2019 IL App (2d) 180808-U
No. 2-18-0808
Order filed June 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DANA MULIGANO,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 17-MR-1377
	)	
VILLAGE OF GURNEE CIVIL SERVICE,	)	
COMMISSION, COMMISSION CHAIR TY	)	
BONDS, and GURNEE FIRE DEPARTMENT	)	
CHIEF JOHN KAVANAUGH, in his	)	
Official capacity,	)	Honorable
	)	Jorge L. Ortiz,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the Commission's decision to discharge the firefighter. We have jurisdiction to consider the appeal, because we review the decision of the Commission, which had entered a final and appealable order.

¶ 2 The Village of Gurnee Civil Service Commission found that Gurnee Fire Department Chief John Kavanaugh[1] had cause to discharge firefighter/paramedic Dana Muligano. The trial

[1] We refer to Kavanaugh in his official capacity as the Department, as he represents the

court upheld the Commission's findings of fact that Muligano committed the charged violations. However, the court determined that the Commission erred in discharging Muligano, and it remanded the case to the Commission to issue a penalty less than discharge. The Commission and the Department appeal.

¶ 3 We have jurisdiction to consider the appeal, because we review the decision of the Commission, which had entered a final and appealable order. The Commission's determination that there was cause for discharge was not arbitrary, unreasonable, or unrelated to the requirements of service and, therefore, it should be upheld. The Commission is affirmed. The trial court is reversed.

¶ 4 I. BACKGROUND

¶ 5 On April 11, 2017, the Department filed charges with the Commission seeking to discharge Muligano. These charges included a November 2016 dispatch violation and a March 2017 transport violation. The Department's theory of the case is that, after 10 years of service with the Department, Muligano exhibited a continued disregard of the rules, an unwillingness to change, and an inability to work with other service members. As highlighted in the two charged offenses, these substantial shortcomings were related to his professional duties, detrimental to the discipline and efficiency of the force, and endangered citizens such that the law and sound public opinion would recognize good cause to remove him from his position. In balance, Muligano's theory of the case is that a vocal minority in the Department, including Kavanaugh, are biased against him. He committed the charged violations, but, in his view, discharge is too harsh a penalty. He contends that he is the victim of disparate treatment, in that other firefighters

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interests of that entity. Kavanaugh had been the Deputy Chief for 10 years before recently being promoted to Interim Chief.

committed similar offenses but were not discharged, and that his prior performance reviews and reputation witnesses mitigate against discharge. The Commission heard evidence of Department Rules, the two charged violations, Muligano's work history, and reputation witnesses.

¶ 6 A. The Department Rules

¶ 7 The Department Rules state in relevant part:

> "All personnel shall obey and fully execute any lawful order, written *or oral*, given by a superior officer/employee which shall include but not be limited to these rules and regulations, all general orders and special orders, *and policies* and procedures and guidelines of the [Department]." (Emphases added.)

And,

> "Personnel shall not fail to give suitable attention to the performance of duty. *** Personnel shall not shirk their duties or responsibilities ***."

¶ 8 B. The Dispatch Violation

¶ 9 The first charged violation concerns ignoring emergency dispatch requests. The Department requires that, after completing an assignment, firefighters "immediately" report their availability to dispatch. Based on GPS records, it is undisputed that, on November 23, 2016, Muligano and his partner for that shift, Carl Szentendrei, did not notify dispatch of their availability and did not respond to emergency dispatch requests for six minutes after completing their last transport. The dispatch radio turns on automatically with the ambulance engine, and firefighters may notify dispatch of their availability by pressing a button or by calling over the radio. It is possible to turn off the radio manually, but doing so would be improper.

¶ 10 Muligano does not remember the incident. He explained that he likely manually turned off the dispatch radio.

¶ 11 Szentendrei testified that he drove the ambulance on the day in question. Muligano sat in the officer's chair. As such, Muligano was responsible for notifying dispatch of their availability. Szentendrei received a one-day suspension for his part in the team's failure to notify dispatch of its availability and to respond to the emergency calls.

¶ 12 A witness to the violation, firefighter/paramedic Hank Chamberlain, testified that he saw Muligano and Szentendrei's ambulance driving away from the hospital, even as several emergency calls were coming in over the radio. Dispatch asked where the Gurnee ambulances were, because they were burdened with multiple emergency calls at once. Muligano did not respond. Six minutes later, Muligano reported his availability. Chamberlain reported what he had seen and heard.

¶ 13 According to Chamberlain, immediate notification of availability means that, upon completion of a hospital transport, "when you [re]enter the ambulance, as soon as you start the engine the radio turns on[,] you put yourself being available." This is not a written rule; rather, it is a "well-understood" policy. The radio turns on automatically, and you are supposed to leave it on, so that "you can hear any type of radio traffic, whether it's directed at your rig or other rigs, to [report] availability, and be able to respond as needed."

¶ 14 Chamberlain requested not to work with Muligano. Chamberlain passed on overtime opportunities if there was even "a chance" he would have to work with Muligano:

> "I never felt comfortable working with him. I think that he will take any rule that he can and push it. I felt especially if we had been on the same ambulance together with no third person or line officer, it would have been my word against his, and something would have come up."

¶ 15 Kavanaugh addressed the dispatch violation: "I took this very serious[ly]. I've never heard of such an allegation of one of our firefighters or group of firefighters." When Chamberlain reported that he had seen Muligano's ambulance available yet non-responsive to multiple emergency calls, Kavanaugh inquired into the GPS records. It took two individuals a number of hours to retrieve the data, which showed that Muligano's ambulance had been exactly where Chamberlain had seen it.

¶ 16 Kavanaugh explained why Szentendrei received only a one-day suspension: "Carl Szentendrei, in all my years working with him, I can remember one incident one time with a banana peel [but] I've never had a discussion or any disciplinary actions or anything with [Szentendrei] up to that point."

¶ 17 C. The Transport Violation

¶ 18 The second charged violation concerns an improper patient transport via ambulance occurring on March 8, 2017. The Department sets forth in written rule two transport codes, Code 1 and Code 3. (There is no Code 2.) Code 1 protocol is no lights, no sirens. Code 1 is for the non-emergency transport of patients who are stable and not at risk of further injury. These patients may be transported to a specified list of hospitals. During Code 1 transport, the firefighter is expected to obey all traffic laws.

¶ 19 Code 3 protocol is to use both lights and sirens. Code 3 is for the emergency transport of unstable patients who need emergency-room treatment. These patients will be transferred to the nearest appropriate medical center, be it an emergency room or a trauma center. During Code 3 transport, the firefighter does not obey ordinary traffic laws. Operating an emergency vehicle with lights and sirens increases the risk of injury to the firefighter, patient, and citizens.

Therefore, Code 3 should be used sparingly. Also, certain routes, such as those that pass by elementary schools, are prohibited during Code 3 transport.

¶ 20 These transport codes have been in place since 2005, they are standard protocol, and all members of the force have received training as to when and how to use them. While emergency and non-emergency distinctions were set forth in writing, various route limitations were communicated orally in training.

¶ 21 John Drinkall, who had 26 years with the force, testified to the transport violation. On March 8, 2017, at approximately 5:15 p.m., Drinkall and Muligano responded to a call concerning a young man with suicidal ideation. Drinkall and Muligano jointly assessed the patient. In Drinkall's view, it was so obvious that this was not an emergency that there was no need to say "Code 1" out loud. The patient was stable, and he merely wanted to talk to a professional. Thus, when Drinkall went into the back section of the ambulance with the patient and Muligano began driving, he assumed Muligano would perform a Code 1 transport. Drinkall did not realize that Muligano was performing a Code 3 transport until they were almost at the hospital. Drinkall had been speaking with the patient, but, when he turned to look out the back window, he saw that Muligano was driving over the center line and cars had pulled off the road for them. Also, Drinkall saw the reflection of the ambulance lights. Drinkall did not think it would be proper to correct Muligano in front of the patient at that point, because they were almost at the hospital. He did not want the patient to lose confidence in them. Drinkall conceded that he was authorized to correct Muligano, and his order would have controlled, because Drinkall was the senior firefighter on the call. (Szentendrei testified that "if you yell loud enough" a medic in the back of the ambulance can communicate with the driver.)

¶ 22 Even if it had been proper to classify the patient as a Code 3, Muligano did not execute a proper Code 3. A Code 3 transport requires lights and sirens, not just lights. Also, Muligano drove a prohibited route down Stewart Avenue, by an elementary school. According to Drinkall, the force had been orally instructed "never" to use Stewart. The route was dangerous even if school was not in session, because the school was located in a residential neighborhood and many children played in the area. Finally, Muligano did not report the Code 3 transport to dispatch as required.

¶ 23 After transporting the patient to the hospital, Drinkall told Muligano that they must report the (improper) use and execution of a Code 3 transport. Muligano refused, saying no one would know if they did not report it. Drinkall told Muligano they could not hide the violation even if they wanted to—they had just traveled 10 miles in 11 minutes during rush hour. Drinkall reported the incident. Drinkall was not disciplined for his decision to refrain from correcting Muligano in front of the patient as they approached the hospital.

¶ 24 Drinkall recalled participating in only a few other transports over 26 years where the driver activated the lights but not the sirens. However, those transports occurred "in the middle of the night when there's nobody out" as opposed to rush hour.

¶ 25 After the transport violation, Drinkall requested not to work with Muligano. He explained: "I felt that working with him actually puts me at greater risk. I'm pretty close to being done with my career here, and I did not want to have myself unduly—you know risks put upon myself working with someone that would disregard our rules of safety."

¶ 26 Muligano admitted committing the transport violation but testified that it was not deliberate. "I just did it like a muscle memory." Muligano did not believe he committed a significant violation. For example, he did not think that it was critical to use the siren: "In fact,

they gave us studies in the academy that showed people drown out sirens, so you use the sirens sparingly." Further, Muligano did not remember being told to "never" use Stewart Avenue. Rather, he was told to "avoid" Stewart after a resident complained that an ambulance sped down that street. Muligano denied pressuring Drinkall to hide the violation.

¶ 27 Kavanaugh addressed the transport violation. He stated that Code 3 transports are very risky. There is a danger to the public, because the driver does not follow ordinary traffic regulations. It is important to notify dispatch when performing a Code 3. During the course of the investigation, it came to light that Muligano performed improper transports not just during the March 2017 incident, but on many other occasions as well. Kavanaugh witnessed Muligano testify under oath at a prior administrative hearing that he improperly transported non-emergent patients Code 3 "a lot."

¶ 28 D. Work History and Reputation Witnesses

¶ 29 Muligano began working for the Department as a firefighter/paramedic in 2007. In that role, he was responsible for fire suppression and ambulance transport for Gurnee and for neighboring municipalities requesting mutual aid. During his tenure, he received four citizen commendations. In one commendation, the family of a boy who suffered a seizure wrote a thank-you note. Muligano and his shift partner had helped to stabilize the boy and calm the family. Muligano also presented numerous certificates demonstrating his successful completion of continuing education courses, such as Fire Officer 1 and 2, each of which took 40 hours to complete. He had requested to go to these trainings. He explained: "I just wanted to better myself, be a better firefighter and be able to help the team out better, help the citizens better."

¶ 30 Muligano testified to past positive performance reviews. In 2014, his review stated that he was a team player in that he took on extra tasks such as vehicle maintenance. He interacted

well with colleagues, arrived early for work, and communicated well on the radio. His 2016 review was similar.

¶ 31 Muligano did not want to be terminated. Instead, he sought mentorship: "I welcome help, I'm open to ideas. I've asked for help. I just want to belong, I just wanted to be a firefighter, I just want to—I love being a firefighter." He concluded: "I have messed up, but the things I've done have been small and no one has ever been hurt," and, "The assurance I can give is the evidence of my track record up to this point. No one has ever been hurt by me. I have never pushed the wrong drugs, never been in a high speed collision."

¶ 32 John Skillman had been Muligano's shift supervisor. Based on his experience with Muligano, he opined that Muligano should be discharged. In his 25-year career, he has never before recommended discipline beyond probation. Skillman did not complete Muligano's 2016 performance review, but he signed off on it. Skillman explained that the charged violations at issue would not have shown up on Muligano's performance review, because the violations were still under investigation at the time the review was completed.

¶ 33 Kavanaugh testified that his 10 years as the Deputy Chief largely coincided with Muligano's 10 years of service. During that period, "[Muligano] and I *** spent quite a few days at my desk across from each other having discussions, probably as much as any employee I've had over that time period." In these discussions, Muligano would tell Kavanaugh which rules should be changed. He also would ask why no one liked him. He told Kavanaugh: "I have a list of 11 people I've written off in this fire department, I will never talk to them, I'm not giving them any information."

¶ 34 Muligano's inability to get along with others troubled Kavanaugh, because: "Our firefighters work together, live together. They trust each other's lives in their hands."

Kavanaugh tried to accommodate Muligano for a number of years. The Department "never to this level ever" has had a firefighter with as many interpersonal conflicts. Other firefighters requested not to work with him. He requested not to work with other firefighters. Kavanaugh rearranged the station and/or shift assignments of 17 firefighters to accommodate these requests. Kavanaugh placed Muligano at Station 2. Kavanaugh "tried to staff Station 2 extremely heavy with senior personnel so therefore maybe we could work with people to get [Muligano] to learn the rules."

¶ 35 Kavanaugh testified to Muligano's disciplinary history. Muligano has been "disciplined with oral reprimands, written reprimands. He has been given a 24-hour suspension *** just this last October." Muligano had been suspended because he activated the Opticom in a non-emergency situation so that he could continue driving through a stoplight-regulated intersection.

¶ 36 Kavanaugh was not impressed by Muligano's responses to his violations. Six days after the dispatch violation, Muligano sent an e-mail to Kavanaugh asking for patience and mentorship. He also wrote:

> "I do not remember [my conduct during the improper dispatch]. We were very busy that day. I admit it is highly possible, even probable, that I forgot to turn on the radio.[2] I admit I have forgotten in the past. As I mentioned earlier, I am a work in progress and subject to an occasional failure."

¶ 37 According to Kavanaugh, Muligano made similar pleas following the Opticom and transport violations. After the Opticom violation, "[H]e once again said, 'I want help, I make mistakes, I'm unable.' " After the transport violation: "He once again said that he loves being a firefighter, he really wants to be here, he is willing to change, he wants people to help him, he

[2] As mentioned, the dispatch radio turns on automatically with the ambulance engine.

would like to be mentored, he wants help. All the things that he wrote to me prior, the same things he's told me at my desk prior over the years." After he apologizes, he admits, "I may have done this numerous times," and "It happens a lot." Kavanaugh finds this frequency of violation "just astonishing."

¶ 38 Kavanaugh considered bringing termination charges against Muligano to be the "toughest thing I have ever done." He has never before been involved in the termination of a firefighter. He does not believe that the Department has terminated a firefighter in the decades that he has been a part of the organization. He thought that it was necessary to terminate Muligano to "uphold the safety of our citizens." He considered Muligano's actions to be "unsafe."

¶ 39 Muligano called a number of reputation witnesses: Szentendrei, Carlos Rivera, Mark Alan Rainey, Jr., William Heuer, and Brandon Michael Roberts.

¶ 40 Szentendrei testified that he felt safe working with Muligano, and he thought Muligano was a good firefighter. Szentendrei believed that a vocal minority of his colleagues, including Chamberlain, disliked Muligano due to "his lifestyle or his political views." Those topics were relevant, because, "when you're living with people for 24 hours straight[,] you start talking about a lot of things and you get to know people a lot better."

¶ 41 Rivera has been a firefighter for 22 years, 14 of which have been for the Department. He believed that certain firefighters, such as Chamberlain, were biased against Muligano. Chamberlain and Muligano "have different views on life and different views on politics." Rivera felt safe working with Muligano and opined that he was a good firefighter.

¶ 42 Rainey has been a firefighter for the Department since 2015. He and Muligano were assigned to the same station house. He never felt unsafe while on calls with Muligano. He has been on "too many [calls] to count" with Muligano. He has never witnessed Muligano commit a

rule violation. He did not believe that Muligano behaved in an unprofessional manner. However, when told that Muligano committed Code 3 violations, Rainey conceded, "[that] would change my opinion."

¶ 43 Heuer has been a firefighter for the Department for 28 years. He and Muligano were assigned to the same shift five years ago. He has "no problem" with Muligano. He thinks Muligano is "very safe." Learning that Muligano committed Code 3 violations would not change his opinion: "If it didn't happen with me, then, no, I'm not going to judge." He conceded, however, that Code 3 "absolutely" carries inherent risk and danger.

¶ 44 Roberts has worked for the Department for nearly 10 years. He has gone on "a lot" of calls with Muligano, who he believes to be a "safe firefighter." However, Roberts conceded that Muligano challenged the rules, and this was not appropriate for someone with Muligano's relative lack of seniority.

¶ 45 Roberts once refused a lieutenant's request that he, Roberts, work with Muligano. When asked to reconcile his refusal to work with Muligano with his prior testimony that Muligano was safe, Roberts answered:

> "I felt like [avoiding Muligano] was best *** for personal reasons. *** I didn't feel unsafe. *** I didn't want to get in trouble working with [Muligano] by—if there was horseplay or any activity that could put me in harm's way. Not harm's way, I'm sorry. I'm trying to think of the word. I was just trying to keep a clean slate."

Roberts stated that, if Muligano returned to the force, he would work with Muligano in the future.

¶ 46 E. The Commission's Findings

¶ 47 The Commission determined that Muligano committed the two charged violations. It rejected Muligano's argument that he could only be disciplined for those aspects of the charges that alleged violation of a written rule. For example, in the second charge, the code designations were put into writing, but the prohibition against driving by an elementary school was an oral policy. Violation of both written rules and oral policies could be considered in evaluating Muligano's conduct.

¶ 48 The Commission found that the Department met its burden to show that it had cause to discharge Muligano. Muligano's consistent failure to follow the rules was directly related to his duties as a firefighter, undermined the discipline and efficiency of the Department, and was of a nature such that the law and sound public opinion would favor removing him from his position. The Commission rejected various arguments in mitigation. It did not matter that children were not present when Muligano drove by the school or that no one was hurt due to either of his violations. The Department did not have to wait for a tragedy before discharging a careless firefighter. Also, Muligano's shortcomings could not be rectified with further training. Muligano has been subject to progressive discipline and has had ample opportunity to change his behavior.

¶ 49 F. Administrative Review

¶ 50 Muligano filed a complaint for administrative review. Muligano argued that: (1) a distinction should be made between written and unwritten rules; (2) he did not violate the (written) rules; (3) a heightened standard for discharge should be applied as a result of the case being decided by the Commission as opposed to an arbitrator; and (4) even if he did violate the relevant rules, the Commission erred in finding cause to terminate him, because the case law supported that employees in his position should be subject to a lesser punishment, and because

the Commission failed to appreciate that he was subject to disparate treatment and other mitigating factors. On the fourth issue, the briefs before the trial court were substantially similar to those on appeal.

¶ 51 The trial court rejected the first three arguments in their entirety. The court accepted the fourth argument's conclusion but did not address the supporting claims (aside from the disparate-treatment claim, which it *rejected*) or otherwise explain its decision. The trial court's order stated in its substantive entirety:

> "[T]his court having been fully briefed on the matter, it is hereby found and ordered that:
>
> 1. The Commission's findings that [Muligano] violated the Village of Gurnee rules and regulations are not against the manifest weight of the evidence.
>
> 2. There is no difference between 'cause' and 'just cause.' Contrary to [Muligano's] argument, there is no heightened standard for discipline required by the law as a result of the case being tried before the Commission rather than arbitration.
>
> 3. [Muligano] violated both written and unwritten rules. Therefore, there was cause for discipline. Cause is not limited to violations of written rules or policies. The Commission's findings that [Muligano] violated the Village of Gurnee's rules and policies is not against the manifest weight of the evidence.
>
> 4. [Muligano] was not the victim of disparate treatment.
>
> 5. The court is left with the firm and definite conclusion that a mistake has been made. Another penalty less than discharge would have been appropriate for

> [Muligano's] rule violations. Therefore, the Commission's ultimate decision to discharge [Muligano] was arbitrary and unreasonable.
>
> 6. This Court is affirming in part and reversing in part, the Commission's decision to terminate plaintiff's employment.
>
> 7. This matter is remanded to the Commission for consideration and implementation of a penalty short of discharge."

The Commission and the Department obtained a stay of the remand order and appealed.

¶ 52 II. ANALYSIS

¶ 53 A. Jurisdiction

¶ 54 As a threshold matter, Muligano challenges our jurisdiction to decide the appeal. He contends that the trial court's order is not final and appealable, because the trial court remanded the case to the Commission to issue a penalty short of discharge. Thus, he urges, the trial court's order was interlocutory, and appellants were required to obtain permission under Illinois Supreme Court Rule 306 (Ill. S. Ct. R. 306 (eff. Nov. 1, 2017)) to seek reversal of the trial court's order and review of the Commission's decision to terminate him. As we will explain, Muligano's argument is based on the flawed premise that we review the trial court's decision rather than the Commission's decision.

¶ 55 Courts have routinely held that, as here, "Where *** the circuit court remanded the matter to the [agency] to impose a lesser penalty than the original penalty of discharge, we can review the [agency's] original decision to discharge." See, *e.g.*, *Robbins v. Department of State Police Merit Board*, 2014 IL App (4th) 130041, ¶ 40; *Williams v. Illinois Civil Service Comm'n*, 2012 IL App (1st) 101344, ¶ 9; see also *King's Health Spa, Inc. v. Village of Downer's Grove*, 2014 IL App (2d) 130825, ¶ 30 (favorably citing *Williams* to draw a related inference). These

cases do not explain the holding in any detail but to say as an introductory qualifier: "We review the decision of the administrative agency and not the decision of the circuit court." *Id*.

¶ 56 We found one case, *Kvidera v. Board of Fire and Police Comm'ners of Schiller Park*, 168 Ill. App. 3d 380, 381 (1988),[3] that held to the contrary. However, like Muligano, that case operated under the incorrect premise that we review the trial court's decision rather than the agency's decision.

¶ 57 In *Kvidera*, the board discharged the employee. The employee brought suit for administrative review. The trial court confirmed the board's factual findings but reversed and remanded in part, ordering the board to impose a sanction less than discharge. There was further back-and-forth between the board and the trial court as to sanctions. Ultimately, the board appealed the trial court's decision that the sanction was excessive.

¶ 58 The appellate court determined that the board's appeal was premature. *Id*. It held that an order remanding a cause to the agency to impose a sanction other than the one imposed is not final and appealable, because it does not terminate the litigation between the parties on the merits. *Id*. It reasoned: "Were we to affirm *the trial court's order* that the board formulate a sanction less severe than discharge or suspension, the board would need to rule again on the appropriate sanction." *Id*. at 381-82.

¶ 59 We disagree with the *Kvidera* court's reasoning. A court on administrative review is not charged with reviewing the trial court's order. It is charged with reviewing the agency's order. As such, we also reject the *Kvidera* court's implication that requiring the agency to re-issue a penalty before one of the parties re-submits a claim to administrative review is somehow more efficient. Additionally, the *Kvidera* court confused the circumstances before it, where the trial

[3] Muligano does not cite this case, but it is our duty to establish our own jurisdiction.

court disagreed with a final ruling of the agency on the ultimate issue, with the circumstances set forth in a case upon which it relied, where the trial court determined that the agency needed to hear additional evidence *before* ruling on an ultimate issue. See *Department of Transportation v. Grawe*, 113 Ill. App. 3d 336, 341 (1983).

¶ 60 The cases cited by Muligano are distinguishable in the same way *Grawe* is distinguishable. That is, the purpose of the remand in those cases was so that the agency could make further determinations, without which, the trial court could not complete its administrative review of the ultimate issue. See, *e.g.*, *Ikpoh v. Zollar*, 321 Ill. App. 3d 41, 43 (2001) (the trial court "could not determine" whether the board's refusal to reinstate the physician was proper absent a the resolution of a key question of fact); *Friedland v. Board of Trustees of Moline Police Department Pension Fund*, 202 Ill. App. 3d 767, 770 (1990) (substantial questions of law and fact remained to be determined by the board before the trial court could review the ultimate issue of whether the officer's membership should be approved). Thus, in *Ikpoh*, to obtain a review by the appellate court, the parties would need to obtain permission for an interlocutory appeal. *Id.* Here, in contrast, the trial court was able to complete its review of the ultimate issue, discharge. There were no disputed questions of fact or law remaining for the Commission to resolve.

¶ 61 For these reasons, we reject Muligano's jurisdictional challenge. Per *Robbins*, *Williams*, and *Kings Health*, we have jurisdiction.

¶ 62 B. The Merits: Cause to Discharge

¶ 63 Turning to the merits, the only substantive issue on appeal is whether the Commission erred in finding "cause" to discharge. Both the collective bargaining agreement at issue here and the Illinois Municipal Code (65 ILCS 5/10-1-18(a) (West 2018)) prohibit the discharge of civil

service employees such as Mugliano absent cause. Cause has been defined as a substantial shortcoming that makes an employee's continued employment detrimental to the discipline and efficiency of the service and something that the law and sound public opinion recognize as good cause for the employee no longer occupying the office. *Woods v. City of Berwyn*, 2014 IL App (1st) 133450, ¶ 42.

¶ 64 Our role is to review the Commission's decision, not the trial court's decision. *Illinois Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 722 (2009). We review the Commission's decision to discharge a firefighter in two stages. *Brown v. Civil Service Comm'n*, 133 Ill. App. 3d 35, 39 (1985). In the first stage, we review the Commission's factual determinations according to a manifest-weight standard. *Id*. Under the manifest-weight standard, we accept the Commission's factual determinations, unless the opposite conclusion is clearly evident. *Arroyo v. Chicago Transit Authority*, 394 Ill. App. 3d 822, 830 (2009). It is not the reviewing court's function to reweigh the evidence or assess witness credibility. *Id*.

¶ 65 The parties discuss whether the first stage more accurately warrants a clearly-erroneous, as opposed to a manifest-weight review. The trial court did not perform a two-stage review and, instead, appeared to apply a clearly-erroneous standard to the entire question of discharge, stating that it had been left with the "firm and definite conclusion" that a mistake had been made. The Department also favors the clearly-erroneous standard, and Muligano concedes that, in the first stage, it *may* be appropriate to review the Commission's determination of a rule violation according to the clearly-erroneous, as opposed to a manifest-weight, standard. This is because the standard of review depends on the question presented. *Roman v. Cook County Sheriff's Merit Board*, 2014 IL App (1st) 123308, ¶ 66. Factual questions are reviewed under the manifest-weight standard; questions of law are reviewed *de novo*; and mixed questions of law

and fact are reviewed for clear error. *Id.* ¶¶ 67-70. A case presents a mixed question of law and fact if it involves the examination of the legal effect of a given set of facts. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1988). A decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id*. The question of a rule violation arguably presents a mixed question of law and fact, because it requires the Commission to make a factual determination as to the nature of the conduct and then to compare that conduct against the rules it is charged with enforcing. However, as Muligano goes on to concede, the "first stage, the finding of guilt, is *not* at issue in this case." (Emphasis added.) Muligano accepts that he violated certain Department rules, both written and unwritten. Rather, he argues that, even in light of these rule violations, there was not sufficient cause to discharge. Therefore, the question of whether the first stage of the discharge review warrants a manifest-weight or a clearly-erroneous standard is irrelevant to the instant appeal.

¶ 66 In the second stage of our review, we consider whether the Commission's findings of fact provide a sufficient basis for the Commission's conclusion as to cause. *Brown*, 133 Ill. App. 3d at 39. A commission's determination that there is cause for discharge is entitled to considerable deference. *Kappel v. Police Board of City of Chicago*, 220 Ill. App. 3d 580, 589-90 (1991). Its determination will not be reversed unless it is arbitrary, unreasonable, or unrelated to the requirements of service. *Woods*, 2014 IL App (1st) 133450, ¶ 41. The court should not substitute its judgment for the Commission. *Abrahamson v. Illinois Department of Professional Regulation*, 152 Ill. 2d 76, 88 (1992). The Commission, not the court, is in the best position to determine the effect of the officer's conduct on the department. *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 529 (1997).

¶ 67 In sum, here, we accept the Commission's assessment of the circumstances substantiating the allegations against Muligano: "the finding of guilt is not at issue in this case." We review with considerable deference its ultimate decision as to whether those circumstances constituted cause and reverse only if its decision is arbitrary, unreasonable, or unrelated to the requirements of service.

¶ 68 In this case, the Commission's decision was not arbitrary, because the evidence supported that there was cause to discharge Muligano due to a (1) substantial shortcoming; (2) that was detrimental to the discipline and efficiency of the service; and (3) that the law and sound public opinion would recognize as good cause for the employee no longer occupying the office. *Woods*, 2014 IL App (1st) 133450, ¶ 42.

¶ 69 First, the evidence supported that Muligano exhibited a substantial shortcoming, *i.e.*, the continued inability to follow rules as highlighted by the charged violations. Kavanaugh considered these to be serious violations. He had never before heard of a firefighter shirking his duty by ignoring multiple emergency dispatch requests. Also, driving Code 3 in rush hour and by an elementary school with lights but no siren was dangerous. In testifying before the Commission, Muligano referred to his violations as "small." He rationalized that it was actually better to drive with lights but no siren. In so doing, he corroborated the testimony of Kavanaugh and others, who said that he frequently challenged and/or tried to change or push the rules. This behavior showed that Muligano was unlikely to rectify his shortcomings with further training.

¶ 70 Second, Muligano's violations were detrimental to the discipline and efficiency of the service. Ignoring dispatch during a period of emergency and operating the ambulance in a dangerous manner were directly related to Muligano's duties as a firefighter. Also, Muligano's inability to follow the rules caused others to avoid working with him. Numerous firefighters,

including one of his own reputation witnesses, had requested not to work with him. Chamberlain declined overtime opportunities if there was a chance he would have to work with Muligano. These firefighters did not believe Muligano was safe. They did not have faith in him; they feared that working with him would hurt their careers. As Kavanaugh testified, having faith in one's fellow service member is critical in emergency situations. Kavanaugh had to move 17 different firefighters to accommodate these requests. Kavanaugh also had to stack Muligano's station with senior members of the force. "Never to th[at] level ever" had Kavanaugh had to arrange shifts in such a manner. These sorts of accommodations are disruptive to the efficiency of the service.

¶ 71 Third, Muligano's violations were such that the law and sound public opinion would favor his removal. Indeed, it was a citizen complaint that prompted the Department policy to avoid driving ambulances by the elementary school.

¶ 72 Muligano's violations were far more substantial than the violations in cases that reversed the agency's decision to discharge. See, *e.g.*, *Burgett v. City of Collinsville Board of Fire and Police Comm'ners*, 149 Ill. App. 3d 420, 424 (1986) (without informing his supervisors, a police officer spent a disproportionate amount of his patrol time observing a vacant house subject to break-in that was 30 feet outside of city limits, but he remained available to dispatch at all times and responded to the only call he received); *Christenson v. Board of Fire and Police Comm'ners of the City of Oak Forest*, 83 Ill. App. 3d 472, 476-77 (1980) (a police captain with an otherwise spotless 32-year service record used a squad car for a personal emergency); *Fox v. Civil Service Comm'n*, 66 Ill. App. 3d 381, 390 (1978) (an investigator for the Illinois Department of Revenue used profanity against a taxpayer who provoked her); *Humbles v. Board of Fire and Police Comm'ners of the City of Wheaton*, 53 Ill. App. 3d 731, 734-35 (1977) (a police officer told his

superior that he was going to the courthouse to testify in a traffic case when he really was going to testify in his own divorce case, and then he disobeyed orders to wait for the sergeant, who was also going to the courthouse; the violation was a single incident motivated by personal embarrassment rather than a desire to shirk a duty); *Kreiser v. Police Board of the City of Chicago*, 40 Ill. App. 3d 436, 441-42 (1976) (a police officer failed to put license plate and city stickers on his personal vehicle, lied to his superior officer about it, and went to lunch without permission).

¶ 73 The Commission is in a better position than we to determine the effect of the violations on the morale and efficiency of the Department. Particularly in light of the considerable deference owed to the Commission, we cannot say its determination of cause was arbitrary, unreasonable, or unrelated to the requirements of service. *Woods*, 2014 IL App (1st) 133450, ¶ 41.

¶ 74 We are not persuaded by Muligano's arguments to the contrary. Muligano contends that the Department selectively enforced its rules by punishing him more severely than others committing the same offenses. He notes that Szentendrei received a one-day suspension for the dispatch incident, and that Drinkall was not disciplined at all for his part in the transport incident.

¶ 75 A basic principle of service member discipline cases is that the discipline must be fairly and certainly applied. *DeGrazio v. Civil Service Comm'n of the City of Chicago*, 31 Ill. 2d 482, 489 (1962). A fair application is vital to the force itself and to maintain the respect of the public. *Id*. When different individuals receive different disciplines for a single, identical, and completely related case, the decision to terminate one employee but not the other may be overturned as arbitrary. *McDermott v. City of Chicago Police Board*, 2016 IL App (1st) 151979, ¶ 23. The court is unlikely to find disparate treatment where one employee has a history of

infractions and progressive discipline and the other does not. *McCleary v. Board of Fire and Police Comm'ners of the City of Woodstock*, 251 Ill. App. 3d 988, 999-1000 (1993).

¶ 76 Muligano was not subject to disparate treatment (an argument, again, which even the trial court rejected). As to the dispatch violation, Muligano had been subject to prior progressive discipline and Szentendrei, but for a trivial oral reprimand over a "banana peel," had not. Also, Muligano subsequently committed another serious violation, *i.e.*, the improper transport, and Szentendrei did not. Moreover, Muligano and Szentendrei did not commit identical acts. Muligano sat in the seat responsible for notifying dispatch of the team's availability. Szentendrei had other responsibilities on that trip. For these reasons, it was not unreasonable to punish Muligano more harshly than Szentendrei.

¶ 77 As to the transport violation, Muligano alone chose to perform a Code 3 for a non-emergency, drive with lights but no siren while failing to obey ordinary traffic rules, and take a prohibited route by a school. Drinkall, in contrast, was not aware that Muligano proceeded under a Code 3, because Drinkall was in the back of the ambulance attending to the patient. By the time Drinkall realized that Muligano had improperly proceeded under a Code 3, they were almost at the hospital. Drinkall did not want to upset the patient by overriding Muligano's procedure. Instead, Drinkall wanted to report the violation. Muligano pressured him not to. Drinkall overcame pressure from Muligano and dutifully reported the incident. Muligano and Drinkall did not commit identical acts. Muligano committed a violation, and Drinkall reported it. There was no disparate treatment.

¶ 78 Muligano further contends that Kavanaugh acted out of animosity in discharging him. This argument is linked to Muligano's disparate-treatment argument, which we rejected. In any event, the Commission heard Kavanaugh's testimony. It assessed his credibility, and it accepted

that he was not motivated by animosity in discharging Muligano. We will not upset the Commission's assessment of Kavanaugh's credibility and motivations.

¶ 79 Muligano next argues that the Commission should have attributed greater weight to mitigating factors such as prior commendations and positive reputation testimony. However, Muligano's mitigating evidence, particularly his reputation witnesses, was not compelling. Roberts and Rainey gave qualified endorsements. Roberts considered Muligano a safe firefighter, but he had previously requested not to work with him. Rainey conceded that his good opinion of Muligano might change, having learned of the Code 3 violation. Heuer also gave an unconvincing endorsement, stating both that Code 3 "absolutely" carries inherent risk but also stating that Muligano's Code 3 violation would not change his good opinion of Muligano.

¶ 80 Moreover, it is not our role to re-weigh the evidence. As explained in *Sutton v. Civil Services Comm'n*, 91 Ill. 2d 404, 411 (1982): "The question *** is not whether this court would decide upon a more lenient sanction than discharge *** in view of the mitigating circumstances." Here, the Commission was free to weigh Kavanaugh's testimony more heavily than the mitigating factors. It was also free to credit Skillman's explanation that the most recent violations had not yet appeared on the performance review, because they were under investigation at the time.

¶ 81 The Commission's decision is well-supported by the evidence and was not arbitrary, unreasonable, or unrelated to the requirements of service. We affirm its decision to discharge Muligano.

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated, we affirm the Commission's ruling.

¶ 84 Commission affirmed. Trial court reversed.