

FOURTH DIVISION  
FEBRUARY 28, 2013

No. 1-12-0894

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

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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GUY RIC CERVONE,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
	)	
v.	)	
	)	
BOARD OF TRUSTEES OF THE	)	No. 11CH05717
MELROSE PARK POLICE PENSION FUND,	)	
JOHN SIMPSON, MIKE SCUDIERO,	)	
LARRY SPINO and FRANK POPE,	)	
Trustees of the Melrose Park Police Pension	)	
Fund,	)	Honorable
	)	Lee Preston,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

*HELD:* Circuit court's order upholding the decision of the pension board that the plaintiff had forfeited his right to pension benefits affirmed where the record established that the plaintiff committed a felony related to, arising out of, and in connection of his employment as a police officer in contravention of section 3-147 of the Illinois Pension Code 40 ILCS 5/3-108 (West

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2008)).

¶ 1 Plaintiff Guy Ric Cervone appeals an order of the circuit court upholding the decision of the Board of Trustees of the Melrose Park Police Pension Fund (Board) to deny Cervone pension benefits in accordance with section 3-147 of the Illinois Pension Code (Pension Code or Code) (40 ILCS 5/3-108 (West 2008)) because he committed a felony during his tenure as a Melrose Park police officer. On appeal, Cervone argues that the Board's decision should be reversed because he was following orders, which he had no discretion to disobey, when he committed the felony of which he was convicted. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 2

## I. BACKGROUND

¶ 3

### A. Conviction

¶ 4 Cervone joined the Melrose Park Police Department (Department) in 1986. At that time, he also became a participant in the Melrose Park Police Pension Fund. During his tenure at the Department, Cervone achieved the rank of lieutenant. Beginning sometime in 2000, Melrose Park Police Chief Vito Scavo ordered Cervone to assume responsibility for the Department's "time due" records. In the Department, "time due" was a form of overtime compensation whereby an officer earned extra time off instead of monetary compensation for working additional hours. For each hour of overtime that an officer worked, he or she would receive 1.5 hours of time due. In order to receive this alternative form of compensation, the Department required officers to complete overtime request forms and submit them to Cervone.

¶ 5 From March 2003 to September 2005, Chief Scavo regularly ordered Cervone to

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manipulate the time due records to make it appear as if certain officers were entitled to more time due than they had actually earned. In particular, Chief Scavo routinely ordered Cervone to manipulate time sheets for two officers, "Officer A" and "Day Shift Officer 1," who frequently performed numerous personal chores and errands for him during their shifts. In accordance with Chief Scavo's instructions, Cervone regularly falsified Officer A and Day Shift Officer 1's time due hours so that they could continue receiving compensation from the Department while performing personal errands for the Chief. Each time either officer's time due hours approached zero, Cervone manipulated the Department's time due records and credited the officers with time that they had not earned.

¶ 6 Starting sometime in the spring of 2005, federal law enforcement officers began investigating criminal activity occurring at the Melrose Park Police Department. Cervone learned of the investigation when federal officers executed search warrants at the Department and began conducting interviews with Department personnel. On September 21, 2005, after learning of the federal investigation, Cervone met with Officer A and Day Shift Officer 1 to discuss their time due records. At that time, he provided them with records that he had manipulated and falsely assured them that their records were accurate. Later, during another meeting, Cervone admitted to Officer A that he had falsified Officer A's time due records and had done so at the direction of Chief Scavo. Cervone confessed that when he was interviewed by federal agents, he lied and denied that anyone directed him to manipulate the Department's time due records. Cervone then instructed Officer A to provide false information to the federal agents and verify the information contained in the falsified records in order to ensure that he and Chief Scavo

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would not face criminal charges.

¶ 7 On July 19, 2007, Cervone and six others were indicted by the federal government. Cervone was charged with two counts of wire fraud and one count of obstruction of justice. The government subsequently dropped the wire fraud charges, and on July 19, 2009, Cervone agreed to plead guilty to the obstruction of justice charge. In the written plea agreement filed with the district court, Cervone admitted that he "corruptly endeavored to influence, obstruct, and impede, and to attempt to impede, and to attempt to influence, obstruct, and impede the due administration of justice, [by]:

a. [Providing] Day Shift Officer 1 and Officer A with false information about their time due and how they accumulated it, well knowing that time due was being investigated by the grand jury and with the intent that Day Officer 1 and Officer A would present false information to the grand jury and federal agents; and

b. [Directing] Officer A to lie to federal agents and the grand jury about how Officer A earned time due so as not to implicate defendant Cervone and Vito R. Scavo, chief of the Melrose Park Police Department."

¶ 8 At the sentencing hearing that followed, the government urged the district court to impose an enhanced sentence, arguing that enhancement was warranted because Cervonne committed the felony while occupying a "position of trust in his position as a police officer and a lieutenant in the police department" and abused that position by falsifying official police records and ordering a subordinate to lie to federal investigators. The court declined to impose an enhanced sentence and ordered Cervone to serve 60 days' imprisonment followed by 2 years of supervised release

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and pay a \$5,000 fine. The court explained its decision behind the "light" sentence as follows: "I first of all think that Mr. Cervone is the kind of person who never would have committed a crime if he didn't want to cooperate with his superiors. I don't think you get a medal for independence but I think you got swept into criminal conduct the way some people unfortunately do by not being willing in those circumstances to rock the boat."

¶ 9 B. Administrative Hearing

¶ 10 Following his conviction, the Board informed Cervone that it was holding an administrative hearing to determine whether his felony conviction should divest him of his rights to a pension pursuant to section 3-147 of the Pension Code (40 ILCS 5/3-147). Cervone testified at the hearing and acknowledged that he pled guilty to obstruction of justice, specifically witness tampering. He admitted talking to Officer A about the falsified time due reports, but explained that he did so at the direction of Chief Scavo. Cervone testified that he "was a good police officer" and that he "was put in a very bad position."

¶ 11 After hearing testimony from Cervone and reviewing the evidence, which included details of the indictment and Cervone's plea agreement, the Board concluded that Cervone was no longer eligible to receive any pension benefits because he committed a felony during the course of his employment as a Melrose Park police officer. The Board specifically found that: "The felony for which Cervone was convicted, was related to, arose out of, or was in connection with his service as a Melrose Park Police Officer. Specifically, a 'nexus' exists between Cervone's felony conviction for Count[] 19 of the Indictment [obstruction of justice], and his service as a Melrose Park Police Officer." The Board expressly rejected Cervone's argument that his pension benefits

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should remain in effect notwithstanding his felony conviction because he had been following orders when he falsified Department records, lied to federal authorities, and instructed another officer to lie to authorities, finding that his "argument [wa]s reminiscent of the defense of the [N]azi war criminals tried in Nuremburg, following World War II."

¶ 12 C. Circuit Court Proceedings

¶ 13 Cervone subsequently filed a complaint in the circuit court seeking administrative review of the Board's decision. He argued that the Board misinterpreted section 3-147 of the Pension Code and categorized his argument as "one of first impression." Cervone acknowledged that he committed and pled guilty to a felony, but argued that his conviction should not result in the forfeiture of his pension benefits because he was following a direct order, which he had no discretion to obey, when he committed the crime.

¶ 14 Following a hearing, the transcripts of which do not appear in the record, the circuit court upheld the decision of the Board, finding that a nexus existed between Cervone's felony conviction and the performance of his official duties, which warranted forfeiture of his pension benefits under section 3-147 of the Pension Code. In doing so, the court rejected Cervone's argument that a felony conviction should not operate to forfeit a police officer's pension rights when the officer was directed by a superior to commit the crime for which he was convicted. The circuit court observed that Chief Scavo's order was not facially valid or legal and that Cervone, "[b]y his own admission, \*\*\* knew Scavo's orders were improper and illegal when he chose to obey them." Given Cervone's decision to obey an illegal order and obstruct justice while serving as a lieutenant in the Department, the court concluded that the Board's finding that

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Cervone forfeited his pension rights was not erroneous.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, Cervone urges this court to reverse the decision of the Board and "consider the issue of whether a police officer being directed to commit a crime by a police chief should be able to retain his pension because an officer must obey the direct order of a chief." Although he committed a felony during the course of his employment as a Melrose Park police officer, Cervone argues that his pension rights should not be affected, because he acted in accordance with orders issued to him by Chief Scavo.

¶ 18 The Board, in turn, responds that its decision to terminate Cervone's pension rights was not clearly erroneous because his conviction for obstruction of justice "was related to, arose from, or was connected with his service as a police officer within the meaning of [section] 5/3-147 of the Pension Code." Moreover, the Board argues that Cervone's assertion that he was "just following orders" should not serve to defeat its finding that his felony conviction divested him of his pension benefits.

¶ 19 Appeals from administrative hearings are governed by administrative review law. 735 ILCS 5/3-101 (West 2008); *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 385 (2010). On appeal from a circuit court's judgment on administrative review, a reviewing court reviews the decision of the agency, not the circuit court. *Provena Covenant Medical Center*, 236 Ill. 2d at 386; *Ramirez v. Andrade*, 372 Ill. App. 3d 68, 73 (2007). In reviewing an administrative agency's decision, the applicable standard of review depends upon

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the type of question raised on appeal. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008); *City of Belvedere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). An administrative agency's factual findings and credibility determinations are deemed *prima facie* true and correct and a reviewing court is limited to ascertaining whether those findings are against the manifest weight of the evidence. *Cinkus*, 228 Ill. 2d at 210; *City of Belvedere*, 181 Ill. 2d at 205. A finding is against the manifest weight of the evidence if " 'the opposite conclusion is clearly evident' " or if the finding is " 'unreasonable arbitrary, and not based upon any of the evidence.' " *Lyon v. Department of Child and Family Services*, 209 Ill. 2d 264, 271 (2004), quoting *Snelson v. Kamm*, 204 Ill 2d 1, 35 (2003). The mere fact that the agency could have ruled differently is not reason to reverse the administrative agency's findings; rather, as long as there is evidence in the record that supports the agency's decision, it should be upheld on appeal. *Robbins v. Pension Board of Trustees of Carbondale Police Pension Fund of the City of Carbondale*, 177 Ill. 2d 533, 538 (1997). An administrative agency's conclusions regarding questions of law, in contrast, are not subject to deference; rather, the court's review is independent and not deferential. *Cinkus*, 228 Ill. 2d at 211; *City of Belvedere*, 181 Ill. 2d at 205.

¶ 20 Section 3-147 of the Illinois Pension Code is a pension forfeiture statute and provides as follows: "None of the benefits provided in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a police officer." 40 ILCS 5/3-147 (2008). "[T]he obvious purpose of [pension forfeiture statutes is] to discourage official malfeasance by denying the public servant convicted of unfaithfulness

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to his trust the retirement benefits to which he otherwise would have been entitled." *Kerner v. State Employees' Retirement System*, 72 Ill. 2d 507, 513 (1978).

¶ 21 When determining the applicability of a pension disqualification statute, the "pivotal inquiry" is whether there is a nexus between the felony that the employee committed and the performance of his official duties. *Taddeo v. Board of Trustees of the Illinois Municipal Retirement Fund*, 216 Ill. 2d 590, 597 (2005); *Romano v. Municipal Employees Annuity and Benefit Fund of Chicago*, 384 Ill. App. 3d 501, 503 (2008). That is, an employee's commission of a felony during his tenure as a municipal employee, alone, does not warrant forfeiture of his pension benefits; rather, to justify forfeiture, there must be a "clear and specific connection" between the felony the employee committed and his employment. *Taddeo*, 216 Ill. 2d at 597; *Romano*, 384 Ill. App. 3d at 504.

¶ 22 When the employee is a police officer, "what triggers [pension] disqualification is the existence between the actual felony conviction and the officer's service as a policeman." *Devoney v. Retirement Board*, 199 Ill. 2d 414, 423 (2002). To make the determination as to whether there is a nexus between a felony and an officer's performance of his official duties, the supreme court developed and applied a "but for" test, which it explained in detail in *Devoney*. *Id.* at 419. In that case, a police officer pled guilty to mail fraud after he and two friends attempted to defraud an insurance company by filing a false personal injury claim. A pension board determined that the officer forfeited his pension rights by committing the felony and the supreme court affirmed, concluding:

"At [his friend's] behest, Devoney had used his position on the police force for

[his friend's] benefit over a protracted period of time. Based upon these circumstances, there was ample ground for the Retirement Board's finding that '*but for* the fact that Devoney was a Police Officer of high rank,' he 'would not have been in the position or selected to participate in the scheme to defraud [which led to his conviction].' "

Because Devoney's participation in the scheme to defraud was the product of his status as a law enforcement official, we believe that the nexus required by [the pension forfeiture statute] was present. Devoney's conviction in federal court, was 'relat[ed] to or [arose] out of or in connection with his service as a policeman' so as to render him ineligible for his police pension benefits." (Emphasis added.) *Id.* at 423-24.

¶ 23 Here, using the traditional "but for" test set forth in *Devoney*, we find that the decision of the Board to revoke his pension benefits was not manifestly erroneous. The record clearly demonstrates that Cervone's conviction was related to, arose out of, and was connected to his service as a police officer as set forth in section 3-147 of the Pension Code. But for Cervone's position as a lieutenant in the Department, he would not have been in the position to falsify Department time due records or give orders to Officer A to lie to federal investigators, which was the conduct that resulted in his felony conviction for obstruction of justice. *Devoney*, 199 Ill. 2d at 423-24; see also *Siwek v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 324 Ill. App. 3d 820, 829 (2001) (upholding a retirement board's decision to deny a police officer's application for retirement benefits following his felony narcotics convictions because the officer used his specific knowledge as a police narcotics specialist to engage in criminal wrongdoing and thus, "his convictions were related to or connected with his service as an officer").

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¶ 24 Cervone, however, urges this court to disregard established precedent and apply a new "but for" test to police officers because case law has recognized that police officers are duty bound to follow orders from their superiors. Given the nature of police departments and the chain of command established within those departments, Cervone argues that he had no choice but to follow the direct orders of his superior, Police Chief Scavo. In support, Cervone relies primarily on *Launius v. Board of Fire & Police Commissioners of City of Des Plaines*, 151 Ill. 2d 419 (1992) and *Kreck v. Board of Police Commissioners of LaGrange Park*, 271 Ill. App. 3d 418 (1995) where courts recognized the police officers may not disobey orders from superiors that they believe to be subjectively unreasonable. Given that he had no discretion to disobey Chief Scavo's orders and would not have engaged in wrongdoing "but for" those orders, Cervone argues that his pension benefits should not be affected by his felony conviction.

¶ 25 In *Launius*, a police officer was terminated after he disobeyed an order to remain at his post and left work to check on his family during a flood. The supreme court upheld the decision of the reviewing board to terminate the officer's employment with the Des Plaines Police Department "for cause." The court acknowledged that the officer subjectively believed that the order was unreasonable given his need to care for his family during severe weather conditions, but recognized that:

" 'A rule permitting each officer to subjectively determine whether he believes an order to be unlawful and reasonable would destroy the discipline necessarily inherent in a paramilitary organization such as the police department. [Citations.] A police officer does not have the prerogative of actively disobeying an order from a superior while seeking a

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determination as to the validity of that order. Such a practice would thwart the authority and respect which is the foundation of the effective and efficient operation of a police force.' " *Launius*, 151 Ill. 2d at 426, quoting *Martin v. Matthys*, 149 Ill. App. 3d 800, 808 (1986).

Accordingly, notwithstanding the officer's subjective belief about the propriety of the order, the court concluded that the board's decision to terminate the officer for disregarding a direct order "was neither unrelated to the needs of the service nor arbitrary and unreasonable" and affirmed the board's decision. *Id.* at 445.

¶ 26 Similarly, in *Kreck*, this court upheld the decision of the board of police commissioners to discharge the plaintiff officer for cause when she disobeyed an order to return to work following an injury because she subjectively believed the order was unreasonable given her physical ability following her injury. Relying on *Launius*, we explained that

"A police department is a paramilitary organization with a chain of command leading to the chief of police. [Citations.] In order to establish and maintain a leadership role, the chief of police must command the respect and obedience of all officers. [Citation.] A police officer does not have the prerogative of actively obeying an order from [the chief] while seeking a determination as to the validity of that order because such a practice would thwart the authority and respect that is the foundation of the effective and efficient operation of a police force." *Kreck*, 271 Ill. App. 3d at 425.

Accordingly, because the officer disobeyed the police chief's direct order, we concluded that the board's decision to terminate her was made in good faith and affirmed its decision.

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¶ 27 Although we acknowledge the paramilitary organization of police departments and the chain of command that is necessary to effectively run such departments, we are unpersuaded by Cervone's reliance on *Launius*, *Kreck* and other similar cases. Unlike the officers in *Launius* and *Krek*, Cervone was not punished for disobeying orders he subjectively believed were unreasonable or unlawful; rather, he was convicted for obeying orders that he knew were objectively unlawful and contrary to Department guidelines. From March 2003 to September 2005, Cervone repeatedly altered the Department's time due records. He then lied to federal investigators and instructed Officer A to lie to those federal authorities in an effort to avoid being held criminally responsible for his wrongdoing. During federal court proceedings, Cervone acknowledged wrongdoing, but explained that he was fearful of losing his job or being assigned to the midnight shift if he did not follow Chief Scavo's orders. We acknowledge the difficult position Cervone was put in by the police chief; however, neither *Launius*, *Kreck* nor any of the other cases Cervone cites in his brief support the proposition that his pension benefits should remain intact after following an order, let alone multiple orders, which he knew to be objectively unreasonable and illegal.

¶ 28 Ultimately, we decline to apply a different "but for" test to police officers who commit felonies upon the orders of their superiors and preserve their pension benefits. Such a test would both fail to accord with the principle of *stare decisis* as well undermine the public policy underlying pension forfeiture statutes, which is to deter felonious conduct by police officers and other public servants by denying them retirement benefits to which they otherwise would have been entitled. *Ryan v. Board of Trustees of the General Assembly Retirement System*, 236 Ill. 2d

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315, 323 (2010); *Devoney*, 199 Ill. 2d at 418.

¶ 29

### III. CONCLUSION

¶ 30 Accordingly, we affirm the judgment of circuit court upholding the Board's determination that Cervone forfeited his pension benefits when he committed a felony arising out of, and connected to, his employment as a Melrose Park police officer.

¶ 31 Affirmed.