [Ms. Speed] was pulled down the stairs by Officer Butterworth and was on the ground the entire time; Shirley Farkas testified that [Ms. Speed] sat on the ground; Officer Snoddy testified that [Ms. Speed] was tackled by Officer Butterworth; Officer Butterworth testified that he used a joint manipulation/wrist lock and escorted [Ms. Speed] to the ground.

In the prior appeal, we stated that, as Officer Butterworth had conceded, the testimony of Ms. Gates and Ms. Speed was clearly sufficient for us to affirm the Board’s finding of a violation of Department policy regarding the unjustified use of force. *Id.* at 3. We concluded, however, that we could not affirm, explaining that an agency’s decision “may be affirmed based only upon the agency’s findings of fact and for the reasons presented by the agency,” *id.*, and that the reasons stated by the Board in support of its finding were not clear. We explained that:

[t]he Board found that “[b]y his own admission, Officer Butterworth wanted to go apprehend Sharon Speed for the earlier assault and struck her approximately 2 additional times with his [baton] and ordered her to the ground.” . . . The record is devoid of any testimony by Officer Butterworth regarding additional ASP baton strikes during this second interaction with Ms. Speed. Although it is arguable that the Board intended the phrase “by his own admission” to refer only to the apprehension of Ms. Speed and not to striking her with a baton, the sentence is unclear, and we cannot affirm on that basis.

Although other witnesses, including Ms. Gates and Ms. Speed, testified about Officer Butterworth’s second interaction with Ms. Speed, the Board did not resolve the conflicts in testimony or expressly credit the testimony of those witnesses with respect to the officer’s second use of the baton. Specifically, the Board did not expressly indicate whether it found the testimony of Ms. Speed and Ms. Gates to be credible, did not address the conflicts in testimony, and did not indicate that it relied on the testimony of Ms. Speed or Ms. Gates in reaching the conclusion that Officer Butterworth engaged in a second interaction with Ms. Speed that involved two additional strikes with an ASP baton. Consequently, although the evidence was legally sufficient to sustain the Board’s findings, the disciplinary action cannot be sustained for the reason given. Because the Board’s findings were expressly based upon admissions made by Officer Butterworth that do not appear in the record, we must vacate the circuit court’s judgment with instructions to remand this case to the Prince George’s County Police Department for further proceedings consistent with this opinion. On remand, the Board shall consider whether to make new findings and recommendations.

Id. at 7-8.

On remand, the Board submitted an amended report to the Department, but made no new findings or recommendations. The Board clarified that the phrase “by his own admission” was intended “to refer only to [Officer] Butterworth stating that he went to Ms. Speed in the [second] altercation because he wanted to apprehend her.” The Board further clarified that, although Officer Butterworth denied striking Ms. Speed during the second altercation, three other witnesses testified that he had done so.

The Board then addressed our concern that its decision did not express findings regarding the credibility of Ms. Speed, Ms. Gates, and Ms. Farkas, resolve conflicts in their testimony, or indicate whether it relied on their testimony in concluding that Officer Butterworth struck Ms. Speed during the second altercation, stating:

The Board acknowledges that there were discrepancies in the testimonies with the number of times [Officer] Butterworth struck Ms. Speed. The Board believed that [the] witnesses’ interpretation of such a dynamic and fast moving event would have been varied due to time of day (approximately 01[:]:51 hours), their individual location, and level of involvement which led to discrepancies in the number of times [Officer] Butterworth struck Ms. Speed. The discrepancies were:

- Ms. Speed stated she was struck approximately 2 times;
- Ms. Gates, who was standing in the yard, stated Ms. Speed was struck approximately 6 or 7 times;
- Ms. Farkas, who was across the street, stated Ms. Speed was struck but could not say how many times.

These discrepancies were considered; however, the Board found these three witnesses to be credible and relied on their testimony in establishing the preponderance of the evidence that [Officer] Butterworth did, in fact, strike Ms. Speed in the second interaction. Their testimonies gave weight to the Board’s finding that it was more likely true than not that [Officer] Butterworth did strike Ms. Speed at least and approximately 2 times in this second engagement. This Board determined this second engagement with Ms. Speed and the subsequent additional ASP strikes were excessive considering Ms. Speed was unarmed, her age (she was 56 at the time of this

incident) and she was considerably smaller in stature than [Officer] Butterworth.

Upon reviewing the Board’s amended report, the Department accepted the Board’s unmodified recommendation that Officer Butterworth be terminated, and issued a Final Disciplinary Action to that effect. The circuit court affirmed, and it is that judgment that is now before us for review.

Additional facts will be included in the discussion as they become relevant.

DISCUSSION

“The standard of review in a LEOBR case ‘is that generally applicable to administrative appeals.’” *Baltimore Police Dep’t. v. Antonin*, 237 Md. App. 348, 359 (2018) (citations omitted), *cert. denied*, 461 Md. 348 (2018), 139 S. Ct. 1214 (2019). We look at the underlying administrative agency decision, not the circuit court’s decision, for the limited purpose of “determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 57 (2002) (citations omitted).

To effectively review the agency’s findings of fact and conclusions of law, we “must be able to discern from the record the facts found, the law applied and the relationship between the two.” *Mombee TLC, Inc. v. Mayor and City Council of Baltimore*, 165 Md. App. 42, 55 (2005) (quoting *Sweeney v. Montgomery County*, 107 Md. App. 187, 197 (1995)) (additional citation omitted). Therefore, the agency must “resolve all significant conflicts in the evidence and then chronicle, in the record, full, complete and detailed

findings of fact and conclusions of law.” *Id.* (quoting *State of Maryland Commission on Human Relations v. Malakoff*, 273 Md. 214, 229 (1974)). We “may not uphold the agency order unless it is sustainable on the agency’s findings and for the reason stated by the agency.” *Blackburn v. Bd. of Liquor License Comm’rs for Baltimore City*, 130 Md. App. 614, 624 (2000) (citation omitted).

When reviewing findings of fact, we apply the “substantial evidence test,” and look only to whether a “reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Baltimore Police Dept. v. Ellsworth*, 211 Md. App. 198, 207-08 (2013) (citation omitted), *aff’d*, 438 Md. 69 (2014). We defer to the agency’s “fact finding and drawing of inferences if they are supported by the record.” *Id.* (citation omitted). “If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact.” *Travers v. Baltimore Police Dep’t*, 115 Md. App. 395, 421 (1997) (quoting *Comm’r, Baltimore City Police Dep’t v. Cason*, 34 Md. App. 487, 508 (1977)).

Officer Butterworth contends that there was a lack of substantial evidence to support the Board’s finding that he struck Ms. Speed during the second encounter.³ Alternatively, Officer Butterworth claims that the Board’s finding cannot be sustained because it is based on “significant factual inaccuracies,” specifically, that (1) Ms. Gates testified that Officer

³ Officer Butterworth does not challenge the Board’s legal conclusion that striking Ms. Speed with his ASP baton was a violation of Department policy regarding use of force.

Butterworth struck Ms. Speed only three to four times with his ASP baton during the second encounter, not six to seven times as stated in the Board’s amended report⁴; (2) Ms. Speed stated that she was struck twice during the second encounter; and (3) Ms. Farkas’s testimony was inconclusive regarding whether and how many times Ms. Speed was hit during the second encounter.

Significantly, Officer Butterworth concedes, as he did in the previous appeal, that the Board’s finding is adequately supported by the testimony of Ms. Speed and Ms. Gates. He asserts, however, that there is a “problem with [the Board’s] logic” in relying on their testimony, and that of Ms. Farkas, because, according to him, all three witnesses were “previously noted to be non-credible” on the issue of whether Officer Butterworth tackled Ms. Speed to the ground, as alleged in Charge Two. He asserts that “[a] reasoning mind could not conclude, on the one hand, that the discrepancies amongst the witnesses precluded a finding that [Officer Butterworth] used excessive force in taking Ms. Speed to the ground[,]” and, “on the other hand, find that the discrepancies amongst those very same witnesses should be accepted with respect to the second engagement involving the ASP baton[.]” Even if we were to agree with Officer Butterworth, he would not be entitled to any relief as his argument pertains to the credibility of the evidence and not to whether the evidence presented at the hearing, regardless of its credibility or lack thereof, *Travers*, 115

⁴ Ms. Gates stated that she saw Officer Butterworth hit Ms. Speed a total of six or seven times: “three before she went in the house,” and “three or four more times” during the second encounter.

Md. App. at 421, would reasonably allow a “reasoning mind” to conclude, as the Board did here, that he hit Ms. Speed with his baton during the second encounter.

As an initial matter, we note our disagreement with the premise that the witnesses were found by the Board to be “non-credible” with respect to the facts relevant to Charge Two, which was based on an allegation that he “physically tackled” Ms. Speed to the ground. In finding Officer Butterworth not guilty of that charge, the Board made no express findings as to the credibility of the witnesses. The Board stated only that it was “not convinced” that Officer Butterworth tackled Ms. Speed to the ground, explaining that, Ms. Speed testified that she was “dragged by Officer Butterworth,” Ms. Gates testified that Ms. Speed was “pulled down the stairs by Officer Butterworth and was on the ground the entire time,” Ms. Farkas testified that Ms. Speed “sat on the ground,” and Officer Snoddy testified that Ms. Speed was “tackled by Officer Butterworth.” It appears that the Board was not questioning the credibility of Ms. Speed, Ms. Gates or Ms. Farkas, but rather, found that the evidence, as a whole, did not sufficiently establish that Officer Butterworth “physically tackled” Ms. Speed to the ground.

In any event, even assuming that the Board had found that the witnesses were not credible on the issue of whether Officer Butterworth physically tackled Ms. Speed, that finding would not compel the Board to conclude that they were not credible on any other issue of fact. The Board, in its role as the finder of fact, was free to believe part of the witnesses’ testimony and disbelieve other parts of the witnesses’ testimony. *Brown v. State*, 234 Md. App. 145, 160 (2017) (citation omitted).

Based on our review of the evidence presented at the hearing, and the detailed findings that the Board provided on remand, we conclude that there was substantial evidence to support the Board’s finding. Ms. Speed and Ms. Gates clearly testified that Officer Butterworth hit Ms. Speed with his baton during the second encounter. There were no significant conflicts in their testimony. The slight variation in their testimony as to the number of times that Officer Butterworth hit Ms. Speed during the second encounter was both insignificant and irrelevant.

Moreover, contrary to Officer Butterworth’s assertion that Ms. Farkas’s testimony “provides no insight,” her testimony supports an inference that Officer Butterworth used his baton to hit Ms. Speed during the second encounter. Ms. Farkas responded affirmatively when she was asked if she was present the “entire time.” She stated that she saw the officer hitting Ms. Speed repeatedly, and that, “after [the officer] had start[ed] hitting her he ordered her to sit down . . . by her door steps.” She then saw Ms. Speed, in handcuffs, getting up from the ground and being escorted to the police car.

It was reasonable to infer from this testimony that Ms. Farkas witnessed Officer Butterworth hitting Ms. Speed during the second encounter, as she was being arrested. *See Travers*, 115 Md. App at 420 (If an inference, “drawn by an agency, of the existence of a fact not shown by direct proof . . . reasonably follows from other facts which are shown by direct proof . . . the [reviewing] court has no power to disagree with the fact so inferred.”) (quoting *Cason*, 34 Md. App. at 508.)

We are satisfied that, from the evidence presented at the hearing, and for the reasons stated by the Board in its amended report, a “reasoning mind reasonably could have”

concluded that Officer Butterworth hit Ms. Speed with his baton during the second encounter. Accordingly, we conclude that there was substantial evidence to support the Board’s finding.

The second question raised on appeal is whether the Board resolved all significant conflicts in the evidence. Officer Butterworth asserts that meaningful judicial review of the Board’s findings “remains elusive” because (1) the Board did not explain why it found the testimony of Ms. Speed, Ms. Gates, and Ms. Farkas credible as to Charge One, but “unreliable” as to Charge Two, and (2) the Board did not explain why it resolved discrepancies in the witnesses’ testimony pertaining to Charge One by attributing the differences in their accounts to the witnesses’ varied perception of the incident, but did not apply the same explanation to Charge Two.

This argument is flawed, as it does not point to a significant, unresolved conflict in the evidence that the Board relied upon to make the finding that is at issue in this appeal. Instead, it is a claim that the Board’s credibility assessments were illogical or inconsistent. Even if we found merit in the claim, which we do not, Officer Butterworth would not be entitled to relief, as we “have no power to substitute our assessment of credibility for that of the agency” if, as we have already concluded, “there was evidence in the record to support the findings of fact in the record before the agency.” *Fire and Police Employee’s Retirement System of Baltimore v. Middleton*, 192 Md. App. 354, 359 (2010).

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