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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|--|---|-------------------------------|
| JAYSON DIMODICA, |) | Appeal from the Circuit Court |
| |) | of Stephenson County. |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 12-MR-94 |
| |) | |
| THE BOARD OF FIRE AND POLICE |) | |
| COMMISSIONERS OF THE CITY OF |) | |
| FREEPORT and its Commissioner |) | |
| members, BRIAN BORGER, ELLIOTT |) | |
| COOPER, DANEICE DAVIS, MICHAEL |) | |
| DORE and ROLAND MUNDA, and KEVIN |) | |
| COUNTRYMAN in his capacity as Chief of |) | |
| the Fire Department of the City of Freeport, |) | Honorable |
| |) | David L. Jeffrey, |
| Defendants-Appellees. |) | Judge, Presiding. |

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Board did not err in terminating plaintiff for cause.

¶ 2 The plaintiff, Jayson DiModica, appeals from the judgment of the circuit court of Stephenson County, which affirmed the decision of the defendant Board of Fire and Police Commissioners of the City of Freeport (Board of Commissioners or Board) to terminate him for

cause. He argues that the Board's findings were against the manifest weight of the evidence and its decision to terminate him was erroneous. We disagree and affirm.

¶ 3

BACKGROUND

¶ 4 DiModica, a registered nurse, began working for the Freeport Fire Department in 2007 as a firefighter/paramedic. He engaged in further training and advanced in his classification. His performance reviews reflected that he met expectations and was motivated to continue with his training.

¶ 5 In March 11, 2011, the fire department notified DiModica of charges against him relating to inappropriate sexual conduct with an 18-year old high school student intern doing "ride-alongs." Those charges eventually were dismissed as insufficiently substantiated.

¶ 6 Near the beginning of 2012, DiModica passed his fellow firefighter, Hillary Broshous, on the stairs to the sleeping quarters, and he slapped her rear as he did so. About a week later, Broshous was in the firehouse kitchen washing dishes when DiModica again slapped her on the rear. She immediately told him, "If my husband caught you doing that, he would kick your ass." This incident was witnessed by other firefighters. Broshous reported these incidents in a written statement dated August 9, 2012. Broshous concluded her written statement by saying that there had been no other incidents where the plaintiff "was inappropriate" and that she had felt no need either to report the incidents or discuss them further with DiModica.

¶ 7 At about midnight on May 25, 2012, Kailey Leif, an emergency medical technician (EMT) with Star Ambulance (a service with which the fire department regularly worked) was in the ambulance bay at Freeport Memorial Hospital, cleaning out the ambulance after a run. The lights were not on in either the bay or the ambulance. As she was working, someone closed the two back doors on her. When she turned around to look, the door opened a crack and DiModica stuck his head in. Leif said it was dark, and DiModica said that he could think of a couple fun

things they could do in the back of the ambulance. Leif laughed. DiModica said, “You laugh, but I’m serious.” When Leif began to get out of the ambulance, DiModica put his hand out for her to take. When Leif had climbed out of the ambulance, DiModica continued, “I’d have to get on my knees, though,” and began to kneel. Leif walked away and immediately told someone else what happened. Leif signed a written statement about the incident in which she stated that the incident made her feel “creeped out” and that “it was completely inappropriate.”

¶ 8 The third woman to come forward with a written statement about DiModica was Jacqueline Heiler, another EMT with Star Ambulance. Heiler described two incidents, neither of which she gave a date for. On the first occasion, Heiler was at the hospital for her nursing studies and was working on her computer. DiModica saw her after he brought in a patient. He approached Heiler and began conversing with her about school. He left the area and returned a few minutes later, handing her a piece of paper in a “secretive” way, by passing it to her in his palm. The piece of paper contained his email address. DiModica told Heiler that she could email him if she had any questions about class or “any questions at all or just to talk.” In her written statement, Heiler commented that she felt that if DiModica really was just acting as a friend there was no need to be secretive when he gave her his email address.

¶ 9 On the second occasion, Heiler had cleaned out the ambulance and pulled it outside after a run to Freeport Memorial Hospital, while her partner was inside writing up the report. DiModica came outside. As Heiler got out of the ambulance and began walking toward the entrance bay door, DiModica began to address her. Although it began as a “normal conversation” (albeit with a “flirty” tone), DiModica then put his arm around Heiler. Heiler felt uncomfortable and kept walking. DiModica removed his arm when she walked into the emergency room. DiModica then “said something about hanging out sometime.” When Heiler rebuffed him, saying that he was married and she had a boyfriend, DiModica responded, “That

doesn't mean anything." Heiler then told him that she "didn't roll that way" and went into the room where her partner was writing up the report.

¶ 10 Heiler concluded her written statement by saying that she felt uneasy around DiModica whenever she ran into him in the emergency room, and that she made a point of not being "caught in a situation" where he was alone with her because she did not know "what he would do or try to do." She commented that "sexual connotation and joking" were normal in the emergency medical service field, but she believed that DiModica was "not joking" and she got a "vibe" from him that was "extremely uncomfortable."

¶ 11 On June 6, 2012, Freeport Fire Chief Kevin Countryman (also a defendant here) notified DiModica that he was investigating allegations of sexual harassment by DiModica while on duty, along with allegations that DiModica conducted himself "in a manner detrimental to the orderly operation" of the fire department and in a manner that brought discredit to the fire department, and "failed to maintain a standard of proper conduct and professionalism." The notice ordered DiModica not to discuss the matter with any fire department employees other than those conducting the investigation. On July 9, 2012, DiModica received a written reprimand about discussing an ongoing investigation with other employees. The record on appeal contains handwritten notes dated July 10, 2012, of a telephone conference with Broshous in which she stated that she had concerns about DiModica acting as her preceptor and that the day before, DiModica had approached her and asked her if he ever "grabbed her ass." On August 9, 2012, DiModica was placed on leave with pay pending the outcome of the investigation.

¶ 12 On September 5, 2012, Chief Countryman filed charges against DiModica with the Board of Commissioners, alleging that, while on duty, DiModica had violated the City of Freeport's policy against sexual harassment and had conducted himself in a manner that brought discredit upon the fire department. "Sexual harassment" was described as "[p]ersistent or repeated

unwelcome flirting, pressure for dates, sexual comments or touching”; or “[s]exually suggestive jokes, gestures, or sounds directed toward another[,] or sexually oriented or degrading comments about another.” The charges alleged that, while on duty, DiModica: (1) on May 25, 2012, made unwanted and unwelcome comments with sexual connotations or inferences toward an employee of Star Ambulance; (2) on two occasions, made similar comments to another employee of Star Ambulance; (3) “inappropriately touched (put his arm around)” an employee of Star Ambulance; (4) on two occasions, “inappropriately touched (slapped on the buttocks)” an employee of the fire department. The chief requested a formal administrative hearing on the charges.

¶ 13 On September 18, 2012, the Board convened to hear the charges, but granted a continuance at DiModica’s request.

¶ 14 On October 2, 2012, the parties agreed to a stipulation that, if called to testify, Broshous, Heiler and Leif would testify consistently with their written statements. DiModica waived his right to confront and cross-examine these witnesses. Statements made to the Board reflect that the parties considered themselves to have submitted to a stipulated bench trial regarding the substance of the charges. As consideration for a further continuance to allow DiModica to present evidence from his therapist at a hearing on the “disciplinary phase,” DiModica waived his right to receive a salary as of that date.

¶ 15 The final hearing was held on October 18, 2012. Debra Milliman, the human resources manager for the city, testified that, when DiModica was hired, he signed a document acknowledging that he had received and reviewed the city’s policy on sexual harassment. A copy of that policy was admitted as an exhibit. Milliman also testified that, in June 2010, fire department personnel including DiModica took part in training on sexual harassment. DiModica received a perfect score on a quiz administered after the training.

¶ 16 Chief Countryman testified next. He went over DiModica's record, noting positive performance reviews as well as occasional discipline for using the department's computers to engage in political advocacy, three instances of accidental damage to a fire department vehicle within five years, and the 2011 allegation of inappropriate sexual conduct that was later deemed unsubstantiated, as there were no witnesses and it was a he said/she said situation. The chief stated that he was requesting that DiModica be terminated because the current charges reflected continuing sexually inappropriate conduct by DiModica. DiModica, like other firefighters, was often required to be alone with patients and others, and his job entailed encounters with people when they were in a vulnerable state. Accordingly, the chief believed that firefighters should be held to higher standard than ordinary people. Chief Countryman acknowledged that there had never been any allegations that DiModica had engaged in any misconduct with patients, but he believed that DiModica had used his position to make advances to women with whom he worked.

¶ 17 DiModica then presented the testimony of his therapist, Dr. Patricia Egan, a licensed psychologist. She explained that she had agreed to see DiModica at his attorney's request. She had seen him three times: October 4, October 11, and the date of the hearing. She had done a clinical interview and had administered psychological tests. She believed that DiModica had "accepted the fact that he may have some issues" and that he would be willing to continue with counseling. The testing showed that his prognosis would be good. One of the Board members noted that the Board had a limited number of disciplinary options that included (a) termination and (b) suspension without pay for 30 days; as DiModica's suspension without pay had begun on October 2, the Board member wondered whether DiModica would be "better" by the time the 30-day period was up in about two weeks. Dr. Egan replied that therapy was an ongoing process and she could not say that DiModica would have resolved his issues within two weeks, but she

believed that his acknowledgment that he needed help was a significant step. On cross-examination, Dr. Egan agreed that DiModica had initially denied that the incidents occurred and that “denial may be an issue,” and agreed that he did not seek help until his livelihood was threatened by the current charges.

¶ 18 The parties then presented closing arguments. The fire department conceded that DiModica had received favorable reviews over the years along with a few disciplinary infractions, but stated that, other than the 2011 allegation of inappropriate sexual conduct, none of the remainder of DiModica’s personnel file really bore on the current charges. As to that 2011 allegation, it had been ruled unsubstantiated and so should not be considered by the Board as having been proven. However, the 2011 allegation should have put DiModica on notice that sexual misconduct would not be tolerated and that allegations about it would be taken seriously. Nevertheless, DiModica persisted in his sexually inappropriate conduct, accumulating complaints of five separate incidents within an eight-month period. Accordingly, the department argued that he should be terminated.

¶ 19 DiModica’s attorney argued that, although initially resistant, DiModica had accepted responsibility for his actions and was genuinely seeking help in addressing those actions. By forgoing his right to require the witnesses against him to appear and testify, he had demonstrated his recognition of the problems his conduct had caused. Further, although he did not want to minimize DiModica’s conduct, none of the incidents were particularly egregious, especially when compared to misconduct by other firefighters that had not resulted in termination. The attorney argued that DiModica was a valuable asset to the fire department as an experienced registered nurse who could assist in training new paramedics. DiModica had never had any complaints in his previous professional nursing experience and indeed had had very good performance as a firefighter/paramedic until the last year and a half, when it was clear that

something major had occurred in his personal life that sent him off track. DiModica had “all the potential in the world” if he remained at the fire department and continued to see Dr. Egan. The attorney therefore requested that DiModica be allowed to retain his employment, with the requirement that he continue his therapy.

¶ 20 After deliberating in executive session, the Board returned to open session and unanimously approved a motion to terminate DiModica for cause.

¶ 21 The Board’s written decision was issued a few days later, on October 23, 2012. In it, the Board found that DiModica’s acts as described in the three witnesses’ statements constituted sexual harassment. (The Board also made detailed findings regarding each incident described in the written statements.) Further, in light of the fact that two of the witnesses were employed outside the fire department, the Board found that DiModica’s actions had brought discredit to the fire department.

¶ 22 As to the appropriate discipline, the Board began by noting that it had three disciplinary options open to it: discharge, suspension of not more than 30 days; or suspension for a period less than 30 days. DiModica had been placed on leave without pay on October 2, 2012. The Board concluded that discharge was appropriate for the following reasons: DiModica’s position necessarily required him to serve as a role model; he had undergone training on the City’s sexual harassment policy and had demonstrated his familiarity with that policy by getting a perfect score on the related test; through the investigation of the 2011 allegation, DiModica had notice that sexually-motivated conduct while on duty was inappropriate and would be investigated; and the sexual harassment of three individuals on five occasions was egregious. The Board found unpersuasive Dr. Egan’s opinion that DiModica’s prognosis was good, given that DiModica did not seek out counseling on his own until after charges were filed. Further, Dr. Egan could not be certain about how long necessary treatment would take, but DiModica would be back on active

duty within two weeks if he were not terminated. If his treatment was not fully effective by then, DiModica “would be a risk to other City employees, employees of companies working in conjunction with the City, and the public at large if he remained in the employment of the City,” and there was “too much unsupervised contact” between DiModica and other persons to permit such a risk.

¶ 23 DiModica appealed the Board’s decision by filing suit in the circuit court of Stephenson County pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2012)). On January 16, 2014, the trial court entered a memorandum opinion and order affirming the Board’s decision. DiModica then filed this appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, DiModica argues that his conduct as described in the written statements of Broshous, Heiler and Leif did not amount to sexual harassment and there was no evidence that he brought discredit upon the fire department. He also argues that discharge was too harsh a punishment for his conduct.

¶ 26 In *King’s Health Spa, Inc. v. Village of Downers Grove*, 2014 IL App (2d) 130825, ¶ 36, this court explained the standard of review that applies here:

“In administrative review cases, the appellate court reviews the decision of the agency, not that of the trial court. *Lindemulder v. Board of Trustees of the Naperville Firefighters’ Pension Fund*, 408 Ill. App. 3d 494, 500 (2011). Where an agency has imposed a sanction, such as revoking a license or discharging an employee, courts use a two-step review process. *Hermesdorf v. Wu*, 372 Ill. App. 3d 842, 851-52 (2007) (applying a two-step review to a decision to discharge an employee); *Byrne v. Stern*, 103 Ill. App. 3d 601, 605-06 (1981) (applying a two-step review to a liquor commissioner’s decision to revoke a liquor license). First, the court determines whether the agency’s

factual findings are against the manifest weight of the evidence. *Byrne*, 103 Ill. App. 3d at 606. An agency's findings are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Roach Enterprises, Inc. v. License Appeal Comm'n*, 277 Ill. App. 3d 523, 528 (1996). Second, the court determines whether the findings of fact support the sanction imposed. *Id.* The second step requires determining whether the agency acted arbitrarily or in clear abuse of its discretion. *Id.* '[A] reviewing court will not interfere with an agency's decision to impose a certain sanction unless the agency acted unreasonably or arbitrarily or chose a sanction that is unrelated to the purpose of the statute.' *Albazzaz v. Department of Professional Regulation*, 314 Ill. App. 3d 97, 101 (2000)."

With regard to the second step, " 'the mere fact [that] a reviewing court considers a different sanction more appropriate does not render a decision arbitrary.' " *Roach Enterprises*, 277 Ill. App. 3d at 530 (quoting *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 312 (1992)).

¶ 27 Here, the Board's findings that DiModica's conduct constituted sexual harassment and brought discredit to the fire department were amply supported by the evidence. The City's sexual harassment policy defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, [and] other verbal, non-verbal, or physical acts of a sexual or sex-based nature, where *** [s]uch conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment." The policy further prohibits certain conduct, including "[p]ersistent or repeated unwelcome flirting, pressure for dates, sexual comments or touching," and "[s]exually suggestive jokes, gestures or sounds directed toward another[,] or sexually oriented or degrading comments about another."

¶ 28 DiModica's actions toward the three witnesses included uninvited prohibited conduct, in that he patted Broshous twice on the rear and put his arm around Heiler, and he inappropriately

engaged in persistent unwelcome flirting and sexual comments with Heiler and Leif. Notably, he persisted in his advances to Heiler and Leif even though both women attempted to rebuff him. When Heiler indicated to him that his invitation to “hang out” was not appropriate because he was married and she had a boyfriend, DiModica disregarded it, saying that did not matter. Similarly, when Leif attempted to treat his comments to her (about “fun things” that could be done in the back of an ambulance) as a joke, he replied that he was serious and followed his comments with additional sexual references and actions (kneeling). The evidence also supports the Board’s finding that DiModica’s actions interfered with the three women’s ability to perform their work, which required them to interact with him professionally. Heiler explicitly stated that she altered her working arrangements to ensure that she was never alone with DiModica because she was not sure what he “would do or try to do.” Leif commented that she felt “creeped out” by his actions. And, although Broshous said in her written statement that she felt no need to take further action after warning DiModica off (after the second time he patted her on the buttocks), she later expressed concerns about working with DiModica when he confronted her about reports of his actions. Thus, the Board’s finding that DiModica’s conduct violated the City’s policy against sexual harassment was not against the manifest weight of the evidence.

¶ 29 DiModica argues that his conduct was only “boorish” and did not amount to sexual harassment, citing *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7th Cir. 1995). This argument is unavailing for two reasons. First, the facts in this case are distinguishable from those in *Baskerville*, where the plaintiff’s manager made comments containing vulgarity and sexual innuendo on a few occasions over several months, but the manager never touched the plaintiff or implicitly invited her to have sex with him, and there was no indication that the plaintiff was ever required to work alone with the manager. *Id.* at 431. In fact, the court in *Baskerville* expressly noted that unconsented physical contact and “uninvited sexual solicitations”—both of which

occurred here—were sexual harassment. *Id.* at 430. Second, unlike this case, *Baskerville* concerns the scope of a claim under Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1991)). Here, the question is whether DiModica violated the City’s policy against sexual harassment. Although that policy mentions Title VII in passing, nothing in its text indicates that the policy prohibits only that behavior which would constitute sexual harassment under Title VII. The City’s policy may well be broader than Title VII; DiModica has not produced any contrary authority. Accordingly, *Baskerville* is not only distinguishable from this case on its facts, but also legally irrelevant to the charge of sexual harassment against DiModica.

¶ 30 DiModica next argues that there was no evidence that his conduct brought discredit to the fire department; at most, he argues, it brought discredit only to himself. We find his argument forfeited for lack of support. Where a party does not offer any argument or meaningful authority in support of that argument, the argument is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646, 677 (2007). Here, DiModica’s entire argument on this point consists of three assertions—that there was no evidence of discredit; at most, he discredited only himself; and none of the three women who gave statements actually asked to stop working with the fire department. He cites no legal authority that would support his assertion that only conduct that results in a refusal to work with an agency brings discredit upon that agency. To the contrary, the record reveals that DiModica’s conduct was the subject of negative commentary outside the department, in that both Heiler and Leif complained to supervisors about it. DiModica’s conduct toward Broshous was also witnessed by other fire department employees, thereby undermining discipline and morale. An agency’s findings are against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *Roach Enterprises*, 277 Ill. App. 3d at 528. DiModica has not shown that the Board erred in finding that his conduct brought discredit upon the fire department.

¶ 31 We therefore turn to the question of whether the Board abused its discretion in terminating DiModica rather than imposing some other sanction. As noted above, an agency abuses its discretion in choosing a sanction only where it acts unreasonably or arbitrarily or chooses a sanction unrelated to the purpose of the statute. *Albazzaz*, 314 Ill. App. 3d at 101.

¶ 32 DiModica's sole argument on this point is that neither the fire chief nor the three women who submitted statements about his conduct requested his termination. As to the fire chief, this argument is simply wrong: in his testimony before the Board, Chief Countryman explicitly asked that the Board terminate DiModica. Moreover, DiModica cites no legal authority for the proposition that termination must be requested by the witnesses in order to be an appropriate sanction. Accordingly, we find this argument, too, forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Mikolajczyk*, 374 Ill. App. 3d at 677. Finally, forfeiture aside, DiModica has not shown that the Board's decision to terminate his employment was unreasonable, arbitrary, or unrelated to the purpose of the applicable law: the evidence amply supported the Board's decision.

¶ 33 CONCLUSION

¶ 34 For all of the foregoing reasons, the judgment of the circuit court of Stephenson County is affirmed.

¶ 35 Affirmed.