Circuit Court for Prince George's County
Case No. CAL 17-41088

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1020

September Term, 2018

JEFFREY VAN CLEAVE

v.

LAUREL CITY POLICE DEPARTMENT

Berger,
Nazarian,
Beachley,

JJ.

Opinion by Nazarian, J.

Filed: September 12, 2019

While responding to a burglary in progress at Indus Food Mart during the late evening of April 10, 2016, Officer Jeffrey Van Cleave unintentionally shot a suspect who had emerged unexpectedly from a well just beyond a set of doors. In response to the incident, the Laurel City Police Department initiated an internal investigation and found Officer Van Cleave guilty of unauthorized use of force (Charge #1), careless handling of weapon (Charge #2), and failing to properly perform duties (Charge #3), and recommended disciplinary action. Officer Van Cleave requested review by the Administrative Hearing Board (the "Board"), and the Board upheld the decision as to Charges #1 and #2 and the corresponding discipline. The Officer sought judicial review in the Circuit Court for Prince George's County, which upheld the Board's decision, and we affirm it as well.

I. BACKGROUND

On April 10, 2016, Officer Van Cleave was a Corporal in the Laurel City Police Department. At around 11:15 that night, he and other officers responded to a call for service at Indus Food Mart.[1] Laurel Police Department Communications received the call as a burglary in progress.

The officers apprehended the first suspect quickly. When asked whether anyone else was with him, the suspect replied that there wasn't. A group of officers that included Officer Van Cleave decided to try and enter the Food Mart from the rear to search and secure the building. As they looked for another way into the building, Officer Van Cleave noticed a set of "head high windows" embedded in a rear door. He used his flashlight,

[1] The store had been burglarized several times before.

which was mounted on his departmentally issued firearm, to look through the windows and detected no movement. Officer Van Cleave then pulled the doors open. After looking into the room, a shot rang out from Officer Van Cleave's firearm, and a person just beyond the door and several feet lower was shot.

Before he had pulled the doors open, Officer Van Cleave had switched his departmentally issued firearm from his right hand (he is right-handed) to his left. Immediately after opening the doors, Officer Van Cleave looked down in front of him, then out toward the far wall of the room. As soon as he saw the far wall, "a head and shoulders pop[ped] up . . . . [a]bout a foot and a half away." Officer Van Cleave testified at the administrative hearing that the movement "scared the hell out of" him because "people shouldn't pop up out of floors." When asked by his counsel whether he experienced any physical sensations in that moment, Officer Van Cleave responded that he did not feel his finger come off the touch point, did not feel any recoil, and did not recollect switching his firearm back to his right hand and holstering it.[2] Officer Van Cleave then pulled the suspect out of the room and began first aid.

In response to this incident, Lieutenant Brad DiPietro of the Laurel City Police Department conducted an internal investigation. After interviewing all of the responding officers, including Officer Van Cleave, Lieutenant DiPietro found that Officer Van Cleave had violated three provisions of the Laurel Police Department General Orders Manual (the "Manual"):

[2] Body camera footage revealed that Officer Van Cleave did indeed re-holster his firearm.

Specification #1: On April 10, 2016, Cpl. Van Cleave responded to a burglary in progress at Indus Foods, 900 Fourth Street. While conducting a search of the building, he opened a rear door and came in contact with a suspect. Cpl. Van Cleave was startled by the encounter and discharged his firearm, striking the suspect in the back, in a situation where deadly force was not authorized.

Charge #1: 4/107 Use of Force

4/107.20 Procedures

A. General

6. Sworn personnel, acting in their officer capacity, shall not use unnecessary or excessive force

Finding: Sustained

Specification #2: On April 10, 2016, Cpl. Van Cleave responded to a burglary in progress at Indus Foods, 900 Fourth Street. While conducting a search of the building, he opened a rear door and came in contact with a suspect. Cpl. Van Cleave was startled by the encounter and discharged his firearm, striking the suspect in the back, in a situation where deadly force was not authorized.

Charge #2: 1/121 Handling of Weapons

1/121.15 Procedures

A. Handling of Weapons

1. Weapons shall not be used or handled in a careless or imprudent manner and shall be used in accordance with established Department procedures.

Finding: Sustained

Specification #3: On April 10, 2016, Cpl. Van Cleave responded to a burglary in progress at Indus Foods, 900 Fourth Street. While conducting a search of the building, he opened a rear door and came in contact with a suspect. Cpl. Van Cleave was startled by the encounter and discharged his firearm, striking the suspect in the back, in a situation where deadly force was not authorized.

Charge #3: 1/154 Attention to Duty

1/154.20 Procedures

A. General

1. Employees shall maintain a strong

> personal commitment to perform their duties properly.
>
> a. Failure to honor this commitment results in:
>
> 1. A reduction of professional standards
> 2. A potential decrease of public service
> 3. A potential increase of jeopardy to others

Finding: Sustained.

Lieutenant DiPietro recommended disciplinary action for each violation: a demotion to Private First Class and a written reprimand for Charge #1, removal from the firearms training unit as an instructor, removal from the Emergency Response Team, and loss of 40 hours of leave for Charge #2, and loss of 40 hours of leave for Charge #3.

Officer Van Cleave exercised his right under Maryland Code (2003, 2018 Repl. Vol.) § 3-107(a)(1) of the Public Safety Article[3] and asked for an administrative hearing to respond to the charges and recommended discipline. The Board convened on October 25, 2017 and heard testimony from all the officers who responded to the burglary, including Officer Van Cleave. The Board viewed body camera footage of the incident. Officer Van Cleave's counsel also qualified Sergeant William Gleason as an expert on use of force science, firearms training, and the effect of interlimb reflex. After reviewing all witnesses'

[3] Section 3-107(a)(1) states the following:

> [I]f the investigation or interrogation of a law enforcement officer 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 by a hearing board before the law enforcement agency takes that action.

testimony and body camera footage, Sergeant Gleason opined that the shooting was the result of interlimb reflex, and not an intentional act on Officer Van Cleave's part:

> [B]ased on everything that I've seen and that I've heard that this is, to me, my opinion is, is that this was a interlimb reflex, that he was startled. . . . There was no negligence. He did everything that he should have done. He was justified in having his weapon out. He had his finger high on the slide or his touch point. . . . And unfortunately, we are human beings as police officers. We're not robots. So, we're subject to physiological responses to stress, and one of them is that unintentional clutching. And I just don't think he had any control over it. Sometimes we see there's a–there's a difference between the term accidental discharge and unintentional. Accidentals are where the officer had his finger on the trigger and shouldn't have. Did something he–there was negligence there. He did something he was trained not to do. Uh, we've all seen the accidental discharge of, you know, people cleaning their firearms and doing the function test. That's–that's negligent. I just don't think there was any negligence in this case. I think he did everything, um, to his training, did everything, you know, by policy and unfortunately, was just startled by something that he just didn't expect in an unseen area, and you can see him go back. . . . I think that based on the shot placement where it hit the suspect and how the suspect was–was low, that it wasn't like, um Corporal Van Cleave had time to assess and then, you know, we all know the reaction time formula, you know, perceive . . . analyze, formulate, initiate, that if–if he would have time to think about all this stuff, he would have shot the suspect as he was already standing as opposed to the suspect still being down. That's how quick that happened in–in my opinion that he was startled. He couldn't overcome that–that startled response.

The Board found Officer Van Cleave guilty of Charges #1 and #2, and not guilty of Charge #3. The Board recommended demotion to the rank of Private First Class and a written reprimand as discipline for Charge #1, and loss of 40 hours of annual leave as discipline for Charge #2.

Officer Van Cleave filed a timely Petition for Judicial Review in the Circuit Court for Prince George's County. He raised two contentions: *first*, that the record did not contain substantial evidence to support a guilty finding on Charges #1 and #2; and *second*, that the Board erred in finding him guilty of violating the Manual's use of force procedures without first finding that he had acted intentionally. The circuit court upheld the Board's decision, finding substantial evidence to support the guilty findings and that the Board had not made any erroneous conclusions of law. Officer Van Cleave filed a timely notice of appeal.

We supply additional facts as necessary below.

II. DISCUSSION

Officer Van Cleave raises here the same issues that he raised in the circuit court.[4] He asks us to reverse the Board's findings and conclusions, and to reinstate him to the rank of Corporal with back pay and benefits, for two reasons: *first*, that the Board's findings that he was guilty of Charge #1 and Charge #2 were not supported by substantial evidence; and *second*, that the Board erred as a matter of law by finding Officer Van Cleave guilty of Charge #1 and Charge #2 without first finding that he intentionally discharged his firearm.

[4] Officer Van Cleave stated the Questions Presented in his brief as follows:

> 1. Did the AHB lack substantial evidence to find Van Cleave guilty of Charges #1 ("Use of Force") and #2 ("Handling of Weapons")?
> 2. Did the AHB render an erroneous legal conclusion in finding Van Cleave guilty of Charges #1 ("Use of Force") and #2 ("Handling of Weapons") where the evidence clearly demonstrated that Van Cleave unintentionally discharged his firearm?

We look through the circuit court's decision and review the Board's decision directly, *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 430 (2015), and, on this record, affirm the judgment.

A. Substantial Evidence Supported The Board's Conclusions As To Charges #1 and #2.

We review administrative agency rulings against a highly deferential standard. We don't substitute our judgment for the agency's—we uphold an agency's fact findings so long as "a reasoning mind reasonably could find the evidence before it." *Trinity Assembly of God of Balt. City v. People's Counsel for Balt. Cty.*, 178 Md. App. 232, 248 (2008) *aff'd*, 407 Md. 53 (2008). When deciding whether substantial evidence exists to support an administrative agency's conclusions, we examine the factual findings provided by the agency. *Md. State Bd. of Dental Exam'rs v. Tabb*, 199 Md. App. 352, 383 (2011). An agency must articulate its findings of fact in a meaningful way "and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." *Id.* (cleaned up). In evaluating an agency's conclusions, "[w]e appraise an agency's fact finding in the light most favorable to the agency, and this deference extends to subsequent inferences drawn from that fact finding, so long as supported by the record." *Marks v. Criminal Injuries Comp. Bd.*, 196 Md. App. 37, 58 (2010). We defer as well to the inferences the agency draws from the facts because that is "the agency's province." *Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115, 128 (2008). The question for us is not whether an inference is correct, but whether it can reasonably be drawn from the record. *Becker v. Anne Arundel Cty.*, 174 Md. App. 114, 138 (2007) ("The test for reviewing the inferences

drawn is reasonableness, not rightness."). And we reverse an agency's decision only where it drew impermissible or unreasonable inferences and conclusions from the record. *Bereano v. State Ethics Comm'n*, 403 Md. 716, 756 (2008).

Officer Van Cleave concedes, as the Board concluded, that the suspect did not pose an imminent threat of death or serious bodily harm at the time Officer Van Cleave shot him and that he failed to conduct a threat assessment before discharging his firearm. He argues nevertheless that the discharge resulted from physiological factors beyond his control, as his expert testified. By declining to afford appropriate (and, effectively, dispositive) weight to this testimony, he contends, the Board reached the "cryptic" and "inherently flawed" conclusion that he violated the Manual's provisions governing the use of force and handling of weapons.

The core facts aren't in dispute. Officer Van Cleave testified himself that he didn't perceive a threat from the suspect and that he didn't conduct a threat assessment before shooting:

> [COUNSEL FOR OFFICER VAN CLEAVE[5]]: Okay. What, if anything, do you see once those doors are opened wider?
>
> [OFFICER VAN CLEAVE]: Um, so I clear near to far. Once I pop the doors, um, I looked down and I look out. Um, I don't see anything down in front of me. I look and I see the far wall. As soon as I see the far wall, a head and shoulders pops up. Um, even with my left leg down below my waist, probably below my knee or at my knee, um, about that far away.
>
> [COUNSEL FOR OFFICER VAN CLEAVE]: About a…

[5] The transcript identifies speaker "Q2" as Lieutenant Brad DiPietro, but a close reading of the transcript reveals that "Q2" is counsel for Officer Van Cleave.

> [OFFICER VAN CLEAVE]: About a foot and a half away.
>
> [COUNSEL FOR OFFICER VAN CLEAVE]: Okay. What did you believe that that object was or that movement was?
>
> [OFFICER VAN CLEAVE]: I don't think I had time to assess what that object or movement was. Um, it just–it wasn't there and then all of the sudden, it was popping up towards me.
>
> [COUNSEL FOR OFFICER VAN CLEAVE]: So what–what effect did that observation have upon you?
>
> [OFFICER VAN CLEAVE]: Well, it scared the hell out of me.
>
> [COUNSEL FOR OFFICER VAN CLEAVE]: Any…
>
> [OFFICER VAN CLEAVE]: It's shocking, very shocking.
>
> [COUNSEL FOR OFFICER VAN CLEAVE] Any particular reason why that scared the hell out of you?
>
> [OFFICER VAN CLEAVE]: Well, there should be a floor there. So, I–people shouldn't pop up out of floors. Um, add to the fact that he wasn't there a second before, and then he was. Um, that's startling. That's alarming.
>
> [COUNSEL FOR OFFICER VAN CLEAVE]: What if–what if any threat did you perceive at that point in time?
>
> [OFFICER VAN CLEAVE]: I didn't have time to do a threat assessment. I just–there was, um, a head and shoulders popped up on me about a foot and a half away.

The Board then cited his testimony that he didn't conduct a threat assessment and concluded that the situation did not satisfy the Manual's criteria for the use of deadly force:

> 4. [Officer Van Cleave] opened the door with his right hand while holding his service weapon in his left hand. This fact was not disputed by either party. The body camera footage of PFC O'Neil, entered as Exhibit P-2, shows the actions occur.
>
> 5. [Officer Van Cleave] is right handed. This fact was not disputed by either party. [Officer Van Cleave] told Lt. DiPietro, during his interview/interrogation for [the internal investigation], that he is right handed. This statement was recorded, and the audio file was entered as Exhibit P-4. Additionally, [Officer Van Cleave] testified during the hearing that he wanted to use his right hand, or stronger hand, to pull

> open the door because he thought he was going to need more strength to pull it open.
>
> 6. Inside the door is a three to four foot drop off, of which [Officer Van Cleave] was unaware. This fact was not disputed by either party. [Officer Van Cleave] testified during the hearing that he was not aware of the drop off.
>
> 7. Upon opening the door, [Officer Van Cleave] encountered a suspect and was startled. This fact was not disputed by either party. During the hearing, [Officer Van Cleave] testified, "It scared the hell out of me."
>
> 8. [Officer Van Cleave] took a step back away from the door, raised his left arm upwards, pointed it in the direction of the suspect, and discharged his firearm. This fact was not disputed by either party. The body camera footage of PFC O'Neil, entered as Exhibit P-2, shows the actions occur.
>
> 9. The round discharged from [Officer Van Cleave's] firearm struck a suspect in the back. This fact was not disputed by either party. The body camera footage of PFC O'Neil, entered as Exhibit P-2, shows the suspect's wound.
>
> 10. The suspect did not display any dangerous or deadly weapons at [Officer Van Cleave]. This fact was not disputed by either party. During his interview/interrogation for [the internal investigation], [Officer Van Cleave], to explain the discharge of the firearm, told Lt. DiPietro, "It was just a reaction to a threat popping up a foot and a half in front of me." This statement was recorded, and the audio file was entered as Exhibit P-4. Also, during the hearing, [Officer Van Cleave] testified, "I didn't have time to do a threat assessment."
>
> 11. This situation, involving a suspect not armed with any weapons, "popping up" after a door was opened, did not rise to the level in which using deadly force would be an appropriate use of force. The facts show that [Officer Van Cleave's] discharge of his service weapon in this incident do not meet the criteria specified in Laurel Police Department General Order 4/107, "Use of Force"; Section .20(C), "USE OF LETHAL FORCE." General Order 4/107 was entered as Exhibit D-3A.

After hearing testimony from all other responding officers and viewing body camera footage of the incident, the Board concluded that Officer Van Cleave should have

conducted a threat assessment before firing his weapon, and, because he didn't, found him guilty of Charges #1 and #2:

> [With respect to Charge #1 ("Use of Force"),] [t]he facts prove that [Officer Van Cleave] was startled to see a suspect emerge from the three to four foot drop area, took a step back, raised his left hand upwards, pointed it in the direction of the suspect, and discharged his firearm. The discharged round struck the suspect. [Officer Van Cleave] testified that he reacted to a threat, and did not have time to do a threat assessment. This evidence outweighs the Defense's argument that [Officer Van Cleave's] response to the threat was a physiological response that he could not control. [Officer Van Cleave] was holding the weapon, and is solely responsible for whether or not it is fired. [Officer Van Cleave's] discharging of the weapon and striking the suspect, or using deadly force, did not meet the criteria in General Order 4/107.20(C) […]
>
> [With respect to Charge #2 ("Handling of Weapons"),] [t]he facts prove that [Officer Van Cleave] was startled, and discharged his firearm while pointing it toward a suspect. [Officer Van Cleave] testified that he did not have time to do a threat assessment. Firing a weapon at or in the direction of a person before conducting a threat assessment is careless and imprudent handling of a weapon. This evidence outweighs the Defense's argument that [Officer Van Cleave's] response to the threat was a physiological response that he could not control. [Officer Van Cleave] was holding the weapon, and is solely responsible for whether or not it is fired. This act constitutes a clear violation of this General Order.

On this record, the Board readily could have concluded that Officer Van Cleave "reacted to a threat, and did not have time to do a threat assessment," that he was required to perform a threat assessment before firing his weapon, and that he should not have fired his weapon if he did not have time to do a threat assessment. And although the Board could have given more weight than it did to Sergeant Gleason's expert testimony about the physiological causes of the shooting, both parties agree the Board, as the trier of fact, is

free to accept all, none, or part of an expert's testimony as it finds appropriate. *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 442 (2015). The record amply supported the Board's conclusions that Officer Van Cleave was required to conduct a threat assessment before using deadly force, that his use of deadly force was impermissible, and that his use of deadly force under the circumstances constituted a mishandling of his weapon. Accordingly, substantial evidence in the record supported the Board's guilty findings as to Charge #1 and Charge #2.

B. The Charges Did Not Require A Finding That The Officer Acted Intentionally.

An agency's interpretation of its regulations is a matter of law and not entitled to the same degree of deference given to the agency's fact finding. *Bragunier Masonry Contractors, Inc. v. Md. Comm'r of Labor & Indus.*, 111 Md. App. 698, 716 (1996). But we don't start from scratch: we give considerable weight to the agency's interpretation and application of regulations on which it relies, *AT&T Commc'ns of Md., Inc. v. Comptroller*, 405 Md. 83, 92–93 (2008), because of "the agency's expertise in its field." *Carven v. State Ret. & Pension Sys. of Md.*, 416 Md. 389, 406 (2010). This is especially true when an agency interprets its own regulations. *Id.*

Nevertheless, "it is always within [our] prerogative to determine whether an agency's conclusions of law are correct." *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 298 (2015). When reviewing an agency's legal conclusions, we apply general principles of statutory interpretation: "we look to the regulation's plain language as the best evidence of its own meaning and when the language is clear and unambiguous, our inquiry

ordinarily ends there." *Id.* (internal quotation marks omitted). But we don't read statutory language "in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone." *Gardner v. State*, 420 Md. 1, 9 (2011). Instead, it "must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the [promulgating body] in enacting the statute." *Id.*

Office Van Cleave contends that the Board erred as a matter of law by finding him guilty of Charges #1 and #2 without first finding that he fired his weapon intentionally. On their face, though, the Charges contain no intent requirement, or, indeed, any *mens rea* element at all. Section 4/107.20(A)(6) of the Manual, the violation of which underlay Charge #1, states that "[s]worn personnel, acting in their officer capacity, shall not use unnecessary or excessive force." Manual section 1/121.20(A)(1), the basis for Charge #2, states that "[w]eapons shall not be used or handled in a careless or imprudent manner and shall be used in accordance with established Department procedures."[6] The Officer doesn't contend that either provision is ambiguous, and we already have affirmed the Board's finding that his actions violated both.

Even so, Officer Van Cleave asks us to insert an intent element into both charges. He recognizes, as he must, that no other provision in the Manual supplies an intent requirement, but he points us to several subsections that, he contends, compel us to find one indirectly. He points *first* to the Manual's general statement of "policy" regarding the

[6] Officer Van Cleave raised this issue in his Question Presented, but did not discuss it in the context of Charge #2 in the argument section of his brief.

use of force, *i.e*., that officers shall use only the force reasonable and necessary under the circumstances:

> It is the policy of this Department that each incident involving the application of physical force upon the person of another must be evaluated upon the facts of the particular incident. Whenever any sworn personnel of the Department, while in performance of their law enforcement duties, deems it necessary to utilize a degree of physical force upon the person of another, the degree of physical force shall only be that which is reasonable and necessary to effect the arrest, prevent escape, overcome resistance, or to protect others or themselves from bodily harm.

He points *next* to the definition of "physical force," which is "[t]hat force applied to overcome resistance, achieve compliance, and gain control of any use of Department issued and/or approved lethal or non-lethal weapons." And third, he cites the general rule that "[o]fficers will only use the force necessary to affect lawful objectives in accordance with Departmental procedures, state law and constitutional mandates." From these, he argues that because necessity is a prerequisite to the use of force, "it is clear that unintentional acts—including the unintentional discharge of firearms—fall outside of its scope." From there, he argues that the police department's Use of Force procedures "recognize[] the difference between a knowing, purposeful, and intentional application of physical force and the unwarranted or accidental discharge of a firearm." He sees this in the fact that the procedures refer to situations where weapons are unnecessary and where they've been used intentionally:

> 1. Unnecessary or prematurely drawing a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens and may result

in an unwarranted or accidental discharge of the firearm.

2. An officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer's reasonable belief there is a substantial risk that the situation may escalate to the point where lethal force may be justified.
3. When the officer has determined that the use of lethal force is not necessary, the officer shall as soon as practical, secure or holster a firearm.

The Officer's arguments are creative, but unavailing. These are administrative charges, with administrative penalties, and the provisions he violated are defined straightforwardly. Although he characterizes the Board's conclusions as misapplying the law, that's not quite right: he faults the Board for finding that he violated the Manual provisions as written rather than inserting an element that isn't. Nor does the Officer offer any basis on which we could deviate from the plain language of the provisions—he doesn't assert they're ambiguous, nor does he offer extrinsic evidence of their meaning. The Board applied the largely uncontested facts to the straightforward Manual provisions and concluded that Officer Van Cleave violated them. We find no basis in the law or on this record to upset those conclusions.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. APPELLANT TO PAY COSTS.