

Circuit Court for Prince George's County
Case No. CAL09-38344

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 939

September Term, 2016

HERBERT ELEE

v.

DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES

Nazarian,
Friedman,
Harrell, Glenn T., Jr.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Nazarian, J.

Filed: September 13, 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.

Herbert Elee appeals the decision by the Circuit Court for Prince George's County affirming the decision of an Administrative Law Judge ("ALJ") and his former employer, the Department of Public Safety and Correctional Services ("DPSCS"), to uphold his termination. On May 4, 2009, Sergeant Elee was terminated from his job at the Maryland Correctional Adjustment Center ("MCAC") for using excessive force against an inmate. He contends that the ALJ erred by finding that the force he used was excessive, because, he says, the force used was consistent with department policy under the circumstances. We disagree and affirm.

I. BACKGROUND

On April 7, 2009, Sergeant Elee was performing administrative duties in the MCAC Bravo unit, a separate unit for disruptive inmates. He was seated at the desk in the Bravo Pod, an enclosed sergeant's station, performing an inmate count. In front of and abutting the desk was a clear floor-to-ceiling Plexiglas wall that divided the Bravo Pod into two spaces: a work area for correctional officers, including the desk at which Sergeant Elee worked, and a temporary holding cell. The Plexiglas divider had a small access slot through which inmates and officers could pass papers and small objects back and forth.

While Sergeant Elee was doing the count, inmate Jamontie Collins was escorted from the medical unit of MCAC to the Bravo Pod holding cell. Mr. Collins's hands were secured in front of his body by handcuffs and his feet secured by leg irons. In his hands he held papers he had received from the medical unit.

Mr. Collins began to complain to Sergeant Elee about a disciplinary infraction notice he received before going to the medical unit. In an effort to get the Sergeant's attention, Mr. Collins flicked two photo identification card clips through the access slot and stated that he wanted to see the lieutenant. Sergeant Elee ordered Mr. Collins to stop and told him that his concern would be addressed after the inmate count was finished. Dissatisfied, Mr. Collins rolled up the papers he had been holding and used them to reach through the access slot and knock the telephone on the Sergeant's desk off its receiver. The phone landed on Sergeant Elee's arm. Sergeant Elee responded by removing a canister of mace from his waist holster and spraying mace through the access slot at Mr. Collins.

On May 4, 2009, MCAC issued a Notice of Termination to Sergeant Elee, citing use of excessive force as the reason. The notice was served on him on May 6.

A. The OAH Hearing.

On May 20, Sergeant Elee appealed his termination to the Department of Budget and Management, which forwarded the case to the Office of Administrative Hearings ("OAH"). Pursuant to Md. Code (1993, 2015 Repl. Vol.) § 4-401 of the State Personnel and Pensions Article ("SP"), the OAH held a hearing on September 15, 2009.

The ALJ heard testimony from Sergeant Elee and four MCAC employees, including Corporal Ali Crosland, an officer who witnessed parts of the incident from down the hall, Sergeant Haamid Talib, an officer who responded immediately to the incident, Lieutenant William Wager, the officer in charge of investigating the incident, and the warden of MCAC, Warden Robert Copple. The ALJ also considered several pieces of evidence,

including photographs of the Bravo Pod and memos from ranking officers regarding the incident. Sergeant Talib's testimony describes the events of April 7, 2009 in the greatest detail, so we highlight primarily his account. His testimony was corroborated in large part by the witnesses that testified after him. The ALJ also relied heavily on his account of the events.

Sergeant Talib testified that, on the day of the incident, he was assigned to work closely with the lieutenant on duty in the Bravo unit. He was sitting in the lieutenant's office when he received a call from Sergeant Elee. Mr. Collins, Sergeant Elee told him, was preventing his cell from being locked by holding open the food slot on the door. Sergeant Talib went to Mr. Collins's cell to investigate. Mr. Collins claimed that he was holding the slot open because his hand was hurt and he needed medical attention. Sergeant Talib took Mr. Collins to the medical ward, where the nurse on duty cleaned "the little nick on his finger" and administered a band-aid. Sergeant Talib testified that he then escorted Mr. Collins back to the unit without any problems. During this period, Mr. Collins was compliant. He put Mr. Collins into the Bravo Pod holding cell, left him in leg irons and handcuffs, but removed Mr. Collins's waist chain and "black box" (the piece of equipment that fastens the arms and legs to the waist chain). Sergeant Talib then locked Mr. Collins into the holding cell opposite Sergeant Elee and left to attend to other matters. When he left the Bravo Pod, Mr. Collins was compliant.

Sergeant Talib returned to the Bravo Pod after the mace incident first to "check on the situation," then to bring Mr. Collins back to the medical unit. He testified that Mr.

Collins was covered in orange-colored mace discharge “from the ear down across the chest.” Sergeant Talib testified that in order to be covered in mace discharge in that way, Sergeant Elee must have sprayed the mace through the access slot from his side of the Bravo Pod into the holding cell. He also testified that when he arrived at the Bravo Pod after the mace incident, he could smell mace in and around the entire area.

Sergeant Talib also testified about the training correctional officers receive on the use of force. He explained that four factors must be present before an officer is permitted to use force—“[a]bility, opportunity, jeopardy, and preclusion”— and he defined each of these elements. “Ability” is present when the inmate has the ability to cause harm. “Opportunity” is present when the inmate has the opportunity to resist the orders of correctional officers. “Jeopardy” is present when an inmate poses a risk of danger to officers or other inmates. “Preclusion” is present only when the officer has exhausted other, less forceful means of bringing an inmate into compliance. Sergeant Talib opined that Sergeant Elee’s use of force was inappropriate because “[Mr. Collins] didn’t have a direct ability to cause [Sergeant Elee] harm because he was already restrained and placed behind the door,” that he didn’t have an opportunity to resist or cause bodily harm, that he was not a hazard, and that the “preclusion” factor was not present because there were other “means and options” available to the Sergeant. MCAC management also introduced an officer training lesson plan that corroborated Sergeant Talib’s description of the four-factor training.

Corporal Crosland corroborated Sergeant Talib's opinion on how Sgt. Elee dispersed the mace: she testified that she saw Sergeant Elee put the mace into the access slot and spray Mr. Collins. Corporal Crosland testified as well that "there was no opportunity for [Mr. Collins] to cause harm to Sergeant Elee," and that Sergeant Elee "was not in danger." She testified that upon responding to the incident, she saw Mr. Collins coughing.

Lieutenant William Wager then testified that Mr. Collins presented no danger to Mr. Elee at the time and that less forceful means of inducing compliance were available. He testified that "in a case where the inmate is in restraints, behind a locked door, there is no leeway for an officer to take it upon himself to use pepper spray or any other agents." He stated that correctional officers are trained that they may use chemical agents only "if the inmate poses an immediate threat to themselves or other parties," and that the chemical agent or physical force can be used only "as necessary to gain or regain control of the situation."

Warden Koppel testified that he investigated the incident personally and determined that, instead of deploying mace, Sergeant Elee could have moved away from the access slot to avoid injury or notified other officers that he needed assistance. The Warden also testified that during a mitigation conference he had with Mr. Elee on April 10, 2009, three days after the incident, Sergeant Elee stated that the inmate had been "agitating" him, that "Sergeant Elee[] himself[] really admitted that he had made the wrong decision," and that Sergeant Elee admitted that "he kind of just lost it."

Sergeant Elee testified as well, and the ALJ recounted his testimony in his written decision.

B. The ALJ’s October 30, 2009 Written Decision.

The ALJ released a written decision on October 30, 2009 affirming the Sergeant’s termination. The ALJ found first, in plain terms, that Sergeant Elee’s deployment of mace seemed to be rooted more in frustration than in responding appropriately to an actual threat from Mr. Collins:

[Sergeant Elee] testified that his reaction was spontaneous, that it “just happened.” [Sergeant Elee] also testified that he “wasn’t happy about the inmate not [permitting his door to be locked] because it interfered with [Sergeant Elee’s] other duties.” Additionally, [Sergeant Elee] testified that he “was not happy with the inmate being in the Sergeant’s station” and “irritated by ID clips being thrown at me and distracting me from my count.” This testimony discloses that [Sergeant Elee] was more focused on the impact the inmate had on his duty to complete the security count than on an appropriate response to the inmate’s non-compliance. In other words, this testimony reflects a scenario wherein [Sergeant Elee] emotionally over-reacted because the inmate was interfering with the Employee’s need to record the security count.

The ALJ explained DPSCS’s “use of force continuum,” which directs employees about when and how to use force:

[DPSCS] policy statements reflect two important points: the Employee is required to use the minimum force necessary to control the non-compliant inmate; and when using force, the Employee must comply with policy, procedures, and techniques taught during training.

To implement the policy, the DPSCS developed the “use of force continuum” which correlates the type of resistance an inmate may present to a correctional officer and

authorizes a corresponding level of force by the officer. . . . However . . . the use of force continuum is not static. . . . *The Manual recognizes that a specific authorized response may not be appropriate under the given circumstances and requires an employee to also recognize whether the authorized response is appropriate.* Under the use of force continuum, an employee “may not employ more force than that prescribed for the situation” but “as the situation develops or stabilizes, the employee should de-escalate the use of force through the appropriate levels.”

(emphasis added). Against that standard, the ALJ found that Sergeant’s Elee’s use of force was authorized, but not justified:

[Mr. Collins’s] conduct could be fairly characterized as “defensive resistance” [thereby authorizing the use of mace] because it is non-compliant behavior involving [a] physical reaction . . . [in] an attempt to inhibit [Sergeant Elee’s] control. However, it occurred under circumstances where the inmate was restrained by wrist cuffs and ankle cuffs and was essentially secured in a separate room with the only physical access to [Sergeant Elee] or any state property being through a small access slot in a plexiglass [sic] wall. The only weapon [Mr. Collins] had was a rolled up piece of paper. Under these circumstances it would be consistent with the DPSCS policy to use “the minimum reasonable force necessary to control the individual or situation” by not using mace. The employee had several options to use reasonable minimal force including, moving himself away from the inmate, calling for other correctional officers to respond and remove the inmate, or communicating with the inmate to reach a mutually acceptable resolution. . . . I find that [Sergeant Elee] failed to use the minimum reasonable force necessary to control the inmate or situation . . . [t]hus, I am satisfied by a preponderance of the evidence that on April 7, 2009 [Sergeant Elee] deployed a spray of mace in a manner which was an excessive use of force.

The ALJ concluded that Sergeant Elee’s use of excessive force supported a finding that he violated SP § 11-105(1)(iii) & (8), and COMAR 17.04.05.04B(2), (4), and (12). The ALJ

also found that Mr. Elee’s termination was justified, given the automatic termination requirement of SP § 11-105 and the discretion MCAC management has under DPSCS policy to terminate employees for certain infractions.

Sergeant Elee sought judicial review of DPSCS’s decision, and the circuit court affirmed. Sergeant Elee filed a timely notice of appeal.

II. DISCUSSION

Sergeant Elee raises several issues on appeal,¹ but they boil down to one: whether substantial evidence in the record supports DPSCS’s decision to terminate him. It did.

¹ Sergeant Elee phrases the Questions Presented in his brief as follows:

- A. Did Management properly terminate the Appellant Under State Personnel and Pensions Article, § 11-105(iii)?
- B. Did Management properly terminate the Appellant Under COMAR 17.04.05.04.B(2)?
- C. Did Management properly terminate the Appellant Under COMAR 17.04.05.04.B(4)?
- D. Did Management properly terminate the Appellant Under COMAR 17.04.05.04.B(12)?
- E. Did Management properly terminate the Appellant Under DPSCS’ Standard of Conduct, DCD-50-2, Section II.K1?
- F. Did Management properly terminate the Appellant Under DPSCS’ Standard of Conduct, DCD-50-2, Section II.Y.1?
- G. Were the ALK’s findings of facts were supported by substantial evidence in the record?
- H. Was the agency’s interpretation of the statute the agency used to administer its sanctions lawful?

When reviewing the final decision of an administrative agency, we look through the circuit court’s decision and evaluate the decision of the agency directly. *People’s Counsel for Balt. Cty. v. Loyola Coll. In Md.*, 406 Md. 54, 66 (2008) (internal citations omitted). We review mixed questions of law and fact, in which an agency “has correctly stated the law and its fact-finding is supported by the record, but the question is whether it has applied the law to the facts correctly,” against the substantial evidence test. *Charles Cty. Dep’t of Soc. Servs. v. Vann*, 382 Md. 286, 296 (2004). Under the substantial evidence test, we determine whether substantial evidence in the record as a whole supports the agency’s findings and conclusions, and whether “the administrative decision is premised upon an erroneous conclusion of law.” *Cosby v. Dep’t of Human Res.*, 425 Md. 629, 638 (2012) (quoting *Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 67–68 (1999)). If we find that the agency decision is based upon substantial evidence and that “reasoning minds could reach the same conclusion from the facts,” the agency decision must be affirmed.

- I. Was the agency’s action warranted considering all relevant factors?
- J. Did the agency weighed factors that were in Appellant’s favor?
- K. Did the agency consider substantial mitigating factors in determining the appropriate sanction?
- L. Did the agency engaged in a peremptory dismissal of all factors in Appellant’s favor?
- M. Was the sanction by the agency was extreme and egregious?

Dept. of Labor, Licensing & Regulation v. Woodie, 128 Md. App. 398, 406 (1999) (quoting *DLLR v. Hider*, 349 Md. 71, 78 (1998)). It is not our role “to substitute [our] judgment for the expertise of [the agency].” *Bd. of Educ. of Montgomery Cty. v. Paynter*, 303 Md. 22, 35 (1985) (emphasis omitted).

A. Substantial Evidence In The Record Supported The ALJ’s Finding That Sergeant Elee Used Excessive Force.

Sergeant Elee contends that he was terminated improperly. He claims that the force he used to bring Mr. Collins into compliance was an appropriate response to Mr. Collins’s conduct. He justifies the use of mace by pointing to Mr. Collins’s contemporary pattern of escalating non-compliant conduct, which began earlier in the day when Mr. Collins refused to allow Sergeant Elee to lock his cell door.

The ALJ disagreed, and sided instead with MCAC management. The ALJ found that Sergeant Elee’s use of force, although authorized in the sense that Mr. Collins’s actions could be classified as “defensive resistance,” was unjustified under the circumstances. The ALJ gave little weight to Sergeant Elee’s claim that he was responding to a pattern of escalating non-compliant conduct, particularly because Mr. Collins complied with Sergeant Talib between the time of the food slot incident and his altercation with Sergeant Elee in Bravo Pod. Taking all of the circumstances into account, the ALJ concluded the force Sergeant Elee used was excessive to the danger he faced from the inmate.

The record contains more than substantial evidence to support this conclusion. Sergeant Talib, who interacted with this same inmate immediately before the making incident and brought the inmate to the holding cell, testified that none of the four factors

justifying the use of force were present when Sergeant Elee maced the confined, handcuffed, and leg-ironed inmate. Sergeant Talib, Lieutenant Wager, and Warden Koppel all testified that other, less forceful means of bringing Mr. Collins into compliance were available to Sergeant Elee at the time. The Sergeant obviously views it differently, and argues that the ALJ should have afforded more weight to his assessment of the threat he faced (although his acknowledgment to the Warden that he had “lost it” undermines the claim that he was legitimately at risk). But it is not our role to re-weigh the evidence—ours is a deferential review. The record amply supports the ALJ’s decision that Sergeant Elee used excessive force.

B. The ALJ Committed No Errors of Law In Finding That Sergeant Elee’s Termination Was Justified.

Having affirmed the ALJ’s core factual finding and conclusion, we turn to the ALJ’s decision to affirm Mr. Elee’s termination. The ALJ justified the decision under two independent authorities: one statutory, SP § 11-105(1)(iii) & (8), and one regulatory, COMAR 17.04.05.04B(2), (4), and (12).²

² In their briefs in this Court, the parties disagreed about the standard of review on disputed questions of law. It is our job to ensure that the ALJ’s decision was not “premised upon an erroneous conclusion of law.” *Cosby*, 425 Md. at 638 (quoting *Bd. of Physician Quality Assurance*, 354 Md. at 67–68). If an ALJ interprets the language or intent of a statute, or case law springing from a statute, we review those interpretations of law *de novo*. *Talbot Cty v. Miles Point Property, LLC*, 415 Md. 372, 384 (2010). But where, as here, an agency is administering a statute in the field of its expertise, we account for that expertise by giving heightened deference to the agency’s interpretation. *See Bell Atl. of Md., Inc. v. Intercom Sys. Corp.*, 366 Md. 1, 21 (2001).

The State Personnel Article defines certain infractions for which termination is mandatory, one of which is “intentional conduct, without justification, that . . . seriously threatens the safety of the workplace,” SP § 11-105(1)(iii), and another of which is “unwarrantable excessive force in the treatment or care of an individual who is a client, patient, prisoner, or any other individual who is in the care or custody of this State[.]” *Id.*, (8). The record supporting the ALJ’s finding of excessive force supports either or both of these statutory standards. Analyzing the record against subsection (1)(iii), Sergeant Elee’s use of mace was undoubtedly intentional, the ALJ specifically found it unjustified, and the use of mace posed both chemical and inmate relations threats to the work environment of the Sergeant’s co-workers. Similarly, regarding subsection (8), the ALJ found the Sergeant’s excessive use of force “unwarrantable” when he found it unjustified, and there is no dispute that Mr. Collins was a prisoner in the custody of the State, and specifically Sergeant Elee, at the time. Either of those findings subjected Sergeant Elee to automatic termination, and we find no error in the ALJ’s conclusion that his conduct warranted that sanction.

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