

Nos. 1-13-1514, 1-13-2957 (Cons.)

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)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DALE PRINCE,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellee/Cross-Appellant,)	
)	
v.)	
)	
GARY McCARTHY, Superintendent of the Chicago Police)	
Department,)	No. 11 CH 36445
)	
Defendant-Appellant/Cross-Appellee,)	
)	
and)	
)	
THE POLICE BOARD OF THE CITY OF CHICAGO,)	Honorable
)	Peter Flynn,
Defendant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* The findings of the Police Board of the City of Chicago that a police officer violated Chicago Police Department rules 2, 6, 15, and 38 were not against the manifest weight of the evidence. The Board's decision to discharge the officer for

violating these rules by discharging one of his service handguns while intoxicated and possessing seven unregistered firearms in a high-crime area was not arbitrary, unreasonable or unrelated to the needs of the service.

¶ 2 Defendant Gerry McCarthy (McCarthy), superintendent of the Chicago Police Department (CPD), appeals an order of the circuit court of Cook County directing the defendant Police Board of the City of Chicago (Board) to impose a sanction less than discharge against plaintiff, Chicago police officer Dale Prince (Prince). On appeal, McCarthy argues the Board's findings were not against the manifest weight of the evidence and the decision to discharge Prince was not arbitrary, unreasonable, or unrelated to the needs of the service. Prince also appeals, arguing the Board's findings were against the manifest weight of the evidence and the five-year suspension ultimately imposed by the Board was arbitrary, unreasonable, or unrelated to the needs of the service. For the following reasons, we reverse the decisions of the circuit court of Cook County ordering the Board to impose a lesser penalty than discharge and remand the cause to the Board, with leave to vacate the order imposing the suspension and to reinstate its earlier order of discharge.

¶ 3 BACKGROUND

¶ 4 On April 6, 2011, McCarthy filed charges with the Board, recommending Prince be discharged from the CPD for violating the CPD rules of conduct (Rules), including:

"Rule 2: Any action or conduct which impedes the [CPD]'s efforts to achieve its policy and goals or brings discredit upon the [CPD].

Rule 6: Disobedience of an order or directive, whether written or oral.

Rule 15: Intoxication on or off duty.

Rule 38: Unlawful or unnecessary use or display of a weapon."

McCarthy alleged that on or about May 11, 2007, at approximately 0046 hours, Prince

unnecessarily discharged his weapon while off duty in the back yard of his residence. McCarthy also alleged that on the same date, Prince submitted to a Breathalyzer test, which disclosed he had a blood alcohol content (BAC) reading of .097, and was in possession of seven unregistered firearms.

¶ 5 On August 2, 2011, the charges were heard by one of the Board's hearing officers. Chicago police sergeant Michael Murzyn (Murzyn) testified that on May 11, 2007, at approximately 12:30 a.m., he responded to a radio call regarding shots fired in the rear of a house located at 7508 South Wood Street. Upon arriving at the scene, Murzyn observed Prince standing atop a chain link fence, breaking an upper pane of one of the windows of the house. Murzyn and two other officers, including Chicago police officer Anthony Ellis (Ellis), directed Prince to not move and pointed their weapons at him. The police then directed Prince to descend from the fence and lie face down on the ground. Prince complied with these directions.

¶ 6 According to Murzyn, Prince appeared disheveled, with blood on his hands and wrists. The officers placed Prince in a police vehicle and proceeded to the rear of the house to investigate the radio call. Murzyn discovered a spent shell casing near the garage and two handguns under an orange traffic cone beneath the back porch. Murzyn later testified that the handguns were Prince's registered service weapons. He was not aware of any burglary alarm being activated at 7508 South Wood Street.

¶ 7 In the back yard, the police encountered Prince's girlfriend, Cynthia Berry (Berry). Murzyn testified that Berry informed the police she and Prince had been out of the house separately and Prince had returned home prior to her arrival. Prince attempted to kiss Berry, but she refused, informing Prince he had the odor of cigarettes and "booze." Berry also informed the police that Prince then went to their bedroom and emerged with a handgun in each hand. Berry

further informed the police that Prince exited through the back door of the house, stating he was "going down the list and going to go out in a blaze of glory."

¶ 8 Murzyn further testified that Chicago police Glombicki (Glombicki) and personnel from the CPD's internal affairs division (IAD) subsequently arrived at the house. Glombicki informed Murzyn there were additional firearms in the house. Murzyn, Berry, and a police evidence technician entered the house, where Murzyn recovered seven additional firearms from a bedroom closet.

¶ 9 On cross-examination, Murzyn testified that the radio call was not unusual, as the block was in a high-crime area. Murzyn acknowledged he had no knowledge of Prince and Berry being involved in any domestic altercation beyond a minor verbal argument. When asked whether an accidental discharge of a weapon by a police officer was "not unusual," Murzyn responded, "It has happened, yes."

¶ 10 Ellis also testified regarding his response to the incident. Based on his 15 years of experience, Ellis opined that Prince appeared to be "intoxicated and a little disoriented" at the house. After the investigation at 7508 South Wood Street concluded, the police transported Prince to the Sixth District police station. According to Ellis, the police also processed the seven firearms recovered from inside the house and learned the weapons were unregistered.

¶ 11 On cross-examination, Ellis testified that Berry never informed him regarding Prince's statement about going out in a blaze of glory. Ellis also acknowledged it was not unusual to receive a radio call of shots fired in the neighborhood of 7508 S. Wood Street. Ellis further acknowledged that Prince complied with his verbal commands and walked 15 to 25 feet to the police vehicle without stumbling.

¶ 12 Chicago police officer Adrienne Neely (Neely) testified that she was a certified breath

technician. On May 11, 2007, she responded to a radio call for a breath technician at the Sixth District police station. Neely testified that she administered various sobriety tests to Prince at approximately 3:54 a.m. Prince refused a horizontal gaze and nystagmus test. According to Neely, Prince exhibited two "clues" of impairment during a one-leg stand test, but she testified that "one or four" clues indicate that an individual is impaired. Prince exhibited one clue of impairment on a walk-and-turn test, which includes eight possible clues. Prince exhibited no clues of impairment on a finger-to-nose test. From these tests, Neely concluded Prince "may have had some alcohol at some point or another."

¶ 13 Neely also inquired of Prince whether he had consumed alcohol or drugs that day. Prince responded that he had not consumed drugs or alcohol. Neely then administered a Breathalyzer test to Prince, which indicated BAC of .097. The parties stipulated to the accuracy of the Breathalyzer test results.

¶ 14 On cross-examination, Neely acknowledged that in her field test report, she checked a box indicating Prince had a slight odor of alcohol and did not check boxes indicating he had a moderate or strong odor of alcohol. She also acknowledged that Prince did not exhibit slurred or mumbled speech and did not stutter or appear confused at any point during the administration of the tests.

¶ 15 Two audio tracks from two police emergency telephone calls Berry placed regarding the incident were played for the hearing officer. During the first telephone call, Berry informed the police dispatcher that her boyfriend was "shooting his gun outside the house" and repeatedly demanded that the dispatcher send police. When the dispatcher inquired for Berry's name, Berry responded by inquiring for the dispatcher's name. The dispatcher responded, "Espinoza," whereupon Berry replied, "Espinoza, if I die, it's going to be on you, OK?" Berry declined to

provide her name to the dispatcher.

¶ 16 During the second telephone call, Berry inquired whether the dispatcher was sending police, and repeatedly stated her boyfriend was firing his weapon outside the house. Berry eventually informed the dispatcher her name was Cynthia. She also provided the dispatcher with a telephone number, Prince's name, and a general description of Prince. Berry further informed the police dispatcher that Prince was at the rear of the house.

¶ 17 After the audio tracks were played, the hearing officer stated that neither of the purported "translations *** really capture it." Neither side objected to the hearing officer's suggestion that the Board members would each receive copies of the audio tracks.

¶ 18 Chicago police detective Randall Bacon (Bacon) testified that he was assigned to the IAD and was instructed by a commanding officer to report to 7508 South Wood Street on May 11, 2007. After receiving a briefing on the incident at the scene, Bacon proceeded to the Sixth District police station. Bacon interviewed Prince twice, at approximately 5 a.m. and 8:45 a.m.

¶ 19 During the first interview, Prince agreed to speak to Bacon after being informed of his constitutional rights. Prince denied he had been drinking and discharging a weapon. Rather, Prince stated that he telephoned Berry when he arrived at the house, but he received no answer. Prince attempted to enter the house through one of the side windows because he had forgotten his keys. Prince also mentioned to Bacon that he received some type of alert from his garage, as though a burglary was occurring. Prince further explained that the seven unregistered weapons recovered from his house had belonged to his grandfather, who was no longer mentally capable of safely possessing them. Prince additionally denied that he had been armed.

¶ 20 According to Bacon, Prince subsequently requested another interview. After being informed again of his constitutional rights, Prince stated that he wanted to be truthful about the

incident. Bacon testified that Prince stated he was out drinking, was intoxicated and went home. Prince also stated he received an alert on his cell phone of a possible garage burglary. Prince further stated to Bacon that he accidentally discharged his weapon, became nervous, and concealed the weapon under his back porch. Prince additionally stated to Bacon that he lost his cell phone.

¶ 21 On cross-examination, Bacon testified that although one spent cartridge was recovered at the scene of the incident, he did not know how many gunshots had been fired. Bacon never counted the number of unspent cartridges in Prince's weapon to assist him in determining the number of gunshots fired, although he conceded that fact would be relevant to the IAD investigation. Bacon admitted that multiple gunshots being fired would tend to undermine a claim of an accidental discharge. Bacon further acknowledged that after Prince stated he had lost his cell phone, Bacon never checked to determine whether the cell phone had been inventoried by the police. Bacon explained that he did not think that Prince receiving a text message regarding the garage burglar alarm was relevant to his investigation.

¶ 22 Chicago police sergeant Cynteria Moore-Powell (Moore-Powell) testified that she was Prince's supervisor for approximately three years commencing in 2003-04. Prince also assisted her after his shift, commencing in late 2009. According to Moore-Powell, Prince was an excellent, self-motivated officer who worked well with others. Moore-Powell had conversed with other officers and opined that Prince was respected by his colleagues. She had no knowledge of the charges against Prince.

¶ 23 Chicago police captain Kenneth Johnson (Johnson) testified that he was Prince's watch commander for "a couple of years" commencing in approximately 2005. Johnson testified that Prince was a hard worker who dealt well with his peers and the public. As watch commander,

Johnson reviewed Prince's reports and arrests, but did not observe him in the field.

¶ 24 Berry, a parole officer for the Illinois Department of Corrections, was in a relationship with Prince from 2003-10. Berry testified that in the early morning hours of May 11, 2007, she was preparing food in the kitchen when Prince arrived. She refused a hug from Prince because he had an odor of cigarette smoke. According to Berry, Prince went into the bedroom, but then rushed out through the back door. She later saw a flash and heard a gunshot, which caused her to lock the back door to the house.

¶ 25 Berry was frightened and telephoned 911 twice. Berry testified she was not frightened by Prince, but by the unknown situation outside. She became frustrated because the police dispatcher was asking "stupid questions." Berry also testified that she was being sarcastic when she stated it would be the dispatcher's fault if she died. Berry acknowledged that she informed the police that Prince said something about going out in a "blaze of glory," but she testified that this statement was untrue. According to Berry, she was "saying different things" and "overexaggerated" to the police because she was angry and confused. She denied having any dispute with Prince prior to the incident. Berry further testified that Prince did not appear to be impaired by alcohol that evening. She acknowledged Prince may have had the odor of alcohol, but added she was unsure on this point because she had been drinking alcohol herself that evening.

¶ 26 Prince testified that on May 10, 2007, he attended a coworker's party to watch a Chicago Bulls basketball game. He consumed beer at the party, but did not recall how many servings he consumed. Prince did not recall "feeling intoxicated to where [he] was stumbling or drunk or to that effect."

¶ 27 Prince returned to 7508 South Wood Street, where he lived with his then-fiancee Berry,

between 12:30 a.m. and 1 a.m. on May 11, 2007. He attempted to hug and kiss Berry, but she refused because he had the odor of cigarette smoke. Prince denied having any dispute with Berry or referring to a "blaze of glory" during this incident.

¶ 28 Prince was preparing to shower when he received a text message from his home monitoring system that the burglar alarm for his garage had been activated. He testified his house was located in a high-crime area and that his garage was invaded three times in the prior month, while his neighbor's garage had been burned to the ground. Prince had telephoned 911 regarding prior incidents, but he did not telephone the police on this occasion.

¶ 29 Prince further testified that he grabbed both of his service handguns, both of which were loaded, from his nightstand drawer. He also testified he was not in possession of these weapons at the party. He ran outside the house, holding a weapon in each hand, pointed downward. According to Prince, he slipped on the uneven brick of his patio and grabbed a banister, causing one of his handguns to discharge inadvertently. Prince did not recall which handgun discharged or whether his fingers were on the triggers of the handguns.

¶ 30 After Prince discharged the handgun, he checked the garage and the sides of his house. He knocked on a window on one side of the house, then proceeded to the other side and knocked on the bedroom window, thinking Berry might be in the bedroom. In order to access the bedroom window, Prince was required to jump over a fence. Before scaling the fence, he concealed his service weapons under a traffic cone because he did not want them to be in plain view and because he did not want to accidentally discharge them. According to Prince, he then climbed the fence and knocked on the window, which broke because it had been cracked. It was at this point that the police arrived on the scene.

¶ 31 Prince additionally testified that the seven unregistered firearms found in his home

belonged to his grandfather. According to Prince, his grandfather had moved from his mother's house to a nursing home and his mother had requested that Prince remove the weapons because children resided in her house. Prince testified he brought the firearms to his house on the afternoon prior to the incident. Prince also testified he had not considered whether his grandfather had registered the weapons and wanted to secure them, turn them in, or register them if needed.

¶ 32 Prince further testified that after he was in police custody, he informed an officer he had inadvertently discharged his firearm. He maintained that he did not lie to any of the police officers. Prince did not recall denying firing his weapon to Bacon or informing the detective that he attempted to telephone Berry because he had forgotten his house keys. He also did not recall a second interview with Bacon.

¶ 33 Following an IAD investigation, Prince was assigned to work at a CPD nonemergency call center. He remained in this assignment, even after criminal charges against him were dismissed, until McCarthy filed the charges against him in these proceedings. Prince was then suspended from service pending resolution of the charges.

¶ 34 Prince also testified he had received awards during his police service. He received the Superintendent Salute for apprehending someone who had committed first degree murder. Prince additionally recalled being awarded a ribbon representing having received more than 50 honorable mentions during a two-year period.

¶ 35 On September 15, 2011, the Board issued written findings and a decision ordering Prince's discharge from the CPD. The Board ruled Prince's possession of unregistered firearms violated Rule 6, because CPD General Order 07-01 required CPD officers to register all firearms in their possession. Moreover, the Board ruled the possession of unregistered firearms in a "very

dangerous neighborhood" was a serious violation of CPD rules and impeded the CPD's efforts to achieve its policy and goals, in violation of Rule 2.

¶ 36 The Board also found Prince's version of the incident was not credible, not only due to the lack of corroborating evidence that he received a text message regarding a possible burglary, but also because his act of disarming himself was inconsistent with a potentially dangerous situation. Even assuming for the sake of argument that Prince was responding to a possible burglary, the Board found Prince's actions improper and unnecessary. The Board found Prince was highly intoxicated at the time he entered his back yard with his service weapons, based on the stipulated results of the Breathalyzer test conducted four hours later, the other field sobriety tests conducted by Neely, and the testimony of Ellis that Prince was inebriated. Given Prince's intoxication, the Board found Prince should have contacted the police, rather than leave his house with loaded firearms.

¶ 37 The Board thus reasoned Prince's claim that his handgun accidentally discharged was not a defense, because Prince should not have exited his house with loaded firearms while intoxicated. The Board concluded Prince's actions violated another provision of CPD General Order 07-01 instructing officers to refrain from carrying a firearm when there is a likelihood they will be consuming alcoholic beverages that may impair their physical or mental abilities. The Board thus concluded Prince violated Rules 2, 6, 15, and 38.

¶ 38 Although there was some dispute regarding the number of Honorable Mentions Prince received, the Board found sufficient evidence to conclude Prince received more than 50 Honorable Mentions during his service to the CPD. After considering the evidence of the May 11, 2007, incident, along with the evidence presented in defense and mitigation of the charges, including Prince's history of awards, the Board determined Prince must be discharged from his

position, due to the reckless and dangerous nature of his misconduct. The Board also determined Prince's misconduct was sufficiently serious to constitute a substantial shortcoming that rendered his continuance in his office detrimental to the discipline and efficiency of the service of the CPD, and something the law recognized as good cause for discharge.

¶ 39 On October 20, 2011, Prince filed his complaint for administrative review in the circuit court of Cook County. On February 10, 2012, Prince filed a petition in support of his complaint, arguing: (1) the four-year delay in bringing charges against him violated his due process rights and the principle of laches; (2) the Board's decision was against the manifest weight of the evidence; and (3) separation was not an appropriate penalty in this case. On April 5, 2012, McCarthy filed a brief in opposition to the complaint, arguing: (1) Prince forfeited the due process and laches issues by failing to raise them in the administrative proceedings; (2) the Board's findings were not against the manifest weight of the evidence; and (3) separation was the appropriate penalty because it was not arbitrary and reasonably related to the needs of the service. On April 20, 2012, Prince filed a reply in support of his complaint, arguing he had not forfeited the due process and laches issues. Prince also reiterated that the Board's decision was against the manifest weight of the evidence and that the penalty of separation was inappropriate.

¶ 40 On May 10, 2012, following a hearing on the matter, the circuit court indicated that it would remand the case to the Board for a clarification of the Board's findings of fact. On May 16, 2012, McCarthy filed a motion to clarify the circuit court's ruling, noting the Board expressly found Prince's account of the incident was not credible and that, even if Prince's account was accepted, Prince's actions were unreasonable under the circumstances of the case. On May 30, 2012, during a hearing on the matter, the parties explained they disagreed regarding the meaning of the court's May 10 ruling. The judge observed that the Breathalyzer test result was a "thin

read [sic]" upon which to find Prince was intoxicated and that the reed "gets thinner" when none of the police officers who examined Prince were willing to testify he was drunk. The judge also observed that the issue of the penalty was not subject to the manifest weight of the evidence standard of review and that if Prince's testimony was credited, separation would seem to be an overly harsh sanction. The judge opined that if the Board's assessment of Prince's credibility depended on the lack of telephone records, it would be unreasonable for the Board (which had the burden of proof) to expect Prince to proactively obtain the telephone records. The judge further observed that from a factual standpoint, the issue of the penalty imposed may hinge on Berry's credibility. The judge then entered an order remanding the matter to the Board for clarification of its comments in accordance with the May 30 transcript, incorporated into the order by reference.

¶ 41 On September 10, 2012, the Board issued further findings and a decision on remand. The Board reiterated that it found Prince was intoxicated at the time of the incident, based on the stipulated result of the Breathalyzer test conducted hours after the incident. The Board observed that a BAC reading of .097 exceeded the limit for legally operating a vehicle in Illinois. The Board also credited the testimony of Ellis that Prince appeared to be intoxicated and a little disoriented. The Board also found Prince's acts, including the discharge of his handgun, the concealment of his weapons under a traffic cone in a dangerous neighborhood, and injuring himself while attempting to reenter the house, were consistent with impairment. The Board further did not find Prince's testimony credible, noting the different accounts of the incident Prince provided to the police investigating the incident.

¶ 42 The Board also found that Berry's testimony denying any argument with Prince, denying that Prince was impaired or had the odor of alcohol, and denying she was fearful of Prince, was

not credible. The Board reiterated there was evidence Prince was intoxicated. The Board observed that Berry informed the police on the night of the incident that she and Prince had a dispute and Prince stated he was "going out in a blaze of glory" as he exited the house.

¶ 43 The Board rejected Berry's testimony that she had exaggerated the incident. The Board observed that Berry was a parole officer who should have understood the gravity of misrepresenting facts to the police. The Board also observed Berry provided her statements to Murzyn in a police vehicle when the situation was under police control. The Board further found the audio of Berry's emergency telephone calls strongly suggested Berry was frightened by Prince, an interpretation confirmed by her decision to lock him out of the house.

¶ 44 Regarding the telephone records, the Board observed that Prince was stripped of his police powers shortly after the incident. Accordingly, the Board concluded Prince knew at the time that the telephone call records would be important to obtain in support of his account of events, if the records in fact supported that account. Thus, the Board concluded no text message regarding Prince's garage burglar alarm existed. The Board further reiterated that the penalty of separation was warranted because Prince discharged a weapon while intoxicated and stored seven unregistered weapons in a house located in a dangerous neighborhood.

¶ 45 On October 31, 2012, the matter coming before the circuit court on the status of the remand, the court ordered briefing on the matter. On November 13, 2012, McCarthy submitted a two-page brief summarizing the Board's findings and conclusions on remand. On November 14, 2012, Prince submitted a four-page brief, arguing the Board did not fully address the issues raised by the circuit court and that the penalty of separation was excessive.

¶ 46 On January 11, 2013, the circuit court entered an order affirming the Board's findings of fact, but remanding the matter to the Board for the imposition of a penalty other than separation.

The circuit court ruled the penalty of separation was outside the reasonable needs of the service.

¶ 47 On March 21, 2013, the Board entered an order stating that the Board remained convinced that the penalty of separation was warranted in this case. In order to comply with the circuit court's order, however, the Board ordered Prince suspended for five years, from April 20, 2011, through April 19, 2016.

¶ 48 On March 28, 2013, McCarthy filed a motion in the circuit court for a presentation of the Board's order and entry of a final judgment. On April 4, 2013, the circuit court entered a final order affirming the Board's order on remand. On May 3, 2013, McCarthy filed a timely notice of appeal to this court. On the same date, Prince filed a timely notice of appeal to this court. This court consolidated the appeals for hearing.

¶ 49 ANALYSIS

¶ 50 On appeal, McCarthy argues: (1) the Board's findings were not against the manifest weight of the evidence; and (2) the decision to discharge Prince was not arbitrary, unreasonable, or unrelated to the needs of the service. Prince argues the opposite position regarding both issues.

¶ 51 "In an appeal from the judgment of an administrative review proceeding, the appellate court reviews the administrative agency's decision, not the trial court's decision." *Hermesdorf v. Wu*, 372 Ill. App. 3d 842, 851 (2007). "The standard of review of an administrative agency's decision regarding discharge requires a two-part analysis." *Duncan v. City of Highland Board of Police & Fire Commissioners*, 338 Ill. App. 3d 731, 735 (2003) (citing *Kloss v. Board of Fire & Police Commissioners of the Village of Mundelein*, 96 Ill. 2d 252, 257 (1983) and *Department of Mental Health & Developmental Disabilities v. Civil Service Commission*, 85 Ill. 2d 547, 550 (1981)). First, we must determine whether the administrative agency's finding of guilt was

contrary to the manifest weight of the evidence. *Walsh v. Board of Fire & Police Commissioners*, 96 Ill. 2d 101, 105 (1983). Second, we must determine whether the administrative agency's findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge existed. *Id.* Given the procedural history of the case, the Board's orders discharging Prince and its findings in support of that decision are the essence of the appeal to which we apply the relevant standards of review. See *Kappel v. Police Board of City of Chicago*, 220 Ill. App. 3d 580, 598-99 (1991) (and cases discussed therein).

¶ 52

The Findings of Guilt

¶ 53 Prince argues the Board's findings of guilt are against the manifest weight of the evidence because: (1) witness testimony supported his account of the incident; (2) the Board improperly shifted the burden of proof in finding him not credible; and (3) McCarthy failed to prove he was intoxicated. Under the manifest weight of the evidence standard, the deference afforded the agency's findings are " 'not boundless.' " *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 465 (2009) (quoting *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 507 (2007)). Nevertheless, "an administrative agency's findings will be deemed contrary to the manifest weight of the evidence only where the opposite conclusion is clearly apparent." *Hermesdorf*, 372 Ill. App. 3d at 852. Moreover, "[t]he reviewing court starts from the position that the administrative agency's findings of fact are *prima facie* true and correct." *Id.*; see 735 ILCS 5/3-110 (West 2006). "Further, the credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are within a board's province." *Valio v. Board of Fire & Police Commissioners of the Village of Itasca*, 311 Ill. App. 3d 321, 329 (2000).

¶ 54 Prince acknowledges that the Board did not find his testimony regarding the incident to

be credible. He argues, however, that "key portions" of his account were supported by Berry's testimony and the testimony from Ellis that Berry did not mention Prince making any statement regarding "going out in a blaze of glory." Prince's argument overlooks that the Board also found Berry's testimony incredible in a number of respects, as detailed in the Board's September 10, 2012, findings and decision. *Supra* ¶ 41. Murzyn testified that Berry informed him she and Prince had a verbal argument and that Prince exited through the back door of the house, stating he was "going down the list and going to go out in a blaze of glory." The fact that Ellis did not hear Berry relate these statements merely created a question of fact for the Board to resolve. Both officers could testify to what they heard during the course of the investigation in this case without calling the credibility of either police witness into question. The Board resolved this question against Prince, and the opposite conclusion is not clearly apparent from this record. Furthermore, the questions of whether Prince and Berry had an argument and what Prince said as he exited the house are not "key" to the determination of whether Prince fired one of his weapons while intoxicated or was in possession of seven unregistered firearms.

¶ 55 Prince next contends the Board improperly shifted the burden of proof in finding him not credible based on his failure to produce telephone records to support his testimony that he received a text message indicating his garage burglar alarm was activated. He relies upon the rule that "a plaintiff to an administrative proceeding bears the burden of proof, and relief will be denied if he or she fails to sustain that burden." *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 532-33 (2006). Prince, however, raises this argument for the first time on appeal, thereby forfeiting it. See *Hermesdorf*, 372 Ill. App. 3d at 858; *Poturalski v. Police Board of the City of Chicago*, 228 Ill. App. 3d 864, 867-68 (1992). Moreover, Prince overlooks that there is a difference between the invocation of the evidentiary rules applicable to an officer's

defense and the overall burden of proof. See *Gunia v. Cook County Sheriff's Merit Board*, 211 Ill. App. 3d 761, 773 (1991). Prince cites no authority for the proposition that the Board could not assess the credibility of his testimony in light of the evidence he offered to support it.

¶ 56 Moreover, the Board explained that its assessment of Prince's credibility was not based solely on the lack of telephone records supporting his testimony. The Board also relied upon Bacon's testimony that Prince had provided varying accounts of the incident. The Board additionally observed that Prince's abandonment of his firearms was not consistent with his claim that a dangerous situation existed outside the house. Furthermore, the Board's decision reasoned that even assuming Prince had received the text message, his response in rushing out of the house with his service weapons while intoxicated—as opposed to telephoning the police—was unreasonable and unnecessary. Based on the record before the Board, it is not clearly apparent that Prince was a credible witness.

¶ 57 Lastly, Prince argues the Board's finding that he was intoxicated was against the manifest weight of the evidence. He maintains the rules at issue did not define the term and thus McCarthy could not prove he was intoxicated. Insofar as Rule 15 does not define "intoxication," the Board was engaged in an interpretation of the rule. "Judicial review of an administrative agency's interpretation of its own rules is *de novo*, but we give the agency interpretation deference." *Finnerty v. Personnel Board of City of Chicago*, 303 Ill. App. 3d 1, 12 (1999). Courts generally apply the rules of statutory construction to the interpretation of agency rules. *Id.* Thus, the language of an agency rule is generally given its ordinary meaning. *Id.* A regulation should be interpreted in light of its purpose, the problems to be remedied, and the objects and purposes sought. *Malinowski v. Cook County Sheriff's Merit Board*, 395 Ill. App. 3d 317, 322 (2009).

¶ 58 "Intoxicated" has been commonly defined to mean "affected by or as if by alcohol." Merriam-Webster's Collegiate Dictionary at 656 (11th ed. 2004). Illinois case law has affirmed the Board's findings of intoxication where the determinations were supported by Breathalyzer test results. See, e.g., *Jones v. Police Board of the City of Chicago*, 297 Ill. App. 3d 922, 931 (1998); *Allman v. Police Board of the City of Chicago*, 140 Ill. App. 3d 1038, 1040 (1986) (finding of impairment affirmed based upon stipulated testimony as to the officer's alcohol blood level); *Avent v. Police Board of the City of Chicago*, 49 Ill. App. 2d 228, 236 (1964). In *Avent*, this court affirmed a finding of intoxication, despite Breathalyzer test results which registered below the statutory level established for the offense of driving a motor vehicle under the influence of alcohol. *Id.* (citing Ill. Rev. Stat. 1961, ch. 95 1/2, ¶ 144(b)). Notably, one of the incidents at issue in *Avent* involved an accidental shooting in a hotel hallway, not the operation of a motor vehicle. *Id.* at 233-34; see also *Jones*, 297 Ill. App. 3d at 925 (incident at a restaurant). Accordingly, the Board could properly base a finding of intoxication in this case based upon a standard established by statute.

¶ 59 In asserting the Board's finding of intoxication was erroneous, Prince ignores Bacon's testimony that Prince admitted he was intoxicated when he returned home after consuming beer at the party. In addition, Ellis testified that Prince appeared intoxicated at the scene of the incident. Prince claims the Board should have ignored this testimony because it was provided in response to a question regarding Prince's odor, but Prince did not object to the broader answer during the hearing. Prince testified that he did not recall "feeling intoxicated to where [he] was stumbling or drunk or to that effect," which is not a blanket denial of intoxication.

¶ 60 Prince stipulated that his Breathalyzer test indicated a BAC of .097, a blood alcohol level exceeding the statutory level for intoxication on the date of the incident. See 625 ILCS 5/11-

501(a)(1) (West 2006). The parties dispute whether, given the passage of time, Prince's BAC could be extrapolated to be higher at the time of the incident (absent testimony regarding the oxidation of alcohol of the sort provided in *Avent*). The stipulated Breathalyzer test result, however, exceeded the statutory level, eliminating any requirement for extrapolation evidence. See *Village of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, ¶ 15.

¶ 61 Prince relies in part on Berry's testimony that he did not appear intoxicated, overlooking that the Board did not find her testimony credible. He observes that Ellis and Murzyn testified that he complied with their directions, which may be relevant to his level of intoxication, but not dispositive of the issue. Prince also observes that Neely did not testify that Prince was impaired or failed any of the field sobriety tests, but did testify his speech was not slurred or mumbling. The Board, however, examined the entirety of the evidence on the issue and concluded Prince was intoxicated. The record does not establish that the opposite conclusion is clearly apparent.

¶ 62 In short, for all of the aforementioned reasons, Prince has failed to demonstrate that the Board's findings of guilt were against the manifest weight of the evidence.

¶ 63 Cause for Discharge

¶ 64 We next turn to the issue of whether the Board's findings of fact provide a sufficient basis for the agency's conclusion that cause for discharge existed. *Walsh*, 96 Ill. 2d at 105. "Cause" is defined as " 'some substantial shortcoming which renders [the employee's] continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his not longer occupying the place.' " *Id.* (quoting *Fantozzi v. Board of Fire & Police Commissioners*, 27 Ill. 2d 357, 360 (1963)). "As the reviewing court, we may not consider whether we would have imposed a more lenient disciplinary sentence." *Krocka v. Police Board of the City of Chicago*,

327 Ill. App. 3d 36, 48 (2001) (citing *Wilson v. Board of Fire & Police Commissioners*, 205 Ill.App.3d 984, 992 (1990)). "An administrative tribunal's finding of 'cause' for discharge commands our respect, and it is to be overturned only if it is arbitrary and unreasonable or unrelated to the requirements of the service." *Walsh*, 96 Ill. 2d at 105.

¶ 65 In *Walsh*, our supreme court observed:

"A police officer hardly can commit a more serious offense than misuse of his gun. Nothing can undermine public confidence in the ability and good judgment of police officers more than the misuse of firearms. Common sense requires that each officer show considerable care and maturity in handling and using his service revolver, for he has ready access to this weapon every day of his career."

Id. at 106.

"Respect for weapons is paramount to an efficient and disciplined police department." *Carrigan v. Board of Fire & Police Commissioners of the Village of Glendale Heights*, 121 Ill. App. 3d 303, 311 (1984) (citing *Jenkins v. Universities Civil Service System Merit Board*, 106 Ill. App. 3d 215, 223 (1982)). "Although the officer may be off duty at the time of the improper use of his weapon, the decisions do not draw any distinction in that regard in the seriousness of the conduct." *Carrigan*, 121 Ill. App. 3d at 311 (and cases cited therein). "The fact that the discharge arose, in effect, from a single incident does not preclude a discharge for cause assuming that the conduct is of a nature that sound public policy would recognize as good cause for no longer occupying the position of police officer." *Id.* at 311-12 (citing *Humbles v. Board of Fire & Police Commissioners*, 53 Ill. App. 3d 731, 734 (1977)).

¶ 66 For example, in *Carrigan*, a sergeant who had earlier consumed seven or eight alcoholic drinks later engaged in a dispute at home with his wife, during which he discharged his handgun

into a toilet. *Carrigan*, 121 Ill. App. 3d at 305. Despite the fact that this was a single incident in Carrigan's 12-year career as a police officer, this court concluded the Board's decision to discharge Carrigan was not arbitrary, unreasonable, nor unrelated to the requirements of service. *Id.* at 312.

¶ 67 Similarly, in *Allman*, the officer admitted he disobeyed general departmental rules and orders by carrying a firearm while consuming alcoholic beverages during non-duty hours, possessing an unregistered firearm, and being intoxicated at a police station. *Allman*, 140 Ill. App. 3d at 1039. Allman, however, questioned the finding that he unnecessarily displayed or pointed a firearm at several people, and so violated a departmental rule against the unlawful or unnecessary display of a weapon. *Id.* The appellate court upheld the findings of the Board. *Id.* at 1040. The *Allman* court also upheld the Board's finding of cause for discharge, in part because "public intoxication while carrying a revolver was a serious and potentially dangerous offense undermining public confidence in the judgment and intelligence of law enforcement officers." *Id.* at 1041.

¶ 68 *Allman* involved not only discharge of a weapon while intoxicated, but also possession of an unregistered weapon. The latter was also at issue in *Kappel*, in which the plaintiff officer was found guilty of: possession and sale of an unregistered handgun, with the serial number removed, to a stranger referred to him by a fellow officer; possession of an unregistered, automatic rifle sold to him by that fellow officer; and possession of an unregistered, semi-automatic rifle sold to him by a third officer. *Kappel*, 220 Ill. App. 3d at 591. In upholding the discharge, the appellate court observed: "Even if Kappel's sale of the \$100 handgun were not considered, possession alone of the handgun, along with the two rifles, exacerbated by the unlawful firing of an unregistered automatic weapon, would constitute a lack of respect for the law particularly

inappropriate in a police officer, which undermines public confidence in the judgment and intelligence of law enforcement officers." *Id.* at 592.

¶ 69 In this case, the Board found that Prince unnecessarily discharged his handgun during the incident at issue. Although the Board found Prince was intoxicated, the Board also found that even if Prince had not been intoxicated, he acted unreasonably by not contacting the police, resulting in the unnecessary discharge of one of his service weapons. Prince's misuse of his weapon is a serious offense. His actions during the incident, including the abandonment of his weapons during what he claimed was a dangerous situation, does not demonstrate the considerable case and maturity in handling service revolvers the Board may require of its officers. See *Walsh*, 96 Ill. 2d at 106. As the incident occurred in the back and side yards of the house, the discharge of the handgun was not as public as the misconduct at issue in *Allman*. See *Allman*, 140 Ill. App. 3d at 10. Nevertheless, the misconduct was sufficiently reckless to support discharge from the police service, even though the incident occurred at the officer's residence. See *Carrigan*, 121 Ill. App. 3d at 312. The misconduct in this case also included Prince's possession of seven unregistered firearms, which not only violated Rule 6 (disobedience of CPD General Order 07-01), but also was aggravated to the extent that he possessed these unregistered firearms in a "very dangerous neighborhood" where they would be relatively more likely to fall into criminal hands. See *Kappel*, 220 Ill. App. 3d at 592.

¶ 70 Prince maintains the Board failed to consider evidence in mitigation, such as his service record and the character testimony from Moore-Powell and Johnson. "[W]hile the Board may consider such evidence in mitigation, it is not required to place dispositive weight on such evidence." *Id.* at 596. "The Board is not required to suspend, rather than discharge, an officer solely because he has provided numerous years of good service, even where some of those years

are subsequent to the misconduct." *Id.*

¶ 71 In this case, the findings and decision of the Board expressly stated that the Board considered evidence in mitigation, and specifically considered Prince's complimentary history during his service. The Board nevertheless decided to discharge Prince rather than suspend him and the Board was not required to select the lesser penalty. *Id.* As the Board's penalty was not arbitrary, unreasonable, or unrelated to the requirements of the service, we may not consider whether we would have imposed a lesser penalty. *Krocka*, 327 Ill. App. 3d at 48.

¶ 72 CONCLUSION

¶ 73 For the foregoing reasons, the decisions of the circuit court of Cook County ordering the Board to impose a lesser penalty than discharge are reversed. We remand the cause to the Board, with leave to vacate the order imposing the suspension and to reinstate its earlier order of discharge. We observe, however, that the Board is not compelled on remand to reinstate its earlier discharge order, if the Board under its present evaluation chooses instead to let the lesser penalty stand. *Kappel*, 220 Ill. App. 3d at 599.

¶ 74 Circuit Court judgment reversed; cause remanded to the Board with leave to reinstate its prior discharge order.