

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2150

September Term, 2015

KEVIN BUTTERWORTH

v.

PRINCE GEORGE'S COUNTY POLICE
DEPARTMENT

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

JJ.

Opinion by Eyler, James R., J.

Filed: April 11, 2017

*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.

Kevin Butterworth, a Prince George’s County police officer, was charged with seven violations of police department policy and procedure. At a March 4, 2015 hearing pursuant to the Law Enforcement Officers’ Bill of Rights (“LEOBR”)¹, the Prince George’s County Police Department’s Administrative Hearing Board (“the Board”) found him guilty of one violation, specifically, using unjustified force when striking a woman with his ASP baton. In its written report dated March 24, 2015, the Board recommended that Officer Butterworth be terminated from his employment with the Prince George’s County Police Department (“the Department”). On April 6, 2015, Prince George’s County Police Chief Mark A. Magaw, concurring with the Board’s findings and recommendation, terminated Officer Butterworth’s employment. Officer Butterworth filed a petition for judicial review in the Circuit Court for Prince George’s County. After a hearing on October 30, 2015, the circuit court affirmed the Department’s decision to terminate Officer Butterworth’s employment. This timely appeal followed.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the Board’s findings and recommendation are sustainable for the reasons stated. Finding that they are not, we shall vacate the judgment of the circuit court with instructions to remand this case to the Prince George’s County Police Department for further proceedings.

¹ See generally, Md. Code (2003, 2011 Repl. Vol.), §3-101 *et seq.* of the Public Safety Article.

FACTUAL BACKGROUND

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 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 starting 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.

DISCUSSION

I.

The scope of judicial review in an LEOBR case is the same as that generally applicable to administrative appeals. *Baltimore Police Dep’t v. Ellsworth*, 211 Md. App. 198, 207-08 (2013), *aff’d*, 438 Md. 69 (2014); *Ocean City Police Dep’t v. Marshall*, 158 Md. App. 115, 120-21 (2004). 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); *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999)(quoting *United Parcel Serv., Inc. v. People’s Counsel for Baltimore City*, 336 Md. 569, 577 (1994)).

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. *Ellsworth*, 211 Md. App. at 207-08. We may not make independent findings of fact or substitute our judgment for that of the agency. *Blackburn v. Bd. of Liquor License Comm’rs for Baltimore City*, 130 Md. App. 614, 623-24 (2000). As we explained in *Blackburn*:

Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency’s findings and for the reason stated by the agency.

Blackburn, 130 Md. App. at 624 (citations and internal quotations omitted).

An agency’s decision may be affirmed based only upon the agency’s findings of fact and for the reasons presented by the agency. *Rouse-Fairwood Ltd. P’ship v. Supervisor of Assessments of Prince George’s County*, 120 Md. App. 667, 697 (1998); *United Parcel*, 336 Md. at 577. “[T]he purpose of this requirement is to afford the parties appearing before an administrative agency the right to know the facts relied upon by the agency in reaching its decision as well as to permit meaningful judicial review of the agency’s findings.” *Rouse-Fairwood Ltd. P’ship*, 120 Md. App. at 697. We may not uphold the agency’s order unless it is sustainable on the agency’s findings and for the

reasons stated by the agency. *Vandevander v. Voorhar*, 136 Md. App. 621, 635 (2001); *Blackburn*, 130 Md. App. at 624.

Clearly, based on the testimony of Ms. Gates and Ms. Speed, there was sufficient evidence to satisfy the “substantial evidence” test with respect to the Board’s finding of a violation of Department policy. Officer Butterworth concedes that point. Officer Butterworth contends, however, that the Board’s finding, adopted by the Police Chief, cannot be sustained for the reasons stated.

The 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 ASP and ordered her to the ground.” At the administrative hearing, Officer Butterworth testified that his second interaction with Ms. Speed occurred when he apprehended her for the earlier assault she had committed upon him. After approaching her, Officer Butterworth “used a joint manipulation technique” and “twisted her” using “like a wrist lock” to “escort[] her to the ground so she could be arrested.” 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. Our decision does not vacate the disciplinary action or compel the reinstatement of Officer Butterworth pending the Board's recommendation and ultimate decision by the Police Chief. *See Travers v. Baltimore Police Department*, 115 Md. App. 395, 427-428 (1997) (reinstatement of employment not compelled pending decision on remand). The final disciplinary action, if any, will be subject to judicial review.

**JUDGMENT OF THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY VACATED;
CASE REMANDED TO THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY WITH
INSTRUCTIONS TO REMAND THE CASE TO
THE PRINCE GEORGE'S COUNTY POLICE
DEPARTMENT FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION; COSTS
TO BE DIVIDED EVENLY BETWEEN
APPELLANT AND APPELLEE.**