2018 IL App (1st) 173073-U
No. 1-17-3073

SECOND DIVISION
December 18, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CRAIG MIHALJEVICH, Plaintiff-Appellant, v. ILLINOIS STATE POLICE MERIT BOARD, ILLINOIS STATE POLICE DEPARTMENT, and LEO SCHMITZ, DIRECTOR OF THE ILLINOIS STATE POLICE DEPARTMENT, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 16 CH 15273 The Honorable Diane J. Larsen, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court of Cook County affirming the Board's decision to terminate plaintiff Mihaljevich from his employment as an Illinois state trooper is affirmed. The Board's findings of fact and conclusions of law were not against the manifest weight of the evidence, and the Board's discharge decision was not arbitrary, unreasonable, and unrelated to the requirements of service. Accordingly, we cannot say the Board's decision to discharge Mihaljevich is clearly erroneous.

¶ 2 Plaintiff Craig Mihaljevich appeals from an order of the circuit court of Cook County affirming the decision of the Illinois State Police Merit Board to terminate his employment as an

Illinois state trooper. The Board discharged Mihaljevich because he sent a text message, under false pretenses, from the cell phone of his wife, Monica Escobar, to Illinois state trooper Jason Czub, whom he suspected was having an affair with his wife, and instructed Czub to come to Escobar and Mihaljevich's house, then detained Czub at gunpoint and attempted to have him arrested for breaking and entering. On appeal, Mihaljevich contends that the decision of the circuit court is clearly erroneous where the Board terminated his employment "contrary to the articulate [*sic*] and detailed *recommended* findings of fact and conclusions of law of [the] hearing officer." We affirm for the reasons that follow.

¶ 3 BACKGROUND

¶ 4 Following an incident on March 24, 2014 involving state trooper Craig Mihaljevich and state trooper Jason Czub, the Director of the Illinois State Police Department filed a seven-count complaint alleging that Mihaljevich violated various department rules of conduct and attached the following rules:

¶ 5 Paragraph III.A.1 (Count I): "Officers will uphold the Constitutions of the United States and the state of Illinois, obey all federal, state and local laws in which jurisdiction the officer is present, and comply with court decisions and orders of courts having jurisdiction."

¶ 6 Paragraph III.A.37 (Count II): "Officers will not make false accusations of a felony, misdemeanor, traffic, petty offense or an administrative charge. Officers will not withhold information or testimony, if to do so would mislead judicial or administrative proceedings. Officers will testify truthfully when under oath. However, officers will not be required to waive any applicable constitutional rights."

¶ 7 Paragraph III.A.41.c (Count III): "Officers are required to truthfully answer questions by, or render material and relevant statements to, competent authority in a Department personnel

investigation when said officer is the subject of the investigation and has been advised of his/her statutory administrative proceedings rights if the allegation indicates that a recommendation for demotion, suspension of more than 15 days or discharge from the Department is probable."

¶ 8 Paragraph III.A.43 (Count IV): "Officers will not use more force in any situation than is reasonably necessary under the circumstances. Officers will use force in accordance with law and Department procedures."

¶ 9 Paragraph III.A.44 (Count V): "Officers will not make any arrest, search or seizure that they know or should know is not in accordance with law and Department procedures."

¶ 10 Paragraph III.A.8 (Count VI): "Officers will maintain a level of conduct in their personal and business affairs that is in keeping with the highest standards of the law enforcement profession. Officers will not participate in any conduct that impairs their ability to perform as law enforcement officers or causes the Department to be brought into disrepute."

¶ 11 Paragraph III.A.7 (Count VII): "Officers will conduct themselves on and off duty in such a manner as to reflect favorably on the Department. Officers will not engage in conduct that discredits the integrity of the Department or its employees, or that impairs the operations of the Department. Such actions will constitute conduct unbecoming an officer."

¶ 12 The complaint stated that Counts I – III constituted "Level 7 Misconduct" punishable up to termination whereas the remaining counts for various level offenses are punishable up to suspension.

¶ 13 In December 2015, the Director and Mihaljevich submitted a proposed settlement agreement stipulating to certain facts constituting violations of department rules and agreeing that Mihaljevich should be suspended for 90 days without pay. The Board was asked to approve

the settlement agreement which it declined and remanded the case for an Administrative Hearing.

¶ 14 A hearing officer held a two-day hearing in April 2016 at which 13 witnesses testified. The hearing officer made recommended findings of fact as to each count, which the Board overruled except for Counts VI and VII. The Board relied on the record of the hearing in making its findings of fact as follows: On March 24, 2014, Mihaljevich was off duty and drove his wife Monica Escobar to school. Mihaljevich noticed that Escobar left her cell phone in the car and he saw text messages from another man later identified as Jason Czub. Mihaljevich used the WhatsApp instant messaging service on Escobar's cell phone to contact Czub and instruct him to come to the house, let himself in through the unlocked front door, and undress. Later, while Czub complied, Mihaljevich was downstairs and heard someone enter the house. Mihaljevich went upstairs to the main floor, approached Czub with his service weapon drawn, and instructed him to "freeze." Czub identified himself as an Illinois state trooper but he could not produce any identification. Mihaljevich handcuffed Czub and then called his neighbor, off-duty Chicago police officer Robert Eigenbauer. Czub was handcuffed and naked in the center of the living room when Eigenbauer arrived. Eigenbauer questioned Czub about his identity and why he was there. Mihaljevich then called 911 at Eigenbauer's request. Chicago police officers John McGovern and Michael Kulbida responded. Officer McGovern uncuffed Czub and gave him his clothes. Officer Kulbida spoke to Mihaljevich and Czub about the text messages sent from Escobar's cell phone. Mihaljevich explained that he "told [Czub] to come to the residence. The front door will be open. Once you get inside get naked, put your clothes on the kitchen table and I'll have a surprise for you when I come downstairs." Mihaljevich gave a similar explanation when Chicago police sergeant Gabriel Flores arrived. After Mihaljevich told Officer McGovern

that he wanted Czub arrested for breaking and entering, Officer McGovern discussed the matter with Sergeant Flores, who concluded that Czub did not intentionally break into the house, but had been "lured into the house by [Mihaljevich] sending the text messages to him." During an administrative interview, Mihaljevich denied text-messaging Czub from Escobar's cell phone or telling Chicago police officers that he did so.

¶ 15 As to Count I, the hearing officer specifically found "that [Trooper] Mihaljevich did not commit the offence of Aggravated Unlawful Restraint, [Trooper] Mihaljevich testified credibly and [Trooper] Czub did not testify credibly." The Board however found by a preponderance of the evidence that Mihaljevich: "(a) violated ROC-002, Paragraph III.A.1, in that he committed the offense of Aggravated Unlawful Restraint in violation of 720 ILCS 5/10-3.1(a), a Class 3 felony, when he invited Jason Czub to come to his residence under false pretenses, to enter through an unlocked front door and get undressed, then knowingly detained him without legal authority while using a deadly weapon in that he held Czub at gunpoint and handcuffed him."

¶ 16 As to Count II, the hearing officer specifically found "that no crime (criminal trespass) had been committed, [Officer] Eigenbauer made the decision to involve the Chicago Police Department, no material information was withheld by [Trooper] Mihaljevich, and [Trooper] Mihaljevich did not seek to have [Trooper] Czub arrested or prosecuted." The Board however found by a preponderance of the evidence that Mihaljevich: "(b) violated ROC-002, Paragraph III.A.37, in that he made false accusations of a misdemeanor and withheld information from investigating officers when he called 911 to report an intruder in his house and told Chicago Police Officers he wanted to sign a criminal complaint against Jason Czub and have him arrested for breaking and entering, after inviting him into the house by text message from his wife's phone."

¶ 17 As to Count III, the hearing officer specifically found that Mihaljevich answered truthfully during his administrative interview. The Board however found by a preponderance of the evidence that Mihaljevich: "(c) violated ROC-002, Paragraph III.A.41.c, in that he failed to truthfully answer questions in a Department of State Police personnel investigation administrative interview when he made the following statements: (1) When he denied sending a text message from his wife's phone to a subject (Jason Czub) to come inside his residence through the unlocked front door, and/or to undress; (2) When he denied telling Chicago Police he sent a text message from his wife's phone to a subject (Jason Czub) to come inside his residence through the unlocked front door, and/or to undress."

¶ 18 As to Count IV, the hearing officer specifically found that Mihaljevich did not use more force than was reasonably necessary given the circumstances. The Board however found by a preponderance of the evidence that Mihaljevich: "(d) violated ROC-002, Paragraph III.A.43, in that he used more force than reasonably necessary under the circumstances and the force used was not in accordance with law and Departmental procedures, when he drew his weapon, handcuffed, and detained Jason Czub after Czub responded to Trooper Mihaljevich's written text messages to enter the residence through an unlocked door and undress."

¶ 19 As to Count V, the hearing officer specifically found that Mihaljevich's seizure of Czub was lawful and in accordance with Department procedures. The Board however found by a preponderance of the evidence that Mihaljevich: "(e) violated ROC-002, Paragraph[] III.A.43, in that he made an arrest or seizure he knew or should have known was not in accordance with law and Department procedures, when he detained Jason Czub."

¶ 20 As to Count VI, the hearing officer specifically found that Mihaljevich, "by sending surreptitious text messages to [Trooper] Czub which caused him to come to his residence,

brought the Department into significant disrepute." The Board also found by a preponderance of the evidence that Mihaljevich: "(f) violated ROC-002, Paragraph[] III.A.8, in that he failed to maintain a level of conduct in keeping with the highest standards of the law enforcement profession, and engaged in conduct that caused the Department to be brought into disrepute, when he lured Jason Czub into his residence, detained Czub at gunpoint, handcuffed Czub, then called 911 when an emergency did not exist, saying there was a naked man in custody in his house. Chicago Police officers responded and Trooper Mihaljevich attempted to have Czub arrested for breaking and entering, however, he later admitted he lured Czub into his residence."

¶ 21 As to Count VII, the hearing officer specifically found that Mihaljevich's conduct was unbecoming of an officer. The Board also found by a preponderance of the evidence that Mihaljevich: "(g) violated ROC-002, Paragraph III.A.7, in that he failed to conduct himself while off-duty in such a manner as to reflect favorably on the Department and engaged in conduct that discredited the integrity of the Department."

¶ 22 In mitigation, the Board considered six prior incidents of discipline issued to other state police officers and found that none of them included the same type, amount, and severity of misconduct presented in the instant case. The Board considered Mihaljevich's work record and lack of disciplinary history. The Board also considered the five-day suspension that Czub received, noting that Czub's misconduct included misusing his squad car and mobile data computer. The Board stated that while the misconduct of Mihaljevich and Czub occurred at the same time and place, the type and severity of their misconduct were entirely different. The Board reasoned that Mihaljevich and Czub did not have the same intent or purpose in their misconduct because Czub was the victim. The Board rejected Mihaljevich's argument that he was a victim of circumstance, noting that any such circumstance was of his own creation. The Board found that

this evidence did not overcome the evidence of Mihaljevich's misconduct that formed the basis for his discharge. The Board concluded that Mihaljevich's continued employment as a state police officer was detrimental to the discipline and efficiency of the Department and terminated Mihaljevich's employment with the Department. On the other hand, the hearing officer found that Mihaljevich committed only two of the seven alleged violations and, ultimately, made no disciplinary recommendation.

¶ 23 The circuit court affirmed the Board's decision and Mihaljevich appealed.

¶ 24 ANALYSIS

¶ 25 We review the final decision of the Board, not that of the circuit court. *McDermott v. City of Chicago Police Board*, 2016 IL App (1st) 151979, ¶ 18. The applicable standard of review depends on the question presented. *Lopez v. Dart*, 2018 IL App (1st) 170733, ¶ 67. In this case, the issue presented for review is whether the circuit court's affirmance of the Board's decision is clearly erroneous because the Board terminated Mihaljevich's employment despite the hearing officer's *recommended* findings of fact and conclusions of law.

¶ 26 The scope of judicial review of an administrative agency's decision to discharge an employee requires a two-step analysis. *Chisem v. McCarthy*, 2014 IL 132389, ¶ 20. First, we must determine whether the Board's findings of fact are against the manifest weight of the evidence. *Id.* The Board's findings and conclusions on questions of fact are considered *prima facie* true and correct. *Lopez v. Dart*, 2018 IL App (1st) 170733, ¶ 70 (citing 735 ILCS 5/3-110 (West 2012)). For that reason, we will neither reweigh, nor reverse the Board's factual findings unless they are against the manifest weight of the evidence. *Id.* Factual findings are against the manifest weight of the evidence if "the opposite conclusion is clearly evident." *Id.* (quoting

Beggs v. Board of Education of Murphysboro Community Unit School District No. 186, 2016 IL 120236, ¶ 50). Reversal is not justified simply because we would have ruled differently. *Id.*

¶ 27 Second, we must determine whether the findings of fact provide a sufficient basis for the Board's determination that there is cause for discharge. *Chisem*, 2014 IL 132389, ¶ 20. "Cause" means "some substantial shortcoming that renders the employee's continued employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his no longer occupying the place." *Lopez*, 2018 IL App (1st) 170733, ¶ 75 (citing *Walsh v. Board of Fire & Police Commissioners*, 96 Ill. 2d 101, 105 (1983)). The Board's determination of cause is given considerable deference because the Board is in the best position to determine the effect of an officer's conduct on the department. *Id.* Unlike the Board's findings of fact, however, the Board's determinations of cause are subject to judicial review to decide whether the charges brought are arbitrary or unreasonable, and whether the dismissal is unrelated to the requirements of service. *Krocka v. Police Board of City of Chicago*, 327 Ill. App. 3d 36, 47 (2001). The clearly erroneous standard of review applies to this mixed question of fact and law. *Beggs*, 2016 IL 120236, ¶ 63. An administrative decision is clearly erroneous when despite evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* ¶ 50. We will address Mihaljevich's arguments within the framework of this two-step analysis as opposed to the order in which they appear in his opening brief.

¶ 28 Mihaljevich argues that the Board's decision is against the manifest weight of the evidence because it is contrary to the hearing officer's recommended findings of fact and conclusions of law, and because he was subjected to disparate punishment compared to Czub. Mihaljevich adds that the Board's decision is against the manifest weight of the evidence

"because *** Czub, a cheating spouse, was caught cheating and provided a false story to the Chicago Police." He also argues that the Board's decision is against the manifest weight of the evidence because Czub "admits" offering Mihaljevich money to not call the police, Czub was a trespasser and Mihaljevich responded appropriately, the restraint of Czub was justified, the incident was so petty that neither a report, nor an arrest was made, and Eigenbauer "directed and controlled the situation," not Mihaljevich. We disagree.

¶ 29 First, we note that Mihaljevich's brief fails to comply with Illinois Supreme Court Rule 341(h) (eff. Nov. 1, 2017) in numerous respects. Mihaljevich's statement of facts is argumentative and provides sporadic citations to the record that do not support the facts as stated. See, *e.g.*, *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 (1998) (statement of facts contains improper argument and fails to accurately portray the evidence presented at the hearing). For example, Mihaljevich states, "Monica Escobar Fernandez and Trooper Jason Czub were both cheating spouses and both did not want their sexual affair to be known by their respective spouses. (C 1362)." However, the citation refers to Officer Eigenbauer's testimony, "[Czub] said essentially that he was over there because wanted to – I couldn't exactly recall the reasoning for why he said he was there but that – He – I recall him constantly, you know, being apologetic for the situation and that, you know, he was offering Officer Mihaljevich money." Further, Mihaljevich states without citation to the record: "Trooper Mihaljevich had every genuine intention of apprising the individual, later identified as Czub, of his ethical and moral improprieties; noteworthy is that none of these actions constitute luring, entrapment, or a violation of rules and regulations of the Illinois State Police." More importantly, Mihaljevich's arguments on appeal are cursory and poorly reasoned, making it difficult to ascertain precisely how his contentions warrant disturbing the circuit court's decision. Because

we have the benefit of the record and the appellees' brief, we will address Mihaljevich's contentions to the extent that we can discern them.

¶ 30 It is well-established that the findings of the agency, and not the hearing officer, are entitled to deference. *Schmeier v. Chicago Park District*, 301 Ill. App. 3d 17, 30 (1998); accord *Beggs*, 2016 IL 120236, ¶ 61. This remains the case, as here, even when the agency's findings differ from the hearing officer's findings and the agency had no opportunity to observe the witnesses. *Id.* We cannot conclude that the Board's decision is against the manifest weight of the evidence for this reason alone. We are also unpersuaded by Mihaljevich's argument that he was subjected to unfairly disparate punishment considering his lack of disciplinary history in comparison to Czub, who was on duty at the time of the incident and received only a five-day suspension. "[T]he fact that different individuals have been disciplined differently is not a basis for concluding that an agency's disciplinary decision is unreasonable; such conclusions are appropriate when individuals receive different discipline in a single, identical, 'completely related' case," which is not the case here. *Siwek v. Police Board of City of Chicago*, 374 Ill. App. 3d 735, 738 (2007) (citing *Launius v. Board of Fire & Police Commissioners*, 151 Ill. 2d 419, 441-42 (1992)). The Board found that the type, severity, and intent of Czub's misconduct were entirely different from that of Mihaljevich, and Mihaljevich fails to demonstrate that the opposite conclusion is clearly evident. Mihaljevich's other arguments fare no better. Where, as here, Mihaljevich merely challenges the hearing officer's credibility determinations about Czub's explanation of what happened and conflicting testimony about Czub offering Mihaljevich money to not call the police without showing that "the opposite conclusion is clearly evident," we sustain the Board's determination on those matters. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 318 (2010). We are similarly

unpersuaded by Mihaljevich's argument that the Board's decision is against the manifest weight of the evidence because he responded appropriately in restraining Czub, who was a trespasser because he went into Mihaljevich's house and "failed to inform the residents of the house that he was there." The Board found that Mihaljevich used the WhatsApp instant messaging service on his wife's cell phone to invite Czub to the house under false pretenses, then detained Czub at gunpoint and attempted to have him arrested for breaking and entering. Mihaljevich, again, fails to show that the opposite conclusion is clearly evident. We reach the same conclusion as to his unsupported arguments that the incident was so minor that no report or arrest was made, and that Eigenbauer "acted lawfully and directed this course of action in its entirety." See, *e.g.*, *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 490 (2010) (rejecting unsupported argument that the trial court's finding was against the manifest weight of the evidence).

¶ 31 We next consider whether the Board's findings of fact provide a sufficient basis for its conclusion that cause for discharge exists. *Lopez*, 2018 IL App (1st) 170733, ¶ 75. Illinois courts recognize that "'police departments, as paramilitary organizations, require disciplined officers to function effectively, and have accordingly held that the promotion of discipline through sanctions for disobedience of rules, regulations and orders is neither inappropriate nor unrelated to the needs of a police force.'" *Chisem* 2014 IL App (1st) 132389, ¶ 23 (quoting *Siwek*, 374 Ill. App. 3d at 738). A police officer's violation of a single rule is sufficient basis for termination. *Siwek*, 374 Ill. App. 3d at 738.

¶ 32 Mihaljevich argues that the Board's decision to terminate his employment was arbitrary, unreasonable, and unrelated to the requirements of service. The entirety of his argument consists of one paragraph citing his "unremarkable exemplary employment history" and lack of prior

disciplinary history, and noting that his misconduct in this case occurred while he was off duty. Notwithstanding, it is well settled that there is no distinction between off-duty or on-duty misconduct by a police officer in regard to the seriousness of the misconduct. *Remus v. Sheahan*, 387 Ill. App. 3d 899, 904 (2009); *Lesner v. Police Board of City of Chicago*, 2016 IL App (1st) 150545, ¶ 46. "'By the very nature of his employment a police officer is in the eyes of the public and for the good of the department must exercise sound judgment and realize his responsibilities to the department and the public at all times.'" *Remus*, 387 Ill. App. 3d at 904 (quoting *Davenport v. Board of Fire & Police Commissioners*, 2 Ill. App. 3d 864, 869-70 (1972)). In his reply brief, Mihaljevich maintains that the evidence does not show that he lured Czub into his house. The flaw in this argument, however, is that it asks us to reweigh the Board's determination as to the credibility of witnesses, which we are not at liberty to do. *Lopez*, 2018 IL App (1st) 170733, ¶ 82.

¶ 33 Here, the Board found that Mihaljevich violated, *inter alia*, three department rules as set forth in Counts I – III, which constituted "Level 7 Misconduct" punishable up to termination. In mitigation, the Board considered six prior incidents of discipline issued to other state police officers and determined that none included the same type, amount, and severity of misconduct presented in this case. The Board considered Mihaljevich's work record and lack of disciplinary history, and that Czub received a five-day suspension for his actions. The Board stated that while the misconduct of Mihaljevich and Czub occurred at the same time and place, the type and severity of their misconduct were entirely different as Czub was the victim. The Board found that the mitigating evidence did not overcome the evidence of Mihaljevich's conduct warranting discharge. The Board is not required to give mitigation evidence such weight that it overcomes a discharge decision, and a discharge made despite the presentation of mitigating evidence is not,

alone, arbitrary or unreasonable. *Robbins v. Department of State Police Merit Board*, 2014 IL App (4th) 130041, ¶ 55. Moreover, we may not consider whether we would have imposed a more lenient disciplinary penalty (*Lesner*, 2016 IL App (1st) 150545, ¶ 45), and based on the entire record, including the Board's findings that Mihaljevich violated all seven department rules set forth in the complaint, three of which are punishable by termination, we cannot say the Board's discharge decision was arbitrary, unreasonable, and unrelated to the requirements of service. We are not left with a definite and firm conviction that a mistake has been committed under the circumstances presented.

¶ 34 CONCLUSION

¶ 35 For the reasons stated, we cannot say that the Board's decision to discharge Mihaljevich is clearly erroneous and affirm the judgment of the circuit court of Cook County affirming the Board's decision to terminate Mihaljevich from his employment as an Illinois state trooper.

¶ 36 Affirmed.