

2018 IL App (1st) 171279-U

No. 1-17-1279

Order filed December 21, 2018

Fifth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

CLIFTON D. HEARD, III,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 16 CH 2789
)	
THE UNIVERSITY CIVIL SERVICE MERIT BOARD;)	Honorable
JAMES D. MONTGOMERY, Chair; BRIAN)	David B. Atkins,
MITCHELL, Member; DANIEL CAULKINS, Member;)	Judge, Presiding.
KAREN HASARA, Member; JILL SMART, Member;)	
LYNIER COLE, Member; DONNA MANERING,)	
Member; ROBERT T. MARSHALL, JR., Member;)	
ROCKY DONAHUE, Member; MARVIN GARCIA,)	
Member; MARSHALL E. HATCH, Member; STATE)	
UNIVERSITIES CIVIL SERVICE SYSTEM; JEFF)	
BROWNFIED, Executive Director; UNIVERSITY OF)	
ILLINOIS AT CHICAGO; BOARD OF TRUSTEES OF)	
UNIVERSITY OF CHICAGO; and KEVIN BOOKER,)	
Chief of Police, University of Illinois at Chicago Police)	
Department,)	
)	
Defendants-Appellees.)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Merit Board's findings of fact were not against the manifest weight of the evidence where the evidence supported findings that plaintiff violated various rules of the Department and other allegations as charged; circuit court did not err in granting the University's motion to reconsider where plaintiff's termination was not arbitrary and unreasonable or unrelated to the requirements of the service.

¶ 2 This appeal arises from an order of the circuit court of Cook County confirming the order of the University Civil Service Merit Board (Merit Board) discharging plaintiff Clifton Heard, III from employment by the University of Illinois at Chicago Police Department (Department). On appeal, plaintiff contends that: (1) the Merit Board's findings of fact were contrary to the manifest weight of the evidence; (2) the hearing officer erred in allowing evidence for uncharged offenses; (3) the mitigating evidence clearly militated against discharge; (4) the trial court erred in granting the Merit Board's motion to reconsider; and (5) the Merit Board failed to provide a full and complete record to the trial court so it could not perform its judicial review function. For the following reasons, we affirm the decision of the Merit Board.

¶ 3 **BACKGROUND**

¶ 4 The record reveals that plaintiff was employed as a police officer with the Department since September 8, 2009. The Department sent plaintiff a letter dated August 4, 2015, notifying him that the Board of Trustees of the University of Illinois (University) intended to initiate discharge proceedings against him based on an incident occurring on July 5, 2015. The letter also detailed a summary of the alleged misconduct that triggered the discharge proceedings as well as plaintiff's violation of a Department General Order and University Policies as follows:

On July 5, 2015, while off-duty, plaintiff drew his weapon in the presence of citizen Corey Rice and also handed his weapon to Department police officer Tawanna Clark in the presence of the same citizen. As a result of the alleged incidents, at approximately 11:45 p.m., Sergeant J. Kehoe responded to a request from the Chicago Police to meet them at Taylor and Racine Streets. Upon his arrival, Sergeant Kehoe received information that indicated that while off-duty, plaintiff was involved in a verbal argument with Officer Clark; when Rice approached them to see if Officer Clark was okay, Rice reported that plaintiff produced a handgun from his side and handed it to Officer Clark. Rice subsequently flagged down a passing Chicago police car to report the incident. On July 6, 2015, plaintiff was served with an administrative leave with pay letter which stated that plaintiff was required to be available Monday through Friday between 8:00 a.m. and 4:00 p.m. for investigative purposes; that plaintiff was not unauthorized to take police action while on leave; and was prohibited from coming to the job site at 943 W. Maxwell Street without first obtaining permission from a command staff member.

¶ 5 Attached to the letter were details of plaintiff's previous discipline, which included: (1) verbal counseling in May 2011 for disobeying a directive; (2) a two-day disciplinary suspension in August 2011 for leaving his assignment; (3) a five-day disciplinary suspension in January 2012 for damaging a vehicle; (4) a 30-day disciplinary suspension in December 2012 for inattention to duty; and 5) a 30-day disciplinary suspension in April 2014 for disobeying an order, failing to report to work and absence from duty.

¶ 6 On August 20, 2015, the University filed the following charges for discharge against plaintiff: (1) violation of a Department general order requiring professional standards of conduct;

(2) off-duty misconduct; (3) an act of intimidation; (4) abuse of his police powers; (5) involving another Department police officer in an act of intimidation; and (6) unethical conduct.

¶ 7 On August 26, 2015, plaintiff, through counsel, filed an appearance and a written request for a hearing pursuant to the State Universities Civil Service System rules.

¶ 8 Subsequently, on September 18, 2015, Attorney Roger MacDougall was appointed as the hearing officer for plaintiff's hearing, scheduled for September 30, 2015.

¶ 9 At the hearing, the University presented exhibits as well as testimony regarding the July 5, 2015, incident.

¶ 10 Sergeant Kehoe prepared an interdepartmental memorandum on July 6, 2015, detailing the circumstances surrounding his involvement with the incident. While assigned as the First Shift Watch Commander, Sergeant Kehoe was called via dispatch in regard to a request for a supervisor at Taylor and Racine Streets. When he arrived, he met with Chicago Police Sergeant Jones who stated that two of the Department's officers, plaintiff and Officer Clark, were involved in an off-duty incident involving another person. The officers were in the back of separate Chicago police cars; Sergeant Jones stated that neither officer was under arrest nor were they handcuffed. Sergeant Jones explained that Rice had observed plaintiff and Clark in a verbal argument during which plaintiff grabbed Officer Clark's arm. When Rice stopped to ask if she was alright, plaintiff told him to mind his own business and took a black gun from his side and handed it to Officer Clark. Officer Clark then walked across the street and placed the gun in a vehicle. Rice walked away and flagged down a Chicago police car and stated "that guy has a gun." The Chicago police officers stopped both plaintiff and Officer Clark and learned that they were both off-duty Department police officers. Plaintiff had no gun on his person, but told the

officers that the gun was locked in the trunk. At that point the Department was called, and a supervisor was requested.

¶ 11 Sergeant Kehoe spoke with Rice who confirmed the events as explained by Sergeant Jones. Rice stated that at no time did he see plaintiff strike Officer Clark and he was just making sure everything was okay. Rice did not know that she and plaintiff were off-duty police officers, plaintiff never pointed his gun at Rice, and he did not feel threatened by plaintiff. Rice did not want to make a formal complaint against plaintiff or Officer Clark and he did not want to sign any criminal complaint against either officer. Sergeant Jones then released plaintiff and Officer Clark to Sergeant Kehoe, who had other officers transport them to the station after plaintiff's car was secured. Because plaintiff and Officer Clark were involved in a domestic relationship, they were separated at the station. Officer Clark was asked whether she was okay and if she needed assistance for domestic violence, to which she replied no. There were no marks, bruises or other signs of domestic violence on either plaintiff or Officer Clark. Both officers had been drinking but showed no signs of intoxication either physically or verbally. Both seemed aware of their surroundings and were very cooperative. Sergeant Kehoe notified Commander Hersey, who, on orders of the Chief of Police, placed both plaintiff and Officer Clark on administrative leave pending completion of the investigation. The officers were told to surrender their police stars, identification cards, keys and radios. Plaintiff removed his .40 caliber Sig Sauer from a locked box in the trunk of his car and gave it to Sergeant Kehoe, who disarmed it and found it to be fully loaded with 13 live rounds. Plaintiff and Clark were ordered to return to their separate residences.

¶ 12 In the transcript of a recorded telephone call to the Department's dispatch center on July 6, 2015, Rice indicated that he filed a report with Chicago police and was inquiring as to whether he needed to file a report with the Department. Rice detailed the incident for the dispatcher, stating that plaintiff was very aggressive with Officer Clark and he walked over to try and get them to stop when plaintiff pulled his weapon out and gave it to Clark. Rice stated that when plaintiff pulled out the gun, he got scared and started running and that plaintiff followed him down the street, claiming that he was a police officer. When Chicago police arrived, Rice learned that both plaintiff and Officer Clark were police officers with the Department. The dispatcher took Rice's name and number and concluded the call after admonishing him that he needed to be careful when intervening in altercations on the street.

¶ 13 A copy of the Department's incident report prepared by Lieutenant Stan Grice detailed essentially the same information as contained in Sergeant Kehoe's memorandum.

¶ 14 Rice subsequently provided a sworn affidavit on July 7, 2015, to the Department, averring essentially the same information he provided during his call to the Department's dispatch. Rice additionally averred that plaintiff stated "the police can't do nothing to me" before walking towards him as if he was going to attack. When plaintiff pulled out his gun, Rice backed away with his hands up before running away while calling 911. He subsequently flagged down a passing police car and told the officers that plaintiff had a gun. At the hearing, Rice testified that plaintiff did not announce that he was a police officer until after the Chicago police car was flagged down.

¶ 15 The Chicago police incident report listed the offense as aggravated assault with a handgun and contained a summary narrative of the incident that was essentially the same as Rice's account.

¶ 16 Officer Clark prepared an interdepartmental memorandum on July 7, 2015,¹ in which she stated that she prepared the statement as a condition of employment and to avoid possible discipline for insubordination. Officer Clark also stated that she reserved her "constitutional right to remain silent under the Fifth and Fourteenth Amendments * * * and any other rights prescribed by law." Officer Clark stated that she and plaintiff left Bar 10 Doors at approximately 11:30 p.m. to have a personal discussion. They were then approached by an unknown male, who twice asked plaintiff if he was "OK" to which plaintiff responded that he was fine and asked him to leave. The unknown man then asked Officer Clark if she was "OK" to which she responded that she was "OK." Officer Clark stated that she was afraid of the unknown male because he was "big, strong and talking loudly." Plaintiff stepped in between her and the unknown male and told the male that she was fine and to just leave them alone. The unknown male stated "this ain't what you want" and refused to leave them alone. Plaintiff told the male that he was an off-duty officer and that he would call the police. The unknown male stood there in an intimidating stance. Plaintiff took his weapon off his waist, gave it to Officer Clark and asked her to secure it in the car's trunk. At no point did she see plaintiff point the gun in an aggressive manner and shortly thereafter, Chicago police and Department police arrived at the scene.

¶ 17 An interdepartmental memorandum was prepared by Lieutenant Grice to summarize his interview with witness Geniro Gomez. On the date in question, Gomez had just finished working

¹ We take judicial notice that the date is typed incorrectly on the document as June 7, 2015; it concerns the incident at issue which occurred on July 5, 2015.

at Taylor Made Pizza, located on the north side of Taylor Street near Lytle Street. He got a ride from a co-worker to his car parked approximately one block away, and as he exited his co-worker's car, he heard a loud argument between an African-American couple standing on the sidewalk on Lytle Street half a block away. Another African-American man approached the couple and appeared to try and break up the situation. After a few words were exchanged between the two males, the man that was arguing with the woman grabbed something from underneath his shirt from the side of his waist. The man who approached them walked away quickly, and Gomez could see the man making a call on his cell phone. The man then flagged down a nearby police car. Gomez stayed at the scene to give the police his statement, but no one took his information and he left the area.

¶ 18 Another witness, Elbert Echols, came to the Department on July 8, 2015, to give his account of the incident because he was told that the officer was arrested by Chicago police for pulling his gun. In the statement, Echols stated that he never saw anyone pull a gun or anyone chase anyone. He saw a bald male arguing with a female; a "light skin" male got between them; Chicago police arrived and he left. Echols observed this while leaving Bar 10 Doors. After a female friend advised him that the officer was arrested for pulling his gun, he came to the Department to give a statement.

¶ 19 In an undated statement, Latoya Neal stated that as she and a friend walked on Taylor Street to their cars, she saw a bald guy and a girl standing at the corner having an "intense" conversation. She then saw a tall guy walk up to the bald guy and say something to him. The bald guy waved his hand as to "shoo" him away. The tall guy walked towards the girl and the bald guy stood in front of her. The tall guy yelled and pointed his finger before walking away.

The police then arrived. She never saw the bald guy hit the girl or the tall guy and she did not see him pull out a gun and point it at anyone.

¶ 20 Plaintiff filed a written statement on July 13, 2015, with the Department. In his statement, plaintiff indicated that on July 5, 2015, at approximately 11:30 p.m., he and Officer Clark were walking eastbound on Taylor Street having a personal discussion. At Taylor and Lytle Streets, they were approached by a large, unknown male, who asked if plaintiff was okay. Plaintiff replied that he was fine. The man again asked if plaintiff was ok, and plaintiff again replied yes and asked the man to leave them alone. The man became angry and aggressive and said "Who the f*** do you think you talking to?" while pointing his finger towards plaintiff's head. Plaintiff again asked the man to leave them alone. At that time, plaintiff and Officer Clark attempted to walk away from the man, but he walked towards Officer Clark and asked, "F*** what he talking about, are you ok?" She told the man she was ok, but the man asked her again. Plaintiff noticed that Officer Clark was visibly afraid of the man so he stepped in front of her and asked him to go away. The man took a fighting stance and in a very aggressive tone and threatening manner stated "N***** this ain't what you want, I [sic] from the Wood." Plaintiff then told the man that he was an off-duty police officer and that he would call the police. The man maintained his fighting stance and said "So what, I know Jon Richardson. It don't matter!" Plaintiff was afraid that the man would attack and disarm him and attack Officer Clark. In an effort not to "introduce a firearm in a physical altercation," plaintiff removed his weapon from his waist and asked Officer Clark to secure it in his vehicle's trunk. The man then backed up and headed east on Taylor. Plaintiff saw a Chicago Police Department vehicle on Racine Street and went in that direction. At the same time, the man ran in the same direction in an apparent

attempt to make contact with Chicago police before plaintiff did. Plaintiff stated that at no time did he become physically or verbally abusive towards Officer Clark, nor did he draw his weapon in a threatening manner towards the man.

¶ 21 Charles Miller, head of security for Bar 10 Doors, testified on behalf of plaintiff. He indicated that Rice had been inside the bar prior to the altercation with plaintiff; he had consumed a number of drinks and was pestering a female patron. Miller told Rice to leave the bar, which he did and crossed the street. According to Miller, the two officers left the bar 10 to 15 minutes later. Prior to them leaving, he spoke with them about getting hired by the Department. Miller knew plaintiff from a number of past interactions at the bar.

¶ 22 Department Police Chief Kevin Booker testified that since becoming Chief earlier in 2015, he took plaintiff under his wing. He was notified of an incident involving plaintiff on July 5, 2015, namely that plaintiff called in sick that night and was subsequently drinking at a bar with his weapon, was involved in a verbal altercation with Officer Clark, displayed his weapon to a citizen and that Sergeant Kehoe was called over to the scene because plaintiff was in the back of a Chicago police car. Chief Booker directed that plaintiff and Officer Clark be placed on administrative leave while the investigation continued. He testified that he reviewed an internal affairs report prepared by Commander Peters, which recommended plaintiff's termination based on plaintiff's disciplinary history as well as the new incident. Chief Booker characterized plaintiff as a "liability to the Department * * * [could not] let him get himself in trouble to where he becomes incarcerated, he hurts himself, or he hurts somebody else." Chief Booker further indicated that each incident in plaintiff's disciplinary history that dealt with a suspension showed poor judgment and aggressiveness that was escalating every time. A lesser form of punishment

was not considered. Chief Booker stated that as an officer, he expected plaintiff to de-escalate the situation by talking to Rice, reentering the bar for assistance, calling the Department for assistance or calling the Chicago police. In Chief Booker's opinion, a weapon should only be removed when there is a deadly threat, and there was no deadly threat in these circumstances, therefore plaintiff's conduct was not acceptable.

¶ 23 The University submitted a written closing argument on October 16, 2015. In its closing, the University characterized plaintiff as an "officer with bad judgment who has repeatedly demonstrated unnecessary aggressiveness in the community." The University further noted that despite four prior suspensions, plaintiff called in sick on July 5, 2015, went out drinking, got into an argument with his girlfriend, Officer Clark, on a public street corner, and then displayed his gun to "Good Samaritan" Rice who came over to ensure that Officer Clark was not in any danger. By displaying his weapon to an unarmed citizen when no deadly threat existed and then handing the gun to Clark, the University argued that plaintiff violated multiple Department General Orders, engaged in off-duty misconduct, abused his police powers, engaged in an act of intimidation, involved another officer in an act of intimidation, and engaged in unethical behavior.

¶ 24 Plaintiff also submitted a written closing argument on October 16, 2015. In his closing, he argued that the evidence did not support a finding that he violated the general orders and thus there was no sufficient cause to warrant his discharge. Plaintiff also argued that the mitigation evidence he and Clark introduced clearly militated against discharge and that the majority of evidence regarding his past discipline introduced in aggravation was unrelated to the charges in the discharge case and should not be considered. He requested that he be reinstated to his

position with full back pay and no loss of employment benefits or seniority, along with pre- and post-judgment interest.

¶ 25 The hearing officer issued written findings of fact on November 28, 2015, which began by addressing three of the parties' prehearing motions.

¶ 26 First, plaintiff's motion for a bifurcated hearing was denied because under the governing statute, a hearing officer only makes findings of fact, which are then submitted to the Merit Board which makes the final determination of whether there was just cause to sanction plaintiff, and if so, the appropriate sanction.

¶ 27 Second, the hearing officer considered plaintiff's motion in *limine* to bar hearsay and irrelevant evidence (which was denied at the beginning of the hearing, but plaintiff was allowed to raise the issues again during the hearing); motion in *limine* to bar discipline records; and oral motion to exclude witnesses. With respect to irrelevant evidence, the hearing officer generally agreed with plaintiff, but ruled that whether something was relevant or not was a matter to be addressed throughout the course of the hearing. With respect to hearsay, the hearing officer noted that he was not strictly bound by the rules of evidence, so it would be dealt with "on a case-by-case basis throughout the hearing." With respect to evidence of prior discipline, the hearing officer ruled that it would not be allowed as proof of any existing charges, but should any charge be substantiated, as a finding of fact, evidence of prior discipline could be introduced in order for the Merit Board to "deal appropriately with any discipline assessed by the University."

¶ 28 Third, the Department's oral motion to exclude witnesses was granted.

¶ 29 The hearing officer noted that all of the charges against plaintiff pertained to an incident that occurred on July 5, 2015. Plaintiff was scheduled to work that day, but called in sick and took the day off. Plaintiff testified that his brother was injured and he was entitled to take time off to be with him under Department rules. Plaintiff consumed alcohol at his brother's house and later went to Bar 10 Doors with his girlfriend, Officer Clark. During the exchange with Rice, neither plaintiff nor Officer Clark called the Chicago police or anyone from the Department, and neither officer attempted to arrest Rice. It was undisputed that no physical altercation occurred between Rice and plaintiff.

¶ 30 Plaintiff was charged with violating three rules of Department General Order 570.100, Professional Standard of Conduct. The content of those rules is provided below.

¶ 31 Departmental General Order 570.100, Professional Standard of Conduct, Order 2, Rule 2, prohibits in part:

"Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.

COMMENT: this Rule applies to both the professional and private conduct of all members. It prohibits any and all conduct which is contrary to the letter and spirit of the Departmental policy or goals or would reflect adversely on the Department or its members. It included not only all unlawful acts by members but also all acts, which although not unlawful in themselves, would degrade or bring disrespect upon the members of the Department, including public and open association with persons of known or bad criminal reputation in the community unless such association is the performance of

police duties. It also includes any action contrary to the stated policy."

¶ 32 Departmental General Order 570.100 – Professional Standard of Conduct, Order 2, Rule 8 prohibits:

"Disrespect to or maltreatment of any person or engaging in any unjustified verbal or physical altercation with any person, while on or off duty.

COMMENT: Rule 8 prohibits the use of any excessive force by any member. This rule also prohibits all brutality, and physical or verbal maltreatment of any citizen while on or off duty, including any unjustified altercation of any kind."

¶ 33 Departmental General Order 570.100 – Professional Standard of Conduct, Order 2, Rule 45 prohibits: "Unlawful or unnecessary use or display of a weapon."

¶ 34 With respect to the three rules of Departmental General Order 570.100 that plaintiff was charged with violating, the hearing officer made the following findings of fact: To the extent of any inconsistencies in the testimony among the witnesses, the testimony of Rice and Gomez was "preferred." Gomez clearly had no interest in the outcome of the case, but the same could not be said of plaintiff or his girlfriend, Officer Clark. The hearing officer found similarly that the evidence from Miller indicated that he had an interest in being in plaintiff's good graces. The hearing officer rejected testimony that Rice, a CTA employee, had been drinking, while noting that plaintiff and Officer Clark had been drinking. The hearing officer also noted that plaintiff admitted to drawing his weapon in front of Rice, who was unarmed, and given the circumstances, this was a violation of the Department rules. The hearing officer found that the

University sustained its burden of proof with respect to the charge that plaintiff violated General Order 570.100 for Professional Standard of Conduct, Order 2, Rules 2, 8, and 45.

¶ 35 With respect to the charge of off-duty misconduct, the hearing officer found that the University sustained its burden of proof as plaintiff admitted to drinking on the evening of July 5, 2015, and the incident report noted that plaintiff smelled like alcohol. Plaintiff also admitted that he was off-duty that day, but still carried around his weapon and consumed alcohol. The hearing officer concluded that, although plaintiff was not charged with taking his weapon to a bar and drinking therein in violation of General Order 240.100, displaying his weapon to a civilian constituted unwarranted off-duty misconduct.

¶ 36 With respect to the charge of abuse of police powers, the hearing officer found that the University sustained its burden of proof: plaintiff did not follow the Department rules, was armed under the authority of the Department when he was off-duty, and plaintiff did not comply with the General Orders limiting authority of an off-duty officer in that he drew his weapon unnecessarily in front of a citizen.

¶ 37 With respect to the charge of an act of intimidation, the hearing officer found the University sustained its burden of proof because there was no evidence that plaintiff was justified in his action of drawing his weapon in front of an unarmed civilian since he did not call for back up, retreat, or attempt to arrest Rice. General Order 230.100 on Use of Force authorizes officers only to draw and display their firearm in situations where they reasonably believe a deadly threat exists. Since Rice was unarmed and did not attempt to assault either Officer Clark or plaintiff, a deadly threat was not present in this incident. Therefore, plaintiff engaged in an act of intimidation when he drew his firearm.

¶ 38 With respect to the charge of involving a Department police officer in an act of intimidation, the hearing officer found the University sustained its burden of proof because plaintiff involved Officer Clark, a Department police officer, in an act of intimidation when he passed his weapon to her and she accepted it.

¶ 39 With respect to the charge of unethical conduct, the hearing officer found the University sustained its burden of proof because the Departmental General Orders lay out what the procedures are when an officer is off-duty and when he is allowed to draw his weapon. There was no life-threatening circumstance that warranted plaintiff's behavior; plaintiff could have called the Department or Chicago police, backed away from the situation, or arrested Rice for assault of a police officer. However, none of those actions was taken by plaintiff. Under the totality of the circumstances, plaintiff acted unethically by drawing his weapon while under the authority of the Department while off-duty.

¶ 40 Plaintiff filed objections to the hearing record on December 18, 2015, objecting generally to "anything stated in the Hearing Officer's Findings of Fact that is inconsistent with the testimony presented at hearing and the law." Specifically, plaintiff objected to: the court reporter's transcription of his testimony that he "drank booze" rather than the testimony that he drank an "O'Douls," a non-alcoholic beverage; the hearing officer's inaccurate characterization of him as "drawing his gun" when there was no testimony defining the term drawing or unlawful display; the hearing officer's improper reliance on "irrelevant testimony and evidence" in finding that the University met its burden in showing various rule violations; the hearing officer's improper reliance on hearsay evidence in forming his decision that the University met its burden in showing various rule violations and hearsay evidence regarding a written Chicago Police

Department report that he committed assault with a gun; the testimony of independent eyewitnesses that was ignored by the hearing officer; the hearing officer's finding that Rice was a credible witness which ignored material inconsistencies; other relevant witness testimony that was ignored by the hearing officer; the exclusion of Lieutenant Grice's testimony; and the hearing officer's material misrepresentation of plaintiff's disciplinary record.

¶ 41 Plaintiff also filed a motion for oral argument before the Merit Board on December 18, 2015, seeking to present "glaring omissions and mistakes of fact" made in the hearing officer's findings of fact; a video of the interior of the bar because the hearing officer concluded that plaintiff was drinking at the bar when he was not; a "new" General Order 570.100 which deleted "off duty" from Rule 8 and deleted Rule 45 and was effective as of March 2015; and seeking an opportunity to argue the appropriate level of discipline because the hearing officer's findings of fact were silent as to the appropriate level of discipline.

¶ 42 The University filed a response to plaintiff's objections to the hearing record and motion for oral argument on January 15, 2016.

¶ 43 The Merit Board issued its written decision on January 27, 2016. The Merit Board approved and certified the hearing officer's findings of fact to the University and discharged plaintiff from service.

¶ 44 On February 26, 2016, plaintiff filed a complaint for administrative review in the circuit court of Cook County. The circuit court issued a written order on February 14, 2017, in which it determined that the Merit Board's findings that plaintiff committed the alleged offenses were not against the manifest weight of the evidence. However, the circuit court concluded that it was not convinced that plaintiff's termination was appropriate under the circumstances. Applying a

clearly erroneous standard to what it perceived as a mixed question of law and fact, the circuit court found that the punishment of termination was excessive and remanded the matter for a more appropriate punishment.

¶ 45 The University subsequently filed a motion to reconsider on March 14, 2017, noting that the court had applied a "clearly erroneous" standard of review to the second prong of the two-step analysis used for judicial review of an administrative agency's discharge decision. The University asserted that the two-step analysis first required a determination of whether the Merit Board's findings were against the manifest weight of the evidence, and second, whether the factual findings were sufficient to support the Merit Board's conclusion that cause exists for discharge. The University further noted that both parties set forth the correct test to be applied to judicial review of the decision to discharge plaintiff in their respective briefs.

¶ 46 Plaintiff responded that the circuit court's order was correct and the University's motion to reconsider should be denied.

¶ 47 The circuit court issued a written order on April 28, 2017, granting the motion to reconsider. The court noted that while it would not have imposed termination in this case, the University was correct that the decision regarding the penalty ultimately lies with the Merit Board in cases like this where the punishment was related to the requirements of service and not arbitrary or unreasonable. The circuit court affirmed the final administrative decision.

¶ 48 Plaintiff filed a notice of appeal on May 25, 2017.

¶ 49 ANALYSIS

¶ 50 Plaintiff contends on appeal that: (1) the Merit Board's findings of fact were contrary to the manifest weight of the evidence; (2) the hearing officer erred in allowing evidence for

uncharged offenses; (3) the mitigating evidence clearly militates against discharge; (4) the trial court erred in granting the University's motion to reconsider; and (5) the University failed to provide a full and complete record to the trial court so it could not perform its judicial review function.

¶ 51

A. Standard of Review

¶ 52 Before addressing the contentions, it is appropriate to explain the standard of review. See *Sindermann v. Civil Service Comm'n of Village of Gurnee*, 275 Ill. App. 3d 917, 922 (1995). Section 10-45 of the Illinois Municipal Code (Civil Service in Cities Act or Act) (65 ILCS 5/10-1-45 (West 2018)) provides that judicial review of the Board's decision shall be in accordance with the Review Law (735 ILCS 5/3-101 *et seq.* (West 2018)). Section 3-110 of the Review Law provides that our review "extend[s] to all questions of law and fact presented by the entire record before the court." 735 ILCS 5/3-110 (West 2018).

¶ 53 In an administrative review case, we review the decision of the agency, not that of the circuit court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006). We are limited to considering the evidence submitted in the administrative hearing and may not hear additional evidence for or against the agency's decision. *Marconi*, 225 Ill. 2d at 532. "A reviewing court will not decide whether a less stringent punishment is appropriate and will overturn the Board's decision only if it is arbitrary or unreasonable or unrelated to the requirements of service." *Robbins v. Department of State Police Merit Board*, 2014 IL App (4th) 130041, ¶ 39 (quoting *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 420, 530 (1998)).

¶ 54

B. Applicable Principles

¶ 55 Our scope of review of an administrative agency's decision to discharge an employee is a two-step process. *Walker*, 2015 IL App (1st) 140087, ¶ 39. The first step in our analysis is to determine whether the agency's finding of guilt is contrary to the manifest weight of the evidence. *Walsh v. Board of Fire and Police Commissioners of Village of Orland Park*, 96 Ill. 2d 101, 117 (1983). The findings and conclusions of the administrative agency on questions of fact are *prima facie* true and correct. *Krocka v. Police Board of City of Chicago*, 327 Ill. App. 3d 36, 46 (2001). "Only if, after reviewing the evidence in the light most favorable to the Board, we determine that no rational trier of fact could have reached the conclusion reached by the Board are we able to overturn a decision under this standard." *Krocka*, 327 Ill. App. 3d at 46 (quoting *Chief Judge of the Circuit Court v. American Federation of State, County & Municipal Employees, Council 31*, 153 Ill. 2d 508, 514 (1992)). The second step is to determine if the Merit Board's findings of fact provide a sufficient basis for its conclusion that there was cause for discharge (*Walker*, 2015 IL App (1st) 140087, ¶ 39) and was not arbitrary or unreasonable or unrelated to the requirements of service (*Robbins*, 2014 IL App (4th) 130041, ¶ 39).

¶ 56 In administrative review cases, the hearing officer acts as the fact finder, and in that capacity, hears the testimony of witnesses, determines the credibility and the weight to be given their testimony, and draws reasonable inferences from all the evidence presented in support of the charges against the accused. *Ahamad v. Board of Education of the City of Chicago*, 365 Ill. App. 3d 155, 162 (2006).

¶ 57 We will not reverse an agency's findings and decision just because an opposite conclusion might be reasonable or we might have ruled differently; if the record contains

evidence to support the agency's decision, we must affirm. *Caliendo v. Martin*, 250 Ill. App. 3d 408, 416 (1993).

¶ 58 With these principles in mind, we turn to the merits of the appeal.

¶ 59 C. Discussion

¶ 60 1. Manifest Weight of the Evidence

¶ 61 Plaintiff first contends that the hearing officer's findings of fact were against the manifest weight of the evidence. Plaintiff takes issue with each of the factual findings made in reference to his violation of the various Department rules and other charges against him, arguing that there was no evidence that his conduct was contrary to the Department policy and goals.

¶ 62 Based on the evidence presented at the hearing, we agree with the hearing officer's findings of fact. The evidence clearly indicates the following: that plaintiff and Officer Clark were involved in an argument after leaving Bar 10 Doors; plaintiff was armed with his weapon while they were present in the bar and he was off-duty; Rice approached the couple to ascertain whether or not Officer Clark required assistance; Rice was unarmed; plaintiff removed his weapon from his waist in front of Rice and gave it to Officer Clark. Plaintiff and Officer Clark both characterized Rice as the aggressor and Neal indicated that when Rice approached, plaintiff waved his hand to "shoo" him away. Rice subsequently backed away, called 911 and flagged down a Chicago police car that was nearby. There was conflicting testimony as to whether or not plaintiff had been drinking while in the bar, although plaintiff did admit that he had consumed alcohol earlier that day. There was also conflicting testimony as to whether plaintiff and Officer Clark indicated that they were police officers prior to Rice calling 911 or flagging down the

Chicago police car. Once Chicago police arrived, plaintiff and Officer Clark were placed in the back of separate police cars, and their superiors were called to the scene.

¶ 63 Rule 2, which applies to both the professional and private conduct of members of the Department, prohibits any action or conduct which brings discredit upon the Department. Our examination of the evidence presented at the hearing reveals that it could support a factual finding that plaintiff's conduct in engaging in a verbal altercation with an unarmed citizen, Rice, and then removing his weapon, whether or not he announced that he was a police officer, discredited the Department. We conclude that the factual finding that plaintiff violated Rule 2 was not against the manifest weight of the evidence.

¶ 64 Rule 8 prohibits the use of any excessive force, while on or off-duty. We find that the evidence supports a factual finding that in displaying his weapon to an unarmed citizen during a verbal altercation while off-duty, plaintiff demonstrated the use of excessive force in violation of Rule 8. As such, we conclude that the factual finding that plaintiff violated Rule 8 was not against the manifest weight of the evidence.

¶ 65 Rule 45 prohibits the unlawful or unnecessary use or display of a weapon. We find that the evidence clearly supports the finding of fact that plaintiff violated Rule 45 as he admitted that he removed his previously concealed weapon during his verbal altercation with Rice. Regardless of the reason the weapon was displayed, the rule prohibits the unnecessary display of a weapon. Chief Booker testified that a weapon should only be displayed when there is the threat of deadly force, and the evidence does not indicate that such a threat was present. We conclude that the factual finding that plaintiff violated Rule 45 was not against the manifest weight of the evidence.

¶ 66 With respect to the charge of an act of intimidation, plaintiff contends that the charging document never indicated what rule or policy addressed this conduct. Plaintiff also maintains that he had no intent to intimidate Rice and Rice himself stated that he never felt threatened by plaintiff. Plaintiff maintains that Rice was the aggressor who sought to intimidate him and Officer Clark. Our review of the evidence reveals that, regardless of the reason, plaintiff's removal of his weapon in front of the unarmed Rice, which plaintiff admitted, could serve as a basis for a factual finding of an act of intimidation. We conclude that the factual finding that plaintiff committed an act of intimidation is not against the manifest weight of the evidence. Moreover, plaintiff's removal of his weapon in front of Rice and handing it to Officer Clark could reasonably serve as the basis for the factual finding that he involved Officer Clark in an act of intimidation. Such finding is not against the manifest weight of the evidence.

¶ 67 With respect to the charges of off-duty misconduct, abuse of police power and unethical conduct, plaintiff contends that the University did not allege which rules or policies addressed those charges and restates his conclusion that the removal of his gun was necessary given the circumstances. In contrast, plaintiff argues that the evidence shows that he acted with "prudence and great restraint when confronted by a much larger aggressor who was intent on fighting him without provocation from [him]."

¶ 68 The evidence does not support plaintiff's characterization of Rice as the aggressor intent on fighting him; there is no evidence that Rice ever attempted to fight plaintiff. Moreover, it was the unnecessary demonstration of force and intimidation in displaying the weapon to Rice during the verbal altercation, in violation of the Department's general orders of professional conduct, which support the factual findings of plaintiff's off-duty conduct, abuse of police power and

unethical conduct. We conclude that the findings of fact were not against the manifest weight of the evidence.

¶ 69 2. Admission of Evidence/Fair and Impartial Hearing

¶ 70 Plaintiff next contends that the hearing officer erred in allowing evidence of uncharged offenses. Specifically, plaintiff maintains that the allegations of off-duty misconduct, abuse of police power, intimidation and unethical conduct were not specifically detailed in the charging document and they are not a part of the Department's rules or regulations. Plaintiff also asserts that the University was improperly allowed to submit evidence that his alleged conduct violated other, uncharged Department rules.

¶ 71 Plaintiff further contends that he was not provided with a fair and impartial hearing because the hearing officer allowed hearsay evidence, ignored the testimony of independent eyewitnesses, and ignored material inconsistencies by Rice in six different statements.

¶ 72 In response, the University contends that plaintiff's arguments are not well developed and lack merit, noting that plaintiff fails to provide a standard of review for his challenges to evidentiary rulings and cites no authority for the proposition that all charges must be based on specific rules or policies of the employing department.

¶ 73 It is well established that administrative proceedings must accord with fundamental principles and requirements of due process of law. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992). Although due process "envisions" an orderly proceeding wherein notice and an opportunity to be heard are given, procedural due process in an administrative hearing does not always require application of the judicial model. *Colquitt v. Rich Township High School District 227*, 298 Ill. App. 3d 856, 860-61 (1998). For administrative

hearings, due process specifically requires a definite charge, adequate notice and a full and impartial hearing. *Giampa v. Illinois Civil Service Commission*, 89 Ill. App. 3d 606, 610 (1980). 610.

¶ 74 However, the same strict rules of evidence which apply in judicial proceedings do not apply in proceedings before administrative agencies. *Giampa*, 89 Ill. App. 3d at 612. The admission of evidence in administrative hearings is purely discretionary. *Ellison v. Illinois Racing Board*, 377 Ill. App. 3d 433, 443 (2007). Unless the failure to observe the technical rules of evidence materially affects the rights of a party and results in substantial injustice to him, such failure is not sufficient reason to set aside an agency's decision. See 735 ILCS 5/3-111(b) (West 2016).

¶ 75 Moreover, none of the evidence to which plaintiff objects warrants reversal of the Merit Board's decision. Although a hearing officer may not consider unrelated events to "color his outlook" as to whether the plaintiff had a propensity to commit the acts with which he was charged, he may consider evidence of past conduct to the extent that it is relevant to the case. See *Secrest v. Department of Corrections*, 64 Ill. App. 3d 458, 460-61 (1978); *deOliveira v. State Board of Education*, 158 Ill. App. 3d 111, 127 (1987). We further presume that the officer considered only properly admitted evidence in reaching its decision. See *Watkins v. American Services Insurance Co.*, 260 Ill. App. 3d 1054, 1067 (1994).

¶ 76 Here, plaintiff was afforded notice and an opportunity to be heard and the hearing was fair and impartial. Even if the hearing officer erred in admitting hearsay or other evidence, admission of such evidence did not materially affect plaintiff's rights and did not result in substantial injustice since the findings of the Merit Board were supported by other substantial

and competent evidence. We find no abuse of discretion by the hearing officer in allowing testimony concerning plaintiff's violation of other Department rules that supported the basis for the various charges the Department decided to bring against him. The hearing officer's findings of fact were not against the manifest weight of the evidence, thus plaintiff's contentions are without merit.

¶ 77 3. Mitigating Evidence

¶ 78 Plaintiff further contends that the mitigating evidence he presented at the hearing clearly militates against discharge. We disagree.

¶ 79 On review, we may not consider whether we would have imposed a more lenient disciplinary sentence; instead, our review is limited to a determination of whether the Board acted arbitrarily or unreasonably in selecting a type of discipline that was inappropriate or unrelated to the service. *McDermott v. City of Chicago Police Board*, 2015 IL App (1st) 151979, ¶ 35. The Board has wide latitude in determining the appropriate punishment to not only punish the conduct of the officer but also deter future conduct by other officers. *Police Board of the City of Chicago v. Kappel*, 220 Ill. App. 3d 580, 590 (1991).

¶ 80 In this case, the Merit Board found that plaintiff violated three of the Department's rules and that such conduct was the basis for the other charges against him. An officer's violation of a single rule is a sufficient basis for termination. *McDermott*, 2015 IL App (1st) 151979, ¶ 36. The Board is not required to give mitigating evidence more weight in a termination decision, and a discharge made despite the presentation of such mitigating evidence is not, without more, arbitrary or unreasonable. *McDermott*, 2015 IL App (1st) 151979, ¶ 36. Here the Merit Board apparently determined that the mitigating evidence did not vitiate the seriousness of the

misconduct. We conclude that the Merit Board's decision to discharge plaintiff was not arbitrary or unreasonable.

¶ 81 4. The University's Motion to Reconsider

¶ 82 Plaintiff also contends that the trial court erred in granting the University's motion to reconsider and affirming his termination by the Merit Board. He argues that the circuit court was correct when it originally found termination was excessive under the circumstances. Plaintiff also contends that the circuit court applied the correct standard in its initial ruling, but even under the standard urged by the University, the original decision is supported by case law.

¶ 83 A motion to reconsider is meant to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 65 (2001). Generally, a trial court's decision to grant or deny a motion for reconsideration will not be reversed absent an abuse of discretion. *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 16. A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the trial court's view. *TCF National Bank v. Richards*, 2016 IL App (1st) 152083, ¶ 41. However, if a motion to reconsider questions only the trial court's previous application or purported misapplication of existing law, we review the trial court's decision to grant or deny the motion to reconsider *de novo*. *Nissan Motor Acceptance Corp.*, 2012 IL App (1st) 111296, ¶ 16.

¶ 84 Here, the University's motion to reconsider noted that the court had applied a "clearly erroneous" standard of review to the second prong of the two-step analysis used for judicial review of an administrative agency's discharge decision. The University asserted that the two-

step analysis first required a determination of whether the Merit Board's findings were against the manifest weight of the evidence, and second, whether the factual findings were sufficient to support the Merit Board's conclusion that cause exists for discharge. The University further noted that both parties set forth the correct test to be applied to judicial review of the decision to discharge plaintiff in their respective briefs.

¶ 85 The circuit court granted the University's motion to reconsider in a written order, noting that while it would not have imposed termination in this case, the University was correct that the decision regarding the penalty ultimately lies with the Merit Board in cases like this where the punishment was related to the requirements of service and not arbitrary or unreasonable. The circuit court then granted the University's motion to reconsider and affirmed the final administrative decision.

¶ 86 The record shows that instead of applying the second step of the administrative review analysis, the circuit court incorrectly found that the Merit Board's decision to discharge was "clearly erroneous." When the error in application of the law was brought to its attention by the University's motion to reconsider, the court applied the correct standard and reversed its decision, even though it noted that it would not have discharged plaintiff. Specifically, the court found that the University was correct that the decision regarding the penalty ultimately lies with the Merit Board in cases like this where the punishment was related to the requirements of service and not arbitrary or unreasonable.

¶ 87 We must determine whether the Board's decision that there was cause to discharge plaintiff was arbitrary and unreasonable or unrelated to the requirements of service. *Caliendo*, 250 Ill. App. 3d at 418. We do not reweigh the evidence or substitute our judgment for that of

the Board, but instead affirm when the record contains evidence supporting the Board's decision. *Malinowski v. Cook County Sheriff's Merit Board*, 395 Ill. App. 3d 317, 323 (2009).

¶ 88 Here, we find that the Merit Board's findings of fact provided a sufficient basis for plaintiff's discharge where he violated several Department rules. Since an officer's violation of a single rule may constitute a sufficient basis for discharge (*Malinowski*, 395 Ill. App. 3d at 322), we find that the Merit Board's decision to discharge plaintiff was not arbitrary and unreasonable or was unrelated to the requirements of the service. As such, we conclude that the circuit court properly granted the University's motion to reconsider and reversed the remand order.

¶ 89 CONCLUSION

¶ 90 For the foregoing reasons, we confirm the decision of the Merit Board finding that plaintiff's off-duty conduct violated three of the Department's rules and supported the other charges against him, and affirm the order of the circuit court discharging plaintiff.

¶ 91 Decision of the Merit Board confirmed; circuit court affirmed.