Circuit Court for Prince George's County
Case No. CAL 16-38047

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 567

September Term, 2018

MICHAEL BROWN

v.

PRINCE GEORGE'S COUNTY
POLICE DEPARTMENT

Wright,
Nazarian,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: June 7, 2019

Appellant, Corporal Michael Brown ("Cpl. Brown"), was employed as a police officer by appellee, the Prince George's County Police Department ("the PGPD"). The PGPD charged Cpl. Brown with violating seven provisions of PGPD's General Orders. After a hearing pursuant to the Law Enforcement Officers' Bill of Rights ("LEOBR"), the PGPD's Administrative Hearing Board ("the Board") found Cpl. Brown guilty of three of the charges.[1] Based on the Board's recommendations, PGPD terminated Cpl. Brown on September 6, 2016.

Cpl. Brown petitioned the Circuit Court for Prince George's County for judicial review, and the circuit court affirmed the Board's decision. Cpl. Brown timely appealed and presents the following question for our review, which we have consolidated:[2]

1. Are the Board's factual findings supported by substantial evidence?

For the reasons discussed below, we answer this question in the affirmative and affirm the rulings of the circuit court.

BACKGROUND

[1] *See generally*, Md. Code (2003, 2011 Repl. Vol.), § 3-101, *et seq.*, of the Public Safety Article ("PS"). Cpl. Brown then requested a hearing before the Board under PS §§ 3-107 & 3-108.

[2] Cpl. Brown presented the following issues for our review:

1. Was there substantial evidence to support the [Board's] guilty findings as to Charges 1, 2, and 7 or, in the alternative, did the [Board] fail to resolve all significant conflicts in the evidence with respect to Charges 1, 2, and 7?

2. Did the [Board] err as a matter of law in finding Cpl. Brown guilty of Charge 1?

On July 14, 2014, Cpl. Brown attended a concert at the Howard Theatre in Washington, D.C. with his wife, his long-time friend and "brother," Mark McCutcheon, and McCutcheon's wife. At the time, Cpl. Brown was a Corporal in the PGPD and was off-duty.

Shortly after 9:00 or 9:30 p.m., the group exited the theatre and McCutcheon went to the valet attendant booth to retrieve his car. McCutcheon found his car's battery dead and believed it was due to a valet attendant leaving the vehicle's lights on. He demanded a refund from the valet attendant, which the attendant refused. Cpl. Brown offered to "jump" start McCutcheon's vehicle using his own and left to get his vehicle.

While Cpl. Brown was getting his vehicle, a valet supervisor, Sameal Molla, spoke with McCutcheon. Cpl. Brown was standing outside of his vehicle when his wife yelled "Oh, my God, they're fighting." Cpl. Brown turned and saw McCutcheon and Molla fighting. He ran across the street and struck Molla using a *brachial stun* [striking one from behind on the side of his head] or an *ear clap*, bringing Molla to his knees. Cpl. Brown's strike of Molla led other valet attendants to come to Molla's aid, and a brawl began between Cpl. Brown, McCutcheon, Molla, and other attendants. An unidentified valet attendant grabbed a pipe from the valet kiosk and tried to strike McCutcheon and Cpl. Brown.

Cpl. Brown and McCutcheon retreated to their vehicles. As the two retreated, one of the valet attendants threw a valet sign in their direction. Cpl. Brown turned and saw a group of individuals crossing the street. Cpl. Brown told his wife to get on the other side

of the vehicle for cover from the approaching group. Fearing for his wife's safety, Cpl. Brown retrieved his off-duty service weapon from the glove compartment of his vehicle.

Cpl. Brown, armed with his gun, and McCutcheon, brandishing a tire iron, returned to the front of the Howard Theatre. Cpl. Brown approached the group of valet employees holding the weapon in a "low safety" position. Cpl. Brown ordered Molla, who was holding a pipe, to "drop the pipe" and "get down on the ground." As Cpl. Brown held Molla at gunpoint, Molla yelled "call the police." Subsequently, the Metropolitan District of Columbia Police Department ("the MCPD") received several calls about a "man with a gun" in front of the Howard Theatre. Cpl. Brown reholstered his weapon and placed it back in his vehicle's glove compartment before MCPD officers arrived. The MCPD officers arrested Cpl. Brown and charged him with assault with a deadly weapon and simple assault.

MCPD Interviews

After the incident, MCPD officers interviewed Cpl. Brown. Cpl. Brown told MCPD officers that Molla was the initial aggressor in the fight and that he *ear clapped* Molla to disengage the fight and help McCutcheon. Cpl. Brown also told the officers that he reholstered his weapon after Molla dropped the pipe.

The MCPD also interviewed Omar Stephenson ("Stephenson"), a witness to the incident, and Derrick Brown ("Officer Brown"), an off-duty MCPD officer who was at the scene. Stephenson told officers that he tried to diffuse the fight between McCutcheon and Molla, but Cpl. Brown aimed his weapon at him. He said that Cpl. Brown aimed the

gun at him and Molla. Officer Brown told MCPD that Cpl. Brown pointed his service weapon at Molla and yelled, "I'm the police. I'm the police. Get down." Officer Brown testified that he called MCPD dispatchers to let them know "that we needed units and . . . one of the guys had a gun."

Internal Affairs Unit Investigation

On November 25, 2015, about sixteen months after the incident, Sergeant Kyle Bodenhorn ("Sgt. Bodenhorn") of the PGPD, interviewed Cpl. Brown for his Internal Affairs Investigation report. During the interview, Cpl. Brown stated that he struck Molla using a *brachial stun*. Cpl. Brown also said he ordered Molla to "get on the ground" and "drop the pole" multiple times. He said that he "disengaged" and reholstered his weapon after Molla dropped the pole.

The Disciplinary Action Recommendation ("the DAR")

Following Sgt. Bodenhorn's report, the PGPD issued a Disciplinary Action Recommendation ("DAR") concerning Cpl. Brown's actions on July 10, 2014, and his November 25, 2015 interview with Sgt. Bodenhorn. The DAR alleged the following violations:

> Charge #1 (Unbecoming Conduct): Assaulting Molla using his hand and striking Molla in the back of the head.
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> Charge #2 (Violation of Laws; Misrepresentation of Fact): Intentionally misrepresenting the type of strike he used against Molla during his November 25, 2015 interview with Sgt. Bodenhorn.
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> Charge #3 (Violation of Laws; Misrepresentation of Fact): Misrepresenting when he reholstered his gun during his interview with Sgt. Bodenhorn.

Charge #4 (Unbecoming Conduct): Holding Molla at gunpoint while McCutcheon assaulted him.

Charge #5 (Unbecoming Conduct): Assaulting Molla by striking him and holding Molla at gunpoint.

Charge #6 (Use of Language): Yelling "Fuck" at Molla.

Charge #7 (Display of Firearm Prohibited): Threatening and intimidating valet staff with the use of his firearm.

Administrative Hearing Board

Cpl. Brown's administrative hearing occurred over two days, beginning on July 16, 2016. Sgt. Bodenhorn, an expert in police practices and use of force, reviewed the surveillance video in the case. He testified as to his interview with Cpl. Brown and reviewed the statements of people he did not interview. He testified that his review of the surveillance video showed that Cpl. Brown "struck" Molla in the "back of the head." Sgt. Bodenhorn also testified that there were two discrepancies in his interview with Cpl. Brown: (1) that Cpl. Brown stated he used a *brachial stun* during his interview with Sgt. Bodenhorn, but during his interview the night of the incident with the MCPD, Cpl. Brown said that he *ear clapped* Molla, and (2) the surveillance video did not corroborate Cpl. Brown's recollection that he reholstered his weapon after Molla dropped the pipe.

Stephenson, Detective Chrystal Boyd ("Det. Boyd"), and Officer Brown also testified. Stephenson testified that he tried to diffuse the fight and saw that Cpl. Brown was holding Molla at gunpoint. Det. Boyd testified about her interviews with Molla and Cpl. Brown. Officer Brown testified that he called 911 in response to the fight between

McCutcheon and Molla. Officer Brown also testified that Cpl. Brown aimed his gun at Molla.

On the second day of the hearing Cpl. Brown and two expert witnesses testified. Cpl. Brown testified that, in defense of McCutcheon, he struck Molla using a *brachial stun*. He also testified that he drew his off-duty weapon because he feared a group of individuals would harm his wife.

Corporal George Harley ("Cpl. Harley"), an expert in the use of force in police practices, who reviewed the surveillance footage also testified. Cpl. Harley testified that PGPD did not teach its officers *ear claps*, which he defined as a "strike to the ears," because if done with too much force, an ear clap could damage an individual's eardrums. However, Cpl. Harley said that *brachial stuns* were taught at the PGPD because they found no "lasting effects from it." He also testified that *brachial stuns* were a "high level of force" and were a "hard personal weapon strike" under the PGPD's use of force continuum. Cpl. Harley noted that PGPD officers would be familiar with PGPD's General Orders, which contained the use of force continuum.

Cpl. Harley further testified that Cpl. Brown's strike of Molla was unjustified because the video surveillance showed that McCutcheon and Molla were engaged in a shoving match and were not actively fighting. Cpl. Harley noted that Brown's continued use of his weapon after Molla dropped the pole was "more force than needed at that point." It was Cpl. Harley's position that Molla's threat level was low, given the lack of

his weapon and his placement across the street from Cpl. Brown, which he testified "[gave] [Cpl. Brown] more time to evaluate and react appropriately to a threat."

On cross examination, Cpl. Harley testified that if an officer perceived that an assault was taking place, or that the threat of an assault was imminent, a high-level force response would be appropriate. He also testified that in assessing a threat, an officer could consider whether an object could cause a risk of death or serious bodily harm, and whether the officer was outnumbered.

Mr. Paul Mazzei ("Mr. Mazzei"), an expert in the field of police use of force training and defense tactics, testified as to *brachial stuns*, the reasonableness of Cpl. Brown's strike against Molla, and opined that Cpl. Brown's use of his gun was warranted given the level of the threat.

The Board's Findings

On July 25, 2016, the Board found Cpl. Brown guilty of Charges 1, 2, 6, and 7, and recommended termination for charges 1, 2, and 7, and 20 hours of leave without pay for charge 6. On September 6, 2016, the Assistant Chief of Police issued a Final Disciplinary Action and terminated Cpl. Brown's employment. Additional facts will be presented as necessary below.

STANDARD OF REVIEW

The Court of Appeals has described the standard of judicial review applicable to proceedings under the LEOBR as follows:

> We have concluded that the scope of judicial review in a LEOBR case is that generally applicable to administrative appeals. Thus, to the extent that

> the issue under review turns on the correctness of an agency's findings of fact, judicial review is narrow. It is limited to determining if there is substantial evidence in the administrative record as a whole to support the agency's findings and conclusions. While an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts, we owe no deference to agency conclusions based upon errors of law.

Coleman v. Anne Arundel Cty. Police Dep't, 369 Md. 108, 121-22 (2002) (cleaned up).[3]

The Court of Appeals has further explained that:

> In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it; . . . the agency's decision is *prima facie* correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.

Motor Vehicle Admin. v. Carpenter, 424 Md. 401, 412-13 (2012) (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005)) (internal quotation marks omitted).

This Court "may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness." *Md. Dep't of Environment v. Anacostia*

[3] The Court of Appeals recently explained the recent increase in use of "cleaned up" as a parenthetical. The parenthetical "signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotations marks, ellipses, footnote signals, internal citations, or made un-bracketed changes to capitalization) without altering the substance of the quotation." *Lopez v. State*, 458 Md. 164, 195 n.13 (2018).

Riverkeeper, 447 Md. 88, 120 (2016) (quoting *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 399 (1979)).

DISCUSSION

Charge #1: Cpl. Brown's Assault of Molla

The Board found that "[Cpl. Brown] reacted unreasonably by running across the street and striking [Molla] with an unwarranted strike from behind on the side of his head, causing him to fall to his knees." Cpl. Brown argues on appeal that there is no substantial evidence that he assaulted Molla by striking him on the side of the head. Specifically, he argues that the Board should have used the criminal definition of assault rather than the common definition of the word. PGPD responds that substantial evidence supports the Board's findings that Cpl. Brown assaulted Molla by striking him on the side of the head.

It is beyond dispute that an assault is an unwanted physical attack on an individual. Cpl. Brown argues that the Board should have applied the criminal definition of assault and considered his defense of others claim. The PGPD responds that "nothing in PGPD's General Orders requires the Board to apply the criminal definition of assault." We agree.

LEOBR proceedings "have some indicia of criminal trials[,]" but are disciplinary in nature. *Meyers v. Montgomery Cty. Police Dep't*, 96 Md. App. 668, 703 (1993). This was not a criminal proceeding, and the Board did nor err in using a common definition of assault. Assuming *arguendo* that the Board erred, both *brachial stuns* and *ear claps*

would meet any and all definitions of assault. *See Snowden v. State*, 321 Md. 612, 617 (1991) (defining assault as "the unlawful application of force to the person of another."). Assault encompasses battery, which is the intentional touching of another person without their consent. Maryland Pattern Jury Instructions-Civil 15:2; *Saba v. Darling*, 72 Md. App. 487, 491-92 (1987) (an assault and battery "consists of an unpermitted application of trauma by one person upon part of the body of another").[4]

The Board found Cpl. Brown's strike of Molla "unwarranted" because McCutcheon had martial arts expertise and could presumably defend himself. Cpl. Brown testified that he ran across the street to defend McCutcheon because six or seven individuals were going to "jump" him. Despite this, the Board disbelieved Cpl. Brown's defense of others claim, when it found that Cpl. Brown's actions were "unwarranted." We will not substitute our own inferences for those of the Board. *See Board of Cty. Comm'rs v. Holbrook*, 314 Md. 210, 218 (1988).

Cpl. Brown next argues that there is insubstantial evidence to support the finding that he struck Molla on the side of the head. Cpl. Brown avers that he hit Molla in the neck or ear, and he points to photographic evidence of Molla's injuries and the testimony of Cpl. Harley and Mr. Mazzei to support his contention.

There was substantial evidence for the Board to find that Cpl. Brown struck Molla in the head. Cpl. Brown testified that he used the heel of his palm to strike the right side

[4] An explanation of the civil definition of assault is more applicable in this case because it appears that LEOBR proceedings are most analogous to that which would arise in the civil context.

of Molla's neck below his ear. Sgt. Bodenhorn testified that the surveillance video shows Cpl. Brown strike Molla in the back of the head. Stephenson testified that he saw Cpl. Brown punch Molla on the side of his head. Det. Boyd testified that Molla said Cpl. Brown "ran up behind him and punched him in the head." Cpl. Brown also told Det. Boyd he struck Molla in the side of the head. Regardless of whether we apply the common, criminal, or technical definition of assault, substantial evidence supports the Board's finding that Cpl. Brown assaulted Molla by striking him in the head.

Contrary to Cpl. Brown's claims, the location of Molla's exact injury is a red herring. We do not find it necessary for the Board to find with specificity that Molla's neck or ear is different from his head. *See Tippery v. Montgomery County Police Dept.*, 112 Md. App. 332, 341 (1996) (holding that a hearing board did not have to respond with a "degree of specificity" that appellant hit the victim with his fist). A reasonable mind could infer that a strike to the neck or ear *is* a strike to the head, as all three body parts are undisputedly in close proximity.[5]

Charge #2: Misrepresentation of Fact

The Board found that "[Cpl. Brown], with his extensive background and training in law enforcement, knew the difference between an *ear clap* and a *brachial stun* and intentionally misrepresented how he struck [Molla] [to] avoid being held administratively responsible for employing an *ear clap*, an unauthorized use of force." (Emphasis added).

[5] The old [African American] spiritual "Dem Bones" advises that "the head bone is connected to the neck bone," etc, etc, etc.

Cpl. Brown argues that he did not intentionally misrepresent this strike and further avers that the Board did not resolve Mr. Mazzei and Cpl. Harley's testimony.[6] The PGPD responds that Cpl. Brown's knowledge of *brachial stuns* supports the Board's findings.

The substantial evidence test requires us to determine whether reasoning minds could have reached the conclusion the Board reached, and we defer to the Board's ability to judge the credibility of the witnesses. *See Tippery*, 112 Md. App. 332 at 340-41 (citations and quotations omitted). The night of the incident, Cpl. Brown told MCPD officers that he struck Molla using an *ear clap*. About sixteen months later at the internal investigation hearing and again at the administrative hearing, Cpl. Brown described the strike as a *brachial stun*.

As the factfinder, the Board was in the best position to evaluate Cpl. Brown's credibility. *See Anacostia Riverkeeper*, 447 Md. at 120 (quotations omitted). The Board could infer that Cpl. Brown's recollection of the strike was freshest hours after the incident occurred, and that Cpl. Brown misrepresented the strike to Sgt. Bodenhorn because he was under investigation. A reasonable mind could infer that Cpl. Brown, a PGPD officer, knew which use of force practices were authorized, either officially or in practice. There is substantial evidence in the record to support the Board's finding that

[6] Cpl. Brown argues at length in his brief that the Board failed to resolve the conflicting testimony of Mr. Mazzei and Cpl. Harley. However, the question of *where* the strike landed is not dispositive in answering whether Cpl. Brown intentionally misrepresented the type of strike he used during his interview with Sgt. Bodenhorn.

Cpl. Brown intentionally misrepresented whether he struck Molla with an *ear clap* or a *brachial stun*.

Charge #7: Display of a Firearm

The Board found that the "Department met the burden of proof beyond a preponderance of the evidence that when [Cpl. Brown] pointed his handgun towards the valet kiosk, this was threatening and intimidating, causing several attendants and bystanders to run and seek cover." The Board also found that "[i]nstead of employing tactical disengagement," Cpl. Brown displayed his firearm.

Before the Board, Stephenson testified the ways in which Cpl. Brown escalated an already tense situation:

> [K]ept approaching the situation - [Molla] - with - with - in a physical way, but at the same time his police friend was tellin' him to - to get down on the ground. And the - the valet guy said, "I'm not getting' down on the ground." And that was when I [tried] to [step] in between the police officer and the guy who was tellin' him to get on the ground, that, "No, no, no, you can't do that." You know? He pointed the gun at me and [told] me to back up. And I'm like, "I'm not gonna back up. No, you need to back up [off] him and let us get this guy in the buildin' and diffuse the situation." By that point in time [Cpl. Brown and McCutcheon] kept [coming] at [Molla], right? So it wasn't like he was actin' as a police officer. He was more actin' as a - he was defending his friend because at the same time he was tellin' me to get on the ground[.]
>
> * * *
>
> But that in itself was troubling and I think the guy didn't get on the ground because while he was ordering [Molla] to get on the ground, tall guy was still advancing towards [Molla] to beat him up. So why would he get down on the ground somebody holding a gun to you and somebody's - who he's supporting trying to beat him up at the same time.

Cpl. Brown argues that his gun may not have been the *sole* cause of the fear bystanders experienced; however, all the 911 calls were about Cpl. Brown's service weapon. The callers described a "man with a gun." At the time of the 911 calls, Cpl. Brown was the only person displaying a gun outside of the Howard Theatre. By contrast, the MCPD received no calls reporting a man with a pipe or tire iron. The Board could have reasonably inferred that 911 calls reporting a gun were indicative of fear and intimidation caused by Cpl. Brown's display of his gun.

Substantial evidence supports the Board's finding that Cpl. Brown's use of his gun was not "tactically necessary." Cpl. Brown testified that when he retrieved his gun from his vehicle, the valet attendants were on the other side of the street but believed "everyone . . . not with [him] was a threat." Stephenson testified that those alleged aggressors were crossing the street to calm Cpl. Brown and McCutcheon down. Multiple witnesses testified that the fight was over before Cpl. Brown retrieved his weapon. It was well within the purview of the Board to credit their testimony and disbelieve Cpl. Brown. Substantial evidence in the record supports the Board's finding.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.