

2018 IL App (1st) 170855-U

No. 1-17-0855

Order filed June 15, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JOSE ALVAREZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 16 CH 9065
THE POLICE BOARD OF THE CITY OF CHICAGO,)	
and the SUPERINTENDENT OF THE CHICAGO)	
POLICE DEPARTMENT, et al.,)	Honorable
)	Sanjay Tailor,
Defendants-Appellees.)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justice Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the decision of the Police Board of the City of Chicago to discharge plaintiff because he failed to show that the decision was against the manifest weight of the evidence.

¶ 2 Plaintiff, Jose Alvarez, appeals from an order of the circuit court of Cook County affirming the decision of the Police Board of the City of Chicago (the Board) that found him in violation of four Chicago police department (the Department) rules and ordered him discharged.

On appeal, he contends that the decision of the Board was against the manifest weight of the evidence. We affirm.

¶ 3 The instant action arose from a July 4, 2012, domestic dispute between plaintiff and his wife. Following the dispute, plaintiff was arrested on a charge of domestic battery (720 ILCS 5/12-3.2 (West 2012)). While the criminal charges against plaintiff were eventually dismissed,¹ the Chicago police Superintendent (Superintendent) proceeded with disciplinary action. On September 25, 2015, the Superintendent charged plaintiff with violating four Department rules of conduct. The Superintendent charged plaintiff with violating Rule 1, “[v]iolation of any law or ordinance,” Rule 2, “[a]ny action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department,” Rule 8, “[d]isrespect to or maltreatment of any person, while on or off duty,” and Rule 9, “[e]ngaging in any unjustified verbal or physical altercation with any person, while on or off duty.”

¶ 4 On two dates, February 16 and April 25, 2016, the parties appeared before the Board for a hearing on the charges against plaintiff. At the hearing, the Superintendent presented eight witnesses: Kristine Young, who called the police to report the incident; Chicago police officers Lopez, Sanders, Higgins, and Kennedy, who responded to the scene; Dr. Rachel Oosterbaan, a medical expert; and plaintiff and his wife, Dora (as adverse witnesses). In addition to testifying on his own behalf, plaintiff also called Dora, Dr. Ernest Chiodo, and four character witnesses.

¹ On appeal, plaintiff has moved this court to take judicial notice of a Cook County circuit court order dismissing all charges against him arising from the incident in question. The motion, which was taken with the case, is hereby granted. See *Illinois Dept. of Human Services v. Porter*, 396 Ill. App. 3d 701, 725 (2009) (this court may take judicial notice of a written decision that is a part of the record in another court because such documents fall within the category of readily verifiable facts).

¶ 5 Kristine Young testified that, on July 4, 2012, she awoke at approximately 4:30 a.m. to the sound of a woman screaming for help. She looked outside and saw a woman clinging onto the railing in front of her home, yelling for help, while a man tried to pull her away. Young announced to the pair that she was going to call the police and then dialed 911. The man continued pulling at the woman as she clung to the railing. Young called 911 for a second time, and, shortly thereafter, the police arrived.

¶ 6 Chicago Police Officers Kennedy and Higgins arrived on the scene first, followed a few minutes later by officers Lopez and Sanders. As Kennedy and Higgins arrived, they saw Dora Alvarez clutching to the front railing of a house and plaintiff, wearing a white t-shirt and underwear, trying to pull her away from it. When Kennedy and Higgins exited their vehicle, plaintiff turned to them and indicated that he was a police officer by saying, “I’m one of you.” Kennedy then requested that a supervisor come to the scene.

¶ 7 Lopez and Sanders arrived on the scene and saw Kennedy, Higgins, plaintiff, and Dora on the sidewalk. Lopez, Kennedy, and Sanders noticed that Dora had injuries on both sides of her face, such as bruises and swelling. Sanders described Dora as “visibly shaken,” distraught, and scared. As Lopez approached Dora and plaintiff, the couple began to walk away. Lopez followed and tried to get Dora’s attention. When Dora turned around, Lopez asked if she was all right. Lopez, who speaks Spanish, heard plaintiff tell Dora in Spanish not to talk to her or turn around. Lopez again asked Dora if she was all right, at which point she “started blurting the whole incident.” Kennedy and Higgins walked plaintiff home, while Lopez and Sanders placed Dora into their squad car where she continued to relate the events of that evening. Lopez and Sanders both stated that Dora did not seem intoxicated, nor did her breath smell of alcohol.

Lopez testified that she spoke with Dora in English, but Sanders testified that Lopez and Dora spoke in Spanish, with Lopez translating Dora's answers into English. Kennedy testified that he was within 50 feet of Dora and Lopez and recalled Lopez speaking in Spanish. Kennedy did not recall what language Dora was speaking.

¶ 8 According to Lopez, Dora told her that plaintiff was a police officer and that the couple had been fighting because he believed that she had been flirting with another man while the couple was at a party earlier in the night. After they arrived home from the party, the argument escalated to physical violence. During the argument, plaintiff straddled Dora, who was lying on the bed, held her hands above her head with his one hand, and slapped her repeatedly with his other hand. He then threatened to hit her again if he ever caught her flirting. Dora escaped and ran out of the house. Dora told Lopez that she wanted plaintiff to go away, but she did not want him to get into any trouble. Kennedy arrested plaintiff and transported him to the police station.

¶ 9 Plaintiff testified that, on July 3, 2012, he and Dora attended a Fourth of July party at his brother's house. Plaintiff arrived at the party first and Dora arrived an hour or two later with their children. He stated that his wife did not appear intoxicated when she arrived, but he later saw her drinking alcohol at the party. During the party, plaintiff became upset because he saw Dora flirting with another man. Dora and plaintiff left the party at the same time, between 2 a.m. and 2:30 a.m., but drove home separately.

¶ 10 When they arrived home, plaintiff, while taking their oldest child to his bedroom, heard a "big bang" on the screen door and Dora's cursing. Later, plaintiff heard Dora yell inside the bathroom and, when he went to investigate, found her with a swollen face. The two began to argue because plaintiff believed that his wife had consumed too much alcohol. He then accused

her of embarrassing him at the party by flirting with another man in front of his family. Dora told him to get her some ice. Plaintiff initially refused, but ultimately retrieved some ice for her and threw it into the bathroom. Dora threw the ice back at him and then left the house wearing her sleep shorts, bra, and a robe.

¶ 11 Plaintiff followed Dora out of the house and asked her not to “make a big scene.” She, in turn, swore at him, told him not to follow her, and said she was going to a friend’s house. Plaintiff testified that he knew Dora was intoxicated because she was slurring her words and her eyes were glassy. As he tried to convince her to come back inside the house, she started running away and yelling for help. He ran after her and noticed that she was weaving as she ran. At some point, Dora tripped on the sidewalk and hit the pavement. She then made her way to a house and grabbed the railing in front of the house. Plaintiff attempted to pull Dora away from the railing, but she refused and began cursing at him loudly in Spanish. He continued to try and pull her away from the railing for several minutes. As he did so, a woman inside of the house came to the window and said that she was calling the police.

¶ 12 When the officers arrived, Dora stood up, grabbed plaintiff’s hand, and began walking home. A female officer asked to speak with Dora and plaintiff told her to “go ahead.” Dora then went to talk with the female police officers. A second police car with male officers arrived on the scene. Plaintiff spoke with the male officers and walked back to his house where he got dressed. Dora sat in a police car across the street talking to the female officers. Plaintiff was taken to the police station and told that the lieutenant there wanted to speak with him. He was informed that he was being arrested for domestic battery. Officers from the Chicago Police Department’s

Internal Affairs Division arrived and informed him that he was being “stripped” of his police powers. The criminal charges against plaintiff were eventually dismissed.

¶ 13 Dora testified that, about 1 p.m., on July 3, 2012, she drove her two youngest sons to a birthday party and then went to a bar to drink with friends. She stayed at the bar for a couple of hours and drank seven or eight beers before driving back to the children’s party where she continued to drink. She stated that she drank an additional four or five “shots” and around nine or ten beers during her two or three hours at the party. She then drove the children to her brother-in-law’s house. Dora described herself as “tipsy,” but not drunk when she drove. When she arrived at her brother-in-law’s party, plaintiff was already there. At the party, she continued to drink heavily without eating dinner. Dora and plaintiff left the party, in separate cars, between 2 and 2:30 a.m.

¶ 14 When they arrived home, Dora fell twice while walking into the house. She stated that the falls resulted in her injuries. The first fall happened when she “missed a step” walking up a set of stairs leading to their house. The second fall happened shortly after as she tripped over another step. She attributed her falls to the fact that she was “carrying stuff” and she became “wobbly and dizzy” after drinking all day. When Dora went to the bathroom and saw the injuries to her face, she asked plaintiff to bring her some ice. He responded by telling her that the bruises were her fault for overdrinking. The couple then began to argue. During the argument, plaintiff accused Dora of flirting at the party and she left the house in her bathrobe. Dora ran from the house “really fast” and saw that plaintiff was following her. She grabbed the front railing of a neighboring house and told plaintiff to leave her alone. Plaintiff grabbed her by the waist and

legs and attempted to pry her from the railing. She resisted and, a few minutes later, police officers arrived on the scene.

¶ 15 A female officer approached Dora, who started to walk away. Eventually, Dora spoke with the officer on the sidewalk and then in a police car. Dora told the officer that she and plaintiff had been fighting, that she had fallen, that plaintiff had pursued her, and that she wanted him taken away because she was upset with him. She admitted that she “might have said something” about plaintiff having straddled her while holding her down on the bed. When plaintiff left, she assumed that the officers had taken him to his brother’s house. The officers then took photographs of her injuries.

¶ 16 Dr. Rachel Oosterbaan, an internist who has practiced medicine for 21 years, testified on behalf of the Superintendent as an expert medical witness. Oosterbaan explained that, in her career, she has seen “probably hundreds” of domestic violence injuries and that such injuries account for approximately 5% of the total cases that she has treated. In preparation to testify, Oosterbaan reviewed the photographs of Dora’s injuries, police reports, witness statements, and the testimony from the first hearing date, which included the testimony of plaintiff and Dora. Oosterbaan opined that the injuries to Dora’s face were more consistent with multiple blunt-force blows rather than falling on concrete. She explained that Dora’s injuries were consistent with “blunt trauma from a fist, not from a piece of concrete” because the injuries “come[] from several different angles suggestive [of] a lateral position inward that a fist would easily do.” Oosterbaan further explained that Dora had “direct trauma into the eye socket” on both sides of her face, which is not likely to have been caused by a fall. Moreover, the lack of abrasions to Dora’s face was “very suggestive of blunt trauma.”

¶ 17 On cross-examination, Oosterbaan acknowledged that she did not examine the site of Dora's alleged falls, nor did she speak with Dora. She explained that it was possible, but unlikely, that a person could fall on concrete without suffering abrasions. Even assuming that Dora fell on wood, rather than concrete, Oosterbaan stated that "she could hit the prominent portions of her face first and not the inside sockets." Oosterbaan further opined that Dora's testimony regarding her extreme intoxication was unlikely and inconsistent with other portions of her testimony.

¶ 18 Dr. Ernest Chiodo, who has a background in "impact biomechanics," testified on plaintiff's behalf as an expert physician and biomedical engineer. Chiodo explained that biomechanics is an "engineering discipline of determining whether or not an injury arose from forces arising from some impact upon the body, whether it's being in a car and having the car collide with another car or slipping and falling." Chiodo stated that he spends 90% of his professional time as an expert witness, and has practiced medicine for "not that many years." Prior to testifying, Chiodo spoke with plaintiff and Dora via telephone, reviewed the transcript of their testimony, and reviewed photographs of Dora's injuries.

¶ 19 Chiodo opined that Dora's injuries in the photographs were "completely consistent with her sworn testimony of having fallen as the cause of her injury." He further opined that the photographs of Dora's injuries show both bruising and abrasions, the latter of which is inconsistent with what "would happen from somebody being hit with a fist or a slap." Chiodo explained that the presence of abrasions would be consistent with somebody that had fallen onto concrete. On cross-examination, he admitted that he has not dealt with many cases involving someone who was punched or slapped because it is "not a common scenario."

¶ 20 Dora testified again as part of plaintiff's case-in-chief. She stated that plaintiff never struck her or otherwise physically abused her during their marriage. She also admitted that she estimated incorrectly during her earlier testimony regarding her alcohol intake. She maintained that she was intoxicated on the night in question, but her earlier testimony that she had consumed 30 drinks was not accurate. She insisted that she was not trying to be deceptive previously, but, rather, had poorly estimated.

¶ 21 In rebuttal, Oosterbaan disagreed with Chiodo's opinion that the photographs of Dora's injuries showed that she suffered abrasions. She reiterated that the photographs show contusions, rather than abrasions, because there was no tear in Dora's skin. Oosterbaan also disagreed with Chiodo's opinion that the injuries were consistent with a fall because a person who falls on the "side of the head" will not impact "the medial eyeball" or "inside the eye socket like these photos clearly demonstrate."

¶ 22 Following the hearing, the Board unanimously ruled to discharge plaintiff for cause, finding that he had violated all four Department rules. The Board credited the testimony of Lopez, which was corroborated in part by Sanders, Kennedy, and Young, with respect to whether plaintiff battered and restrained Dora. The Board also credited Oosterbaan's expert testimony regarding the nature of Dora's injuries. The Board found that the testimony of plaintiff and his wife was "plainly not credible" because (1) Dora's injuries were not consistent with falling, (2) Dora's account of her intoxication was "clearly manufactured," (3) they testified inconsistently with respect to when and where Dora fell on the night in question, and (4) their testimony that Dora ran away from the home shortly after 2:30 a.m. is inconsistent with the undisputed fact that Young's 911 call occurred at 4:30 a.m.

¶ 23 Plaintiff appealed the Board's decision and the circuit court of Cook County affirmed. Plaintiff appeals.

¶ 24 On appeal, plaintiff contends that the Board's factual findings were against the manifest weight of the evidence. Specifically, he contends that there is insufficient evidence to support the Board's decision to credit Lopez's credibility where her testimony conflicted with the other officers on the issue of what language her and Dora were speaking. He also argues that the Board's determination that the Superintendent's expert was more credible than his expert is not supported by the testimony.

¶ 25 On appeal, this court reviews the decision of the Board, not the circuit court. See, *e.g.*, *Krocka v. Police Board*, 327 Ill. App. 3d 36, 46 (2001) (citing *AFM Messenger Service, Inc. v. Department of Employment Security*, 315 Ill. App. 3d 308, 312 (2000)). In reviewing the Board's decision, this court employs a two-step analysis. *Walsh v. Board of Fire & Police Commissioners*, 96 Ill. 2d 101, 105 (1983). We first determine whether the agency's factual findings are against the manifest weight of the evidence. *Krocka*, 327 Ill. App. 3d at 46 (citing *Launius v. Board of Fire & Police Comm'rs of the City of Des Plaines*, 151 Ill. 2d 419, 427 (1992)). Then, this court must determine whether the findings of fact provide sufficient basis for the agency's determination that there is cause for discharge. *Id.* (citing *Launius*, 151 Ill. 2d at 435); see also *Kappel v. Police Board*, 220 Ill. App. 3d 580, 588 (1991).

¶ 26 Here, plaintiff does not challenge the agency's determination that there was cause for discharge. Rather, he argues only that the Board's factual findings were against the manifest weight of the evidence.

¶ 27 Section 3–110 of the Administrative Review Law states: “The findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct.” 735 ILCS 5/3–110 (West 2016). We will affirm a board’s findings unless they are against the manifest weight of the evidence. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 534 (2006). An administrative agency’s decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Id.* The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently does not justify reversal of an administrative agency’s findings. *Id.* It is for the Board, not the reviewing court, to resolve factual inconsistencies, make credibility determinations, weigh the evidence, and determine where the preponderance of the evidence lies. *Launius*, 151 Ill. 2d at 427–28; *Marconi*, 225 Ill. 2d at 534. This court will not substitute its judgment for that of the administrative agency. *Chisem v. McCarthy*, 2014 IL App (1st) 132389, ¶ 21. When the record contains evidence supporting the administrative agency’s decision, this court should affirm that decision. *Marconi*, 225 Ill. 2d at 534.

¶ 28 Here, the record amply supports the Board’s findings with regard to the credibility of the witnesses. The Board credited Lopez’s testimony that, during the course of their conversation, Dora related to her that plaintiff had held her down on the bed and struck her. This version of events was supported by Oosterbaan’s testimony that Dora’s injuries were consistent with blunt force trauma from a fist, rather than from a fall because she suffered multiple injuries from several different angles. Oosterbaan also explained that Dora had injuries to the interior of both eye sockets and that these injuries were inconsistent with having been caused by a fall. Moreover, Lopez’s testimony is entirely consistent with that of the other three officers. Although

Lopez testified that she spoke with Dora in English, not Spanish, it was for the Board to resolve this factual inconsistency. The Board also heard from plaintiff and Dora that her injuries were the result of falling after a night of drinking. Chiodo, plaintiff's expert, offered competing expert testimony that Dora's injuries were consistent with a fall and that the photographs of her injuries showed that she suffered abrasions. Ultimately, the Board resolved these inconsistencies in favor of the Superintendent.

¶ 29 Given this record, plaintiff's argument essentially asks us to reweigh the evidence in his favor. As mentioned, this we cannot do. Determining whether a witness testified credibly is not the function of this court on appeal, but rather rests squarely with the Board, unless it is clearly apparent on the record that the opposite conclusion is warranted. *Suburban Downs, Inc. v. Illinois Racing Board*, 316 Ill. App. 3d 404, 415 (2000) ("It is the function of the board to judge the credibility of witnesses, resolve conflicts in the evidence, and draw reasonable inferences and conclusions from the facts."); *Jones v. Police Board of City of Chicago*, 297 Ill. App. 3d 922, 933 (1998) (explaining that, as with other witnesses, the weight and credibility assessment of expert testimony is within the province of the agency hearing testimony). We conclude that the opposite conclusion is not warranted from the record, and, therefore, we will not disturb the Board's finding.

¶ 30 For these reasons, the decision of the Board is affirmed.

¶ 31 Affirmed.