2015 IL App (2d) 140954-U
No. 2-14-0954
Order filed September 14, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE VILLAGE OF VERNON HILLS, Plaintiff-Appellant, v. VERNON HILLS POLICE PENSION FUND, JOHN BRISCOE, MARK CHANDLER, DONALD HOOK, LARRY LASCHEN, and PATRICK ZIMMERMAN, in their capacities as Trustees of the Board of Trustees of the Vernon Hills Police Pension Fund, and MARK SOSNOSKI, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 13-MR-1544 Honorable Margaret J. Mullen Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The Board's decision awarding a police officer a line-of-duty disability pension was affirmed. The Board's decision was not against the manifest weight of the evidence; the Board did not apply an improper legal standard or impose an improper burden of proof; the appellant forfeited its arguments with respect to the admission of hearsay evidence; due to the absence of a transcript of the February 14, 2012, proceedings, we presumed that the Board's order limiting discovery and witnesses was in conformity with the law and had a sufficient factual basis; the Board acted properly with respect to several motions pertaining to the involvement in the proceedings of Board member John Briscoe; and the Board properly refused to consider a motion to disqualify an attorney, because the Board lacked the statutory authorization to grant the relief requested.

¶ 2 Mark Sosnoski, a police officer in the Village of Vernon Hills (Village) police department, applied for a line-of-duty disability pension pursuant to section 3-114.1 of the Illinois Pension Code (Pension Code) (40 ILCS 5/3-114.1 (West 2014)). The Board of Trustees of the Vernon Hills Police Pension Fund (the Board) allowed the Village to intervene. The Board awarded Sosnoski the requested benefits, and the Village filed a complaint for administrative review in the circuit court of Lake County. The circuit court affirmed the Board's decision, and the Village appeals. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The Board granted Sosnoski a line-of-duty disability pension after reviewing voluminous documentary evidence and hearing testimony from six witnesses. The Village raises numerous arguments in this appeal, many of which challenge the sufficiency of the evidence supporting the Board's decision. Accordingly, it is necessary to provide a detailed summary of the evidence considered by the Board.

¶ 5 Timeline of Events

¶ 6 Sosnoski began working as a police officer in December 1999. At various times, he participated in the police department's physical fitness testing program to earn annual stipends. The record reflects that in the years leading up to his injury, he ran 1 ½ miles in 13 minutes and 54 seconds in 2006, 14 minutes and 25 seconds in 2007, 13 minutes and 9 seconds in April 2008, and 13 minutes and 20 seconds in October 2008.

¶ 7 On December 7, 2008, Sosnoski injured his left knee in the course of his patrol duties when he fell while attempting to break up a fight. He was treated at Condell Medical Center that same day and was diagnosed with a sprained knee. On December 9, 2008, Sosnoski saw Dr. Robert Dugan and complained that his knee was hyperextending. Sosnoski subsequently

received an injection of Depo-Medrol and Ildocaine and was released to regular work duties on January 5, 2009.

¶ 8 On January 31, 2009, Sosnoski underwent a medical examination to qualify for the Northern Illinois Police Alarm System (NIPAS) Emergency Services Team (EST). He was found to be "physically fit and medically able to perform the duties of a NIPAS EST Team member." According to a manual submitted into evidence, part of the process of qualifying for NIPAS involved a physical agility test, which required being able to run 1 ½ miles in 12 minutes and 20 seconds, do 40 sit ups in 1 minute, and do 40 pushups in 1 minute. Additionally, documents dated April 27, 2009, and October 18, 2009, indicate that Sosnoski ran 1 ½ miles in 11 minutes and 49 seconds and 14 minutes and 2 seconds, respectively, as part of the police department's physical fitness testing program.

¶ 9 On November 12, 2009, Sosnoski returned to Dr. Dugan and complained that his left knee symptoms had returned. Dr. Dugan offered him the option of arthroscopic intervention. The Village's workers' compensation service agent requested that Sosnoski see Dr. Jay Levin for an independent medical examination (IME). Dr. Levin recommended that Sosnoski undergo the procedure, which Dr. Dugan performed on December 18, 2009.

¶ 10 Sosnoski then elected to begin treatment with Dr. Levin. Sosnoski was concerned that he could not "squat, kneel, or run without pain." Dr. Levin gave him a cortisone injection and recommended sedentary work pending participation in a work conditioning program. Sosnoski subsequently complained to Dr. Levin that he felt that his knee had hyperextended on several occasions, noting that he had experienced difficulty with running and jogging in therapy.

¶ 11 Following a series of supartz injections, Dr. Levin performed a second surgery on June 22, 2010. The procedure involved a left knee arthroscopy with examination under anesthesia,

arthrotomy of the left knee with chondral debridement of the medial femoral condyle, and placement of a Zimmer DeNovo NP natural tissue graft. Despite an extensive course of physical therapy after the surgery, Sosnoski continued to experience discomfort, including a feeling that his knee was hyperextending. At the end of November 2010, Dr. Levin authorized Sosnoski to return to working full shifts "with the opportunity to exercise/rehab for up to 4 hours/day in the department's gym."

¶ 12 On December 8, 2010, Sosnoski saw Dr. Nikhil Verma for an IME. Dr. Verma opined that the treatment to date was "reasonable and necessary with regard to the work injury." Dr. Verma believed that Sosnoski could perform "light duty work with no running or jumping," and he recommended additional physical therapy. Dr. Verma anticipated that Sosnoski could return to full duty in four-to-six months.

¶ 13 Sosnoski was terminated at some point from his position with NIPAS, and he filed a grievance on December 13, 2010. In his grievance letter, Sosnoski stated that he had been through training and "call outs" since the December 2008 injury "without incident," and he expressed his expectation to "be back to operation speed by January 2011." The grievance was rejected as being untimely.

¶ 14 Over the next several months, Sosnoski continued to complain of experiencing pain and a sensation as if someone were trying to pry his left kneecap away from his body. In April 2011, Sosnoski received another injection, but that did not improve his symptoms. The next month, Sosnoski complained that he had pain after working eight-hour shifts and said that he found it difficult to get comfortable. Dr. Levin ordered a functional capacity evaluation (FCE) and limited him to working in a sedentary position for the time being.

¶ 15 According to the June 3, 2011, FCE, Sosnoski exhibited "[s]erious functional limitations *** with regards to agility, squatting, crouching and his inability to get into and out of these positions in a timely safe manor [*sic*]." The FCE concluded: "It cannot be recommended that this patient return to an occupation requiring quick response time into and out of these positions." The FCE found that Sosnoski could handle "a one time lift of 100 lbs and frequent lifting of 50 lbs."

¶ 16 Dr. Levin agreed with the conclusions of the FCE and excused Sosnoski from work. On August 3, 2011, Sosnoski saw Dr. Verma for another IME. Dr. Verma opined that Sosnoski had reached maximum medical improvement and would not likely benefit from further physical therapy or treatment. Dr. Verma believed that Sosnoski could "return to work within the restrictions as outlined in the FCE."

¶ 17 In late August 2011, Sosnoski applied for a line-of-duty disability pension. Around the same time, he returned to work in the role of an investigator. The record contains a position description for "A Police Officer assigned to the Investigation Unit by the Chief of Police." According to the description, "[t]he primary responsibility of the Investigator is to properly investigate all cases assigned by the Commander with special emphasis given to the collection and preservation of evidence, apprehension of offenders, recovery of property and preparation of cases for prosecution." The position description is not entirely clear as to the level of physical activity that is required of an investigator. For example, the position description provides that an investigator must maintain himself or herself "in good health and physical condition," "[b]e available to assist any officer in the preliminary or follow up investigation of a case," and "[a]ssist law enforcement officers from other jurisdictions while they are conducting investigations in Vernon Hills." Additionally, investigators are expected to "[l]ocate and

question complainants, witnesses and suspects" and "[a]ssist in securing of crime scenes and in gathering and processing the evidence."

¶ 18 On August 29, 2011, Sosnoski saw Dr. Levin and rated his pain as being 5-7 out of 10, with pain increasing during the day. Dr. Levin ordered Sosnoski to "strictly adhere to the limitations" noted in the FCE, returning him to work "in a sitting job only with no prolonged walking, standing, or driving, and no direct contact with criminal suspects." Dr. Levin also advised Sosnoski to "elevate his left leg while sitting at his desk and limit his walking and rising from his chair throughout the day." On September 8, 2011, Sosnoski called Dr. Levin and said that he had tried to work within these restrictions, but "had to leave due to the continued pain." Dr. Levin then took Sosnoski off of work until the next appointment on September 19, 2011.

¶ 19 At the appointment on September 19, Sosnoski told Dr. Levin that he had gone to the county courthouse for a warrant, which "involved a lot of walking and driving." Sosnoski described being able to "walk and do certain activities," but said that he "pays for it later." Dr. Levin opined in his report that day that Sosnoski would "not be able to work as a detective on a permanent basis." Dr. Levin reiterated that opinion during several visits over the next five months and repeatedly excused Sosnoski from work.

¶ 20 On March 8, 2012, Sosnoski saw Dr. Verma for another IME. Dr. Verma opined that Sosnoski "would be able to perform a job activity that adheres strictly to be [*sic*] limitations as set forth in the FCE," but would have difficulty "[i]f the job requires activities outside of the FCE even on an occasional basis." According to Dr. Verma, Sosnoski was capable of performing a light-duty, "strictly desktop [*sic*] position."

¶ 21 On March 21, 2012, Mark Fleischhauer, the chief of police, wrote Sosnoski a letter attempting to address the confusion regarding the nature of the investigator position.

Fleischhauer asserted that Sosnoski was placed in that position "in an effort to reasonably accommodate the injury." Sosnoski would only be required to perform tasks consistent with the limitations identified in the FCE. Fleischhauer described this as "a desk position within the Investigations Section," subject to revision as Sosnoski's condition improved.

¶ 22 Sosnoski returned to desk work and followed up with Dr. Levin on April 19, 2012. Dr. Levin recommended that Sosnoski "transition to this desk work with limited 4-hour days for the next several weeks." On May 14, 2012, Sosnoski told Dr. Levin that the restrictions were "not working" and that he was being paid for only four hours per day and using his sick time for the other four hours. Dr. Levin continued to restrict Sosnoski to working a four-hour-per-day desk job over the next several months as Sosnoski complained of "persistent left knee pain," falling into a wall when "his left knee gave out," and experiencing pain "if he sits on a regular chair for 4 hours." Dr. Levin last saw Sosnoski on August 6, 2012, at which time he continued the restriction of four hours per day of desk work.

¶ 23 Surveillance Video

¶ 24 The Village provided numerous surveillance videos of Sosnoski for the Board's consideration. Most of the videos appear to depict Sosnoski running errands and doing mundane things such as walking or getting into and out of his vehicle. One video, taken on July 26, 2011, appears to depict Sosnoski lying on his back near a vehicle and then returning to a standing position. A lengthy video taken on August 9, 2012, shows Sosnoski at an all-day golf outing. In addition to being on his feet and walking around, the video shows Sosnoski pulling a folding table out of the bed of a truck, riding on a golf cart, and hitting a golf ball. Sosnoski is wearing a brace on his left knee in the video.

¶ 25 Physicians Selected by the Board

¶ 26 Three physicians examined Sosnoski pursuant to section 3-115 of the Pension Code (40 ILCS 5/3-115 (West 2014)). Each physician issued reports and provided deposition testimony for the Board's consideration.

¶ 27 (1) Dr. Pietro Tonino

¶ 28 Dr. Pietro Tonino examined Sosnoski on March 19, 2012. In his initial report, Dr. Tonino opined that Sosnoski was "not able to perform his duties as a police officer pursuant to the job description of Village of Vernon Hills Police Department." Dr. Tonino determined that the nature of the disability was "left patellar tendinosis with chondromalacia of the left knee." He indicated that Sosnoski "would have most difficulty moving quickly to respond to situations which may be required in the course of performing the duties of a police officer." Dr. Tonino subsequently reviewed the surveillance videos described above and issued a supplemental report indicating that his opinion had not changed.

¶ 29 In his deposition, Dr. Tonino testified that he did not see evidence of malingering or "motivation for secondary gain" when interviewing Sosnoski. Dr. Tonino said that he would recommend that Sosnoski undergo "debridement of the patellar tendon and arthroscopy." When shown the surveillance video of the golf outing, he said that Sosnoski "probably would" be able to do those things while wearing a knee brace even if he had patellar tendinosis.

¶ 30 Prior to his deposition, Dr. Tonino had not considered whether Sosnoski could perform the duties of an investigator. Dr. Tonino acknowledged that the position description required investigators to be capable of apprehending offenders, and he opined that Sosnoski could not do that unless the person was "sitting across from him." Nor could Sosnoski "go in the field." Dr. Tonino also said that Sosnoski would have a difficult time if he were interrogating a combative prisoner at the station.

¶ 31 However, Dr. Tonino believed that Sosnoski could perform the duties of an investigator if the job description were modified to exclude having to apprehend suspects. Assuming that Sosnoski "was specifically told that he did not need to go out and serve warrants or apprehend criminals" and that "[h]is job was confined to a desk position," Dr. Tonino testified that Sosnoski could "do that job." With respect to this modified investigator position, the following exchange occurred between Dr. Tonino and counsel for the Village:

> "Q. Is there anything in connection with Officer Sosnoski's condition *** that would indicate to you that if he is working this desk job as an investigator, that he would not be able to do that for a full workday of eight hours?
>
> A. This job here you just showed me today?
>
> Q. Yes, yes.
>
> A. Sure. He could do that."

According to Dr. Tonino, Sosnoski was able to use a phone and a computer, sit at a desk, interview people, and take down information.

¶ 32 (2) Dr. Daniel Samo

¶ 33 Dr. Daniel Samo examined Sosnoski on March 20, 2012. He concluded that "based on [Sosnoski's] complaints of pain and instability," Sosnoski would "not be able to perform the essential job tasks of a law enforcement officer." Dr. Samo described the disability as a chondral defect in the left knee, "as well as some possible laxity in extension of the knee." Sosnoski was "unable to run, squat or crawl," and would "have difficulty rising from prolonged sitting or getting up from the ground." Dr. Samo issued a supplemental report on May 16, 2012, after reviewing the surveillance videos and a letter from the Village's counsel. In that letter, counsel had apparently represented to Dr. Samo that Sosnoski "was assigned to a new

position as an investigator which is a desk job." Dr. Samo wrote that the materials he reviewed did not change his opinion, adding that Sosnoski would be unable "to perform as a patrol officer" or do things such as pursuing and apprehending suspects. However, Sosnoski likely could perform the job of an investigator if there were no requirement to do things such as pursue or apprehend suspects.

¶ 34 Dr. Samo testified at his deposition that his conclusion that Sosnoski could not perform the essential tasks of a law enforcement officer was based entirely on Sosnoski's subjective complaints. However, in Dr. Samo's examination of Sosnoski, he did not "find anything that was inconsistent with the medical records," and he felt that Sosnoski was honest with him. Nor did he see evidence in the medical records of "any amplifying of injury or malingering."

¶ 35 Counsel for the Village asked Dr. Samo the following question: "If I represent to you that Officer Sosnoski was given a position as an investigator in the Vernon Hills Police Department, which was a desk job in which his duties and responsibilities were limited to performing investigations, preparing warrants that would be executed by others, are those duties and responsibilities that he's capable of performing?" Dr. Samo responded, "Yes." Dr. Samo was shown a copy of the position description for an investigator. He testified that, other than potentially apprehending suspects, there was nothing that "Sosnoski would not be able to do within the duties and responsibilities of an investigator." Dr. Samo believed that Sosnoski could "do a desk job."

¶ 36 Dr. Samo was shown several surveillance videos as well as records indicating that Sosnoski's running times on his physical fitness tests improved for a period of time after the December 2008 injury. Dr. Samo was asked whether this evidence changed his opinion about whether Sosnoski would be able to perform the duties and responsibilities of a police officer.

Dr. Samo responded that "it really comes down to a credibility question" and that there was "no objective finding" indicating that Sosnoski "definitely can't do the job." Addressing Sosnoski's running times, Dr. Samo believed that this could be reflective of progressive degeneration over time. Additionally, Dr. Samo testified that the July 26, 2011, surveillance video of Sosnoski assisting a motorist was "inconsistent with the reported difficulties in emerging from a crouched or squatting position." This indicated to Dr. Samo that Sosnoski "may not be totally honest with his subjective complaints."

¶ 37 (3) Dr. Sherwin Ho

¶ 38 Dr. Sherwin Ho examined Sosnoski on April 4, 2012. Dr. Ho's impression was "[c]hondral injury medial femoral condyle left knee, status post juvenile allograft chondral implantation (DeNovo) and partial ACL tear resulting only in mild knee hyperextension." He explained that "[t]hese 2 relatively minor injuries would be compatible with a return to full activity and full duty once allowed to adequate [*sic*] heal, with our [*sic*] without surgical intervention, or in the case of the ACL with use of a functional knee brace." After reviewing the surveillance videos, Dr. Ho issued a supplemental report opining that Sosnoski "would be able to work as a full-time investigator for the Village of Vernon Hills Police Department" and "would be unlimited in terms of walking, driving, or desk work." Dr. Ho explained that Sosnoski's "only limitations would be no running or jumping."

¶ 39 In his deposition, Dr. Ho testified that Sosnoski was fully healed. Upon examining Sosnoski, he did not "find any objective evidence of a continuing injury that would disable [him] from performing his duties as a police officer." He opined that Sosnoski could "perform some or most of the job duties of a police officer," subject to certain restrictions, including running, jumping, and repeated impact to the knee. However, he believed that Sosnoski "would be able

to run occasionally" or "on an intermittent basis." Specifically, Sosnoski's injury would not preclude him from "chas[ing] after someone once in a while," such as "once every few months." Sosnoski should be able to work a full eight-hour shift as an investigator, which, as described to Dr. Ho by counsel for the Village, was "essentially a desk job, working at computers, answering phones, and occasionally hopping in the car and driving to the courthouse to have a warrant signed by a judge."

¶ 40 Dr. Levin's Deposition

¶ 41 The Board also considered Dr. Levin's deposition testimony from September 11, 2012. He described Sosnoski's pathology as "a cartilage condition of the medial femoral condyle." He last saw Sosnoski in August 2012, and there were no plans for follow-up treatment. In his time treating Sosnoski, he had not noticed any indications of malingering, and he said that Sosnoski seemed to be "pretty forthright and a hard-working guy." Dr. Levin did not agree with Dr. Tonino's opinion that Sosnoski would benefit from additional surgery.

¶ 42 Dr. Levin testified that he limited Sosnoski to working four hours per day based on Sosnoski's complaints that he was experiencing some knee pain working eight hours at a desk job. Specifically, Dr. Levin said: "If you ask why, after I put him back to eight hours, and I limit him to four, [it is] because the man said he can't do eight hours." However, he added, he also correlates patients' complaints with tests before restricting work hours. In his opinion, Sosnoski was capable of doing a desk job as long as he could get up and walk or move his leg from time to time when he felt discomfort.

¶ 43 Counsel for the Village questioned Dr. Levin about whether Sosnoski could work as an investigator, describing the job duties as follows:

> "Sir, I'll represent to you that the department has told [Sosnoski] that he can get up and walk around when he needs; that he can elevate his leg if that provides him with comfort or alleviates any pain, he can just stick it up on a chair or a waste can, feel free to do it; he's been told that he's working inside, in the office, he doesn't have to go outside and serve warrants on anyone.
>
> And the warrant process *** primarily consists of obtaining information through phone interviews, working on the computer and so forth, filling out a form on the computer, and then taking it to Waukegan and giving it to a judge to sign.
>
> It then gets put in the computer, and whatever law enforcement officers happen to be out there, pull somebody over, see them, what have you, then they can execute that warrant.
>
> He's not required to go out and physically serve the warrant on the bad guy and say, okay, you're under arrest, and apprehend him."

Counsel for the Village then asked Dr. Levin: "Given those limitations, is there any reason he can't do that kind of a desk job?" Dr. Levin answered: "I believe that would be consistent with his FCE, and my previous recommendation." Nevertheless, when shown the position description for an investigator, Dr. Levin declined to directly offer an opinion as to whether Sosnoski could perform the job. Instead, he explained that Sosnoski should not run, squat, or fight with suspects, but that he could perform a desk job where he was able to get up and walk around from time to time. Dr. Levin would not release Sosnoski to "return to full police officer duties." However, he would, and did, release Sosnoski to work in the investigations unit, subject to the limitations previously discussed.

¶ 44 Dr. Levin was also shown the surveillance video of the golf outing and was asked why Sosnoski could not go to work if he could "go ahead and play golf all day." Dr. Levin responded: "Well, that's a good question. As long as he's within the other parameters of the functional capacity evaluation from June 2011, it would seem to me that that would demonstrate that that's not an unreasonable thing to do."

¶ 45 Testimony at the Hearing

¶ 46 The Board also heard testimony from six witnesses at the pension hearing on April 16, 2013.

¶ 47 (1) Sosnoski's Testimony

¶ 48 Sosnoski testified that he could not perform the full duties of an investigator, as that position was described in the position description. He explained that the line between patrol and investigations sometimes becomes blurred, and he could not perform those duties when they do become blurred. He believed that he "would be more of a liability" to officers who needed him, stating: "The last thing I need to do is take off running for something and have my knee hyperextend again and fall down and then take not only myself out but another officer ***."

¶ 49 Sosnoski testified that his knee had gotten worse since 2008. There were things that he was able to do in 2009 and 2010 that he could not do now, such as running, standing stationary without moving his legs, and squatting. He acknowledged that he had qualified for NIPAS after the injury but insisted that he could not pass the test now.

¶ 50 According to Sosnoski, after the injury, the Village assigned him to work as an investigator with restrictions on running, dealing with the public, and taking people into custody. In his years with the police department, he had never known an investigator who was told not to arrest anybody. He acknowledged that when he began working as an investigator, Rick Davies,

the commander in charge of investigations at the time, told him that he could elevate his leg, take breaks to walk if his leg got stiff, or go to therapy during the workday. Davies also said to let him know if there was anything else that was needed so that the Village could accommodate the limitations. Sosnoski acknowledged that in his position as an investigator, he had never been required to physically serve a warrant, make arrests, or go out on patrol in a squad car. He recognized that the Village had "honored that sedentary position" and allowed him to work at a desk job.

¶ 51 Sosnoski testified that he had been assigned to eight-hour shifts since he was ordered back to work in investigations in April 2012. According to Sosnoski, even doing desk work was uncomfortable, and since April 2012 he had worked four hours per day pursuant to the limitation placed by Dr. Levin. He did not believe that he could work more than four hours per day as a police officer.

¶ 52 Sosnoski was questioned about the surveillance videos. He said that the July 26, 2011, video depicted him assisting his wife and daughter with car trouble by "wir[ing] up the back half of the exhaust so they could drive home." He admitted that the video showed him lying on the ground under the vehicle, getting up from the ground in a prone position with his knees bent, and walking around to his car. He also admitted that he did not have any difficulty doing those things in the video. However, according to Sosnoski, although assisting a motorist could be one of his duties as a police officer, he did not have to "get in and out of a squatting or crouched position" to assist his wife and daughter, which he would be required to do as an officer. Additionally, Sosnoski acknowledged that the August 9, 2012, video of the golf outing showed him hitting golf balls and riding in a golf cart over uneven terrain. Nevertheless, he believed

that running a golf outing did not have anything to do with the physical requirements of being a police officer.

¶ 53 (2) Testimony of Officer Andrew Jones

¶ 54 Andrew Jones, who was assigned to the investigations division as a school resource officer, testified for Sosnoski. Although Sosnoski had never accompanied him on an investigation in a school, Jones said that it was "not a hundred percent clear" that Sosnoski, in a limited-duty investigations assignment, would not be dispatched to back him up. Prior to December 7, 2008, Jones would not have had any reservations about Sosnoski backing him on a call. However, he would not feel comfortable if Sosnoski were called to back him up now, because he did not feel that Sosnoski could perform the job.

¶ 55 (3) Fleischhauer's Testimony

¶ 56 Fleischhauer, the police chief, testified for the Village. As chief, he had the authority to assign duties to particular officers. In September 2011, he reviewed the medical limitations in Sosnoski's FCE and approved a placement in investigations. Commander Davies had been in charge of investigations at the time, and Fleischhauer told Davies to instruct Sosnoski not to do anything that he did not feel that he could do. Sosnoski had raised concerns about certain items in the position description. Fleischhauer told Sosnoski that he was not required to respond to emergency calls and that this was "basically an inside position" and "administrative in nature." According to Fleischhauer, in the role of investigator, Sosnoski had provided "service in the police department" within the meaning of section 3-114.1 of the Pension Code (40 ILCS 5/3-114.1(a) (West 2014)).

¶ 57 Fleischhauer testified that the issue of light-duty assignments was addressed in the Village's policy and handbook, which included "recognition of the Village's obligations under

the Americans [w]ith Disabilities Act [(ADA) 42 U.S.C. § 12101 *et seq.* (2012)] to provide a reasonable accommodation for any individual who has a medical or physical limitation." There was also a provision for light-duty assignments in the union contract if a person was expected to assume full duties within 60 days. Fleischhauer explained that, although the Village was not required to create light-duty assignments, it had the option of allowing somebody to be on light duty for longer than 60 days. In his years as chief, there had been many occasions in which people were given light-duty assignments to accommodate their needs. Fleischhauer testified that Sosnoski had been on light duty for several years, later acknowledging that the Village had never had anybody on light duty for two years.

¶ 58 Fleischhauer initially indicated that the Village "created" a light-duty assignment for Sosnoski in an attempt to accommodate his medical limitations. He subsequently clarified that there was "no position created called permanent light duty investigator," but that Sosnoski was instead "assigned to investigations in one of the open positions." The investigator position description had been in existence for 12 or 13 years. According to Fleischhauer, this was a "regular job position" that was modified by his March 21, 2012, letter to Sosnoski.

¶ 59 Fleischhauer was questioned at length about the availability and expected tenure of Sosnoski's position in investigations. Fleischhauer described the position as permanent, adding that, assuming that Sosnoski did his job, he was entitled to keep the position as long as he continued to work for the police department. However, when asked whether the Village could take Sosnoski's light-duty position away at any time, Fleischhauer responded: "I guess technically the answer is yes, but the Village has never done so in the past." Fleischhauer acknowledged that, as chief, he had a year-to-year contract with the Village and "could be replaced at any moment."

¶ 60 Fleischhauer testified that Sosnoski was not currently working in investigations, but had been temporarily assigned in January 2013 to "support services under crime prevention," because a pregnant officer requested light duty. The plan was for Sosnoski to return to investigations once the pregnant officer returned to patrol duty at the end of the year. Fleischhauer was asked: "[I]f he was assigned to this permanent position, then why was he moved into support services ***?" Fleischhauer responded:

> "When the position—when he was originally assigned there, he was—the restrictions were he could come back eight hours a day, and that's when he was assigned to investigations. Subsequent to that, he came back with another note from his doctor saying his restrictions were to four hours a day. He remained in that position. And until another full-time light duty—there was a need to create another full-time light duty position. And the full-time employee was moved in there in light of the fact that she was able to provide eight hours of service in investigations and there was a need in the support services side."

¶ 61 Fleischhauer acknowledged that he did not currently have a release allowing Sosnoski to return to full duty, testifying that, "as it stands today," Sosnoski was "only capable of working part time." Nevertheless, Fleischhauer believed that Sosnoski was capable of performing eight-hour shifts as an investigator. Fleischhauer also said that he hoped that Sosnoski would be returned to work eight hours per day and that it would "become a permanent position in investigations" with "no bouncing around." Asked whether "there would continue to be bouncing around" if Sosnoski did not return to eight hour shifts, Fleischhauer responded: "Absolutely. Absolutely. And I–I can't answer that." Similarly, when asked whether Sosnoski's job would be "available" if it were determined that he "could not return to work for

more than four hours based upon doctor's advice," Fleischhauer answered: "I honestly don't know."

¶ 62 According to Fleischhauer, Sosnoski had used all of his available sick time and would get paid for only four hours per day. The union contract allowed the Village to discipline officers for misusing sick time, although no disciplinary action had been taken against Sosnoski for doing so.

¶ 63 (4) Jonathan Petrillo's Testimony

¶ 64 Jonathan Petrillo, the police department's deputy chief of support services, also testified for the Village. Petrillo testified that Sosnoski was "currently working under [his] supervision on a temporary basis performing crime prevention duties." According to Petrillo, Sosnoski was "providing a service to the police department" in that capacity. Sosnoski had been working four hours a day since he was assigned to support services. Sosnoski never told Petrillo that he "couldn't do the crime prevention officer position."

¶ 65 (5) Michael Allison's Testimony

¶ 66 Michael Allison, the village manager, was the final witness for the Village. He testified that the Village had a policy of providing a discrimination-free workplace. He believed that the Village had attempted to reasonably accommodate Sosnoski's medical limitations under the ADA. Specifically, Allison and the chief—and the chief and his staff—"spent a considerable amount of time" discussing how Sosnoski's medical limitations would affect his ability to be an investigator. As part of that interactive process, the Village considered the FCE, doctors' notes, and discussions that Sosnoski had with Davies and the chief. Allison acknowledged that he had never spoken with Sosnoski about making a reasonable accommodation and that Sosnoski had

not directly requested such accommodation. However, according to Allison, Sosnoski was told to bring up any concerns or limitations.

¶ 67 Allison testified that the Village had attempted to reasonably accommodate other officers' medical limitations. Addressing chief Fleischhauer's tenure, he testified that he had "not heard of any desire by anyone to replace him." According to Allison, "the whole tenor of the discussion" with the village board has been to continue Sosnoski's employment as an investigator.

¶ 68 (6) Bill Heelan's Testimony

¶ 69 Sosnoski called Bill Heelan as a rebuttal witness. Heelan previously served as a police officer for the Village and was currently on disability retirement status. He testified that he was not offered an accommodation in investigations following his injury in the line of duty. Instead, after his hip replacement, he returned to work on light duty shredding papers for a short period of time. He was still capable of doing that, but the Village did not offer him a light-duty position with full salary and benefits. Heelan admitted that he was currently involved in litigation that was adverse to the Village.

¶ 70 The Board's Findings

¶ 71 At the conclusion of the evidence, the Board voted unanimously to grant Sosnoski a line-of-duty disability pension. It subsequently issued a written decision, in which it found that Sosnoski suffered an injury while in the performance of an act of duty. That injury rendered him disabled for service as both a patrol officer and investigator, as those positions were detailed in the position descriptions.

¶ 72 The Board determined that the limited-duty investigator assignment was an unsatisfactory alternative for several reasons, including that Sosnoski could not "perform any full-time sworn

position" within the police department. Specifically, it found that Sosnoski was only "medically released to work four hours per day as an investigator," with duties "modified by a letter from Police Chief Mark Fleischhauer dated March 21, 2012." According to the Board, Sosnoski had "not been medically released to work eight hours per day as an investigator," and that position was not part-time. The Board found Fleischhauer's testimony that Sosnoski had not been accused of misusing sick time to "constitute an acknowledgment by the Village that [Sosnoski] was not capable of performing a full eight-hour day in the position of investigator."

¶ 73 The Board also questioned the availability and tenure of the modified investigator position. The Board noted that it had "not been conclusively established that the four-hour-per-day modified investigator position would be available to [Sosnoski] for the rest of his career." The Board "placed great weight on the notion that the modifications made to the investigator position by Chief Fleischhauer, individually, did not constitute a permanent position within the Vernon Hills Police Department, but that it was simply a modification to an existing job position done by Chief Fleischhauer, which the Village could revoke at any time." The Board deemed certain statements by Fleischhauer to be "conclusive as to the issue of whether [Sosnoski] was disabled for service within the Vernon Hills Police Department." Those statements included his testimony that "there's no position created called 'permanent light duty investigator' " and that the position was not for a part-time investigator. Additionally, the Board found several pieces of evidence to be in conflict with the notion that Sosnoski had been permanently assigned as an investigator, including his reassignment to support services to accommodate a pregnant officer's request for light duty, Petrillo's characterization of the support services assignment as "temporary," and the union contract's provision that light-duty

assignments were available when an employee was expected to assume full duties within 60 days.

¶ 74 Moreover, the Board determined that the Village created the modified investigator position specifically to prevent Sosnoski from receiving a disability pension, which was improper under *Danko v. Board of Trustees of the City of Harvey Pension Board*, 240 Ill. App. 3d 633 (1992). In support of this conclusion, it emphasized that Fleischhauer gave conflicting testimony as to whether the Village created the light-duty position to accommodate Sosnoski's medical limits or instead assigned him to an open position. Furthermore, the Board cited Allison's testimony that he never spoke with Sosnoski about reasonable accommodations pursuant to the ADA and that Sosnoski never requested such accommodations. The Board also recalled Heelan's testimony that although he was still capable of shredding papers, the Village had not offered him a light-duty position with full salary and benefits.

¶ 75 The Village filed a complaint for administrative review. On August 25, 2014, the trial court affirmed the Board's decision. The Village timely appeals. We will refer to additional facts in the analysis section as they become relevant to the specific arguments on appeal.

¶ 76 II. ANALYSIS

¶ 77 The Village raises numerous arguments on appeal, many of which challenge the sufficiency of the evidence supporting the Board's decision. Additionally, the Village contends that the Board applied the wrong legal standard, applied an incorrect burden of proof, admitted hearsay evidence, improperly limited discovery and witnesses, acted improperly with respect to several motions pertaining to the involvement of Board member John Briscoe, and improperly refused to consider a motion to disqualify Sosnoski's counsel.

¶ 78 At the outset, it bears emphasizing that pension hearings are intended to be non-adversarial fact-finding proceedings. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 94 (1992) ("It is settled that an administrative hearing is not a partisan hearing with the agency on one side arrayed against the individual on the other. Rather, it is an administrative investigation instituted for the purpose of ascertaining and making findings of fact."). Additionally, an administrative hearing need not be conducted in the same manner as "a full judicial proceeding." *Williams v. Board of Trustees of the Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680, 691 (2010).

¶ 79 We review the Board's decision, not the decision of the trial court. *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 531 (2006). Our standard of review for each issue depends upon the nature of the question presented. The Board's findings and conclusions on questions of fact are deemed "to be prima facie true and correct" (735 ILCS 5/3-110 (West 2014)) and will not be reversed unless they are against the manifest weight of the evidence. *Marconi*, 225 Ill. 2d at 532. However, we review questions of law *de novo*. *Marconi*, 225 Ill. 2d at 532. We review issues that present a mixed question of law and fact using the clearly erroneous standard. *Marconi*, 225 Ill. 2d at 532.

¶ 80 Sufficiency of the Evidence

¶ 81 Many of the Village's arguments challenge the sufficiency of the evidence supporting the Board's decision. Specifically, the Village argues that Sosnoski performed service to the police department, he had a permanent limited-duty position, there was no objective evidence of disability, the Board misinterpreted the ADA, the Board's findings were inconsistent with Sosnoski's post-injury fitness evaluations, and the Board ignored the surveillance videos. The Village also raises a number of sub-arguments in support of these broader points.

¶ 82 As a court of review, it is not our function to reweigh the evidence, but to determine whether the Board's decision was against the manifest weight of the evidence. *Antonelli v. Board of Trustees of the Hillside Police Pension Board*, 287 Ill. App. 3d 348, 353 (1997). Even if an opposite conclusion is reasonable or we might have ruled differently, we will not set aside the Board's decision "unless an opposite conclusion is clearly evident." *Antonelli*, 287 Ill. App. 3d at 353. It is within the province of the Board to weigh the evidence and determine credibility. *Trettenero v. Police Pension Fund of the City of Aurora*, 333 Ill. App. 3d 792, 802 (2002).

¶ 83 Article III of the Pension Code governs police pension funds in municipalities with between 5,000 and 500,000 inhabitants. 40 ILCS 5/3-103 (West 2014). Section 3-114.1 of the Pension Code provides for a line-of-duty disability pension "[if] a police officer as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service ***." 40 ILCS 5/3-114.1(a) (West 2014). There is no dispute that Sosnoski was injured while performing an act of duty. However, the parties disagree whether that injury rendered him disabled for service in the police department.

¶ 84 Sosnoski, as the applicant, had the burden of showing "that he was injured while performing a duty, that the injury caused him to become disabled, and that the disability made it necessary for him to retire from the police force." *Thurow v. Police Pension Board of the Village of Fox Lake*, 180 Ill. App. 3d 683, 687 (1989). "[A] police officer is not entitled to a disability pension if there is an available and existing full time light duty position within the police service which he can perform." *Danko*, 240 Ill. App. 3d at 646. However, even if a position exists that can accommodate the applicant's restrictions, that position is not "available" until it is actually

offered to him. See *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill. 2d 446, 470 (2009). A position is available when there is a "firm offer" for "a position comparable in working conditions, compensation and tenure to the one previously open to" the applicant. *Peterson v. Board of Trustees of the Firemen's Pension Fund of the City of Des Plaines*, 54 Ill. 2d 260, 265 (1973); see also *Terrano v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 315 Ill. App. 3d 270, 276 (2000) ("The opinion in *Peterson* makes it quite clear that it is a firm offer of a limited duty position that could be performed by an individual with the applicant's physical limitations which renders the applicant not disabled within the meaning of the [Pension] Code despite his inability to perform the duties of an active police officer."); *Thurow*, 180 Ill. App. 3d at 691-92 (applying *Peterson* in a case involving police pensions under Article III of the Pension Code).

¶ 85 In the present case, there was evidence presented of four capacities in which Sosnoski could have potentially provided service in the police department: (1) the patrol officer position; (2) the position in investigations, as it was described in the position description; (3) the position in support services; and (4) the limited-duty position in investigations. The Board reasonably determined that Sosnoski could not perform the duties of a patrol officer or a full-duty investigator. There was also evidence tending to show that the other two positions were not "available" to Sosnoski so as to preclude him from being considered disabled within the meaning of section 3-114.1 of the Pension Code. Accordingly, we hold that the Board's decision was not against the manifest weight of the evidence.

¶ 86 At the time of his injury in December 2008, Sosnoski was working as a patrol officer. To the extent that the Village argues or implies in its brief that Sosnoski was exaggerating his injuries such that he was still capable of serving as a patrol officer, the evidence supported the

Board's finding that Sosnoski could no longer perform the duties of that position. For example, the June 3, 2011, FCE indicated that Sosnoski had "[s]erious functional limitations *** with regards to agility, squatting, [and] crouching." Additionally, the Board's finding was supported by medical testimony. Dr. Levin said that he would not release Sosnoski to "return to full police officer duties." Similarly, Doctor Tonino opined that Sosnoski could not "go in the field," could not apprehend offenders unless they were "sitting across from him," and would have a difficult time interrogating combative prisoners at the station. Dr. Samo likewise concluded, based on Sosnoski's subjective complaints, that Sosnoski could not perform the essential tasks of a law enforcement officer. It is true that, when confronted with Sosnoski's physical fitness test results and the surveillance videos, Dr. Samo acknowledged that there was a "credibility question." However, he testified that he felt that Sosnoski was honest with him. Indeed, Drs. Levin, Tonino, and Samo all testified that they did not see signs that Sosnoski was malingering. Although Dr. Ho believed that Sosnoski was "unlimited in terms of walking, driving, or desk work" and could perform "some or most of the job duties of a police officer," even he acknowledged the need for restrictions on "running, jumping, and repeated impact to the knee."

¶ 87 To be sure, there was evidence presented that might have supported an opposite conclusion. For example, the Village introduced evidence intended to call Sosnoski's credibility into question, such as the surveillance videos, his physical fitness test results, and the fact that he qualified for NIPAS after the injury. However, this evidence was not necessarily dispositive of the issue of whether Sosnoski could presently perform the duties of a patrol officer. See *Thurow*, 180 Ill. App. 3d at 690 (application for benefits should not have been denied simply because the applicant could play golf or because he was presently employed as a

salesman and security guard); *Pierce v. Board of Trustees of the Police Pension Fund of the City of Waukegan*, 177 Ill. App. 3d 915, 920 (1988) ("The fact that plaintiff once wrestled a prisoner after his injury, that he worked several off-duty security jobs, or that he kick-started his Kawasaki does not demonstrate that he is capable of performing all duties required of a policeman."). In light of the conflicting evidence, the Board was tasked with assessing witness credibility and ascertaining the true extent of Sosnoski's physical limitations. It is not our role to reweigh the evidence.

¶ 88 For the same reasons, the evidence supported the Board's finding that Sosnoski could not perform the duties of an investigator, as that position was defined in the position description. According to the description, "[t]he primary responsibility of the Investigator is to properly investigate all cases assigned by the Commander with special emphasis given to the collection and preservation of evidence, apprehension of offenders, recovery of property and preparation of cases for prosecution." As there was medical testimony supporting that Sosnoski could not apprehend offenders or go into the field, the Board's conclusion on this point was not against the manifest weight of the evidence.

¶ 89 Around the time that he applied for a line-of-duty disability pension, Sosnoski was assigned to a position in investigations before being removed from work by Dr. Levin. Sosnoski resumed working as an investigator in a limited-duty capacity around April 2012, and Dr. Levin restricted him to working four hours per day. However, at the time of the pension hearing in April 2013, Sosnoski was no longer working in investigations. Instead, as of January 2013, he had been moved to a position in "support services under crime prevention" to accommodate a pregnant officer's request for light duty. According to Fleischhauer, the plan was for Sosnoski to return to investigations once the pregnant officer returned to patrol duty at

the end of the year. Fleischhauer testified that he hoped that this would "become a permanent position in investigations" with no more "bouncing around."

¶ 90 Despite the Village's assurances to the contrary, the Board could have reasonably concluded that neither the position in support services nor the limited-duty position in investigations was available to Sosnoski so as to preclude him from being considered disabled within the meaning of section 3-114.1 of the Pension Code. See *Danko*, 240 Ill. App. 3d at 646 ("[A] police officer is not entitled to a disability pension if there is an available and existing full time light duty position within the police service which he can perform."). At the time of the hearing, Sosnoski was working in support services. However, he did not have a firm offer to continue working in that unit, and both Fleischhauer and Petrillo described the assignment as temporary. Accordingly, the evidence showed that there was not a position in support services that would be considered to be available to Sosnoski under case law. See *Peterson*, 54 Ill. 2d at 265 (a position is available where there is a "firm offer" made to the applicant "of a position comparable in working conditions, compensation and tenure to the one previously open to him").

¶ 91 Furthermore, even though Sosnoski had previously been assigned to investigations in a limited-duty capacity, according to Fleischhauer, there was no position open in that unit until the end of the year. The police department's need to play musical chairs with Sosnoski's assignments to accommodate other officers' requests raised questions about the tenure of the proposed position. Under these circumstances, the Board could have reasonably concluded that the limited-duty position in investigations was not available to Sosnoski, even though he had served in that capacity in the past.

¶ 92 In *Pierce*, we held that an officer need not "wait until he is suspended or retired on account of his disability" to apply for benefits. *Pierce*, 177 Ill. App. 3d at 922. In that case,

the applicant was working full time on limited duty when he filed his disability application. *Pierce*, 177 Ill. App. 3d at 920, 922. Although the evidence showed that "there was literally no place for an officer suffering from a partial disability to remain on the police force" (*Pierce*, 177 Ill. App. 3d at 921), the pension board argued on appeal that it would be "wasteful to have disabled officers applying for disability pensions while they are still capable of performing light-duty police tasks" (*Pierce*, 177 Ill. App. 3d at 921-22). The pension board suggested that this light-duty arrangement "could have continued indefinitely" but for the fact that the applicant was ultimately dismissed from the police force for unrelated disciplinary reasons. *Pierce*, 177 Ill. App. 3d at 921. We rejected that argument, reasoning that the applicant "was serving on limited duty at the *convenience* of the police chief" and that "[t]here were no safeguards or rules protecting his limited-duty status." (Emphasis in original.) *Pierce*, 177 Ill. App. 3d at 922.

¶ 93 Similar to *Pierce*, the Board in the present case could have reasonably found that Sosnoski served at Fleischhauer's convenience and that there were no safeguards protecting his limited-duty position in investigations. The proposed position was outlined in Fleischhauer's March 21, 2012, letter, which described the duties as "a desk position," within the limitations identified in Sosnoski's FCE, that was subject to revision as his condition improved. However, Fleischhauer testified that the Village had never had anybody on light duty for two years, suggesting that the proposed open-ended limited-duty assignment was unprecedented. Fleischhauer also acknowledged that the Village could technically take away the light-duty position at any time, although he added that the Village had "never done so in the past." Moreover, irrespective of whether the Village "created" the position specifically for Sosnoski or instead had previously assigned him to an open position, the evidence showed that the position was not open at the time of the hearing.

¶ 94 The Board concluded that the proposed limited-duty position in investigations did not defeat Sosnoski's claim of disability for several other reasons. Specifically, the Board determined that Sosnoski had not been released to eight-hour work days and that the Village improperly created the position "specifically to prevent [him] from receiving a disability pension." Given that we affirm the Board's decision on the basis that the limited-duty investigator position was not available to Sosnoski, we need not address the Village's arguments directed to the Board's other findings.[1]

¶ 95 Proper Legal Standard

¶ 96 The Village also contends that the Board applied the wrong legal standard. According to the Village, in questioning witnesses at the hearing, the Board "us[ed] the concepts of patrol and service to the department interchangeably." The Village also complains that Drs. Tonino, Samo, and Ho were initially sent a pre-printed form asking them to opine whether Sosnoski could "perform his *** duties as a police officer pursuant to the job description of the Vernon Hills Police Department." To the extent that these arguments are distinct from the

[1] We note that in its appellant's brief, the Village asserts that it "is willing to subject itself to an order of the Court that an Investigator position be made available to Officer Sosnoski for so long as his doctors limit his activities and/or are of the opinion that he cannot fulfill the requirements of a patrol officer." On administrative review, "[n]o new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." 735 ILCS 5/3-110 (West 2014). Accordingly, we did not consider this statement in evaluating the sufficiency of the evidence supporting the Board's decision.

sufficiency-of-the-evidence argument, we will address them separately. We review these issues *de novo*. *C. Szabo Contracting, Inc. v. Lorig Construction Co.*, 2014 IL App (2d) 131328, ¶ 23 ("the issue of whether a trial court applied the correct legal standard to the evidence presents a question of law, which is reviewed *de novo*").

¶ 97 The Village's arguments are unavailing. At the beginning of the hearing on April 16, 2013, David Zafiratos, the Board's attorney, properly articulated the applicable legal standard on the record: "First of all, the burden of proof is on the petitioner, in this case Officer Sosnoski, to establish that he is physically disabled for service in the police department as a result of sickness, accident, or injury incurred in or resulting from the performance of an act of duty." Additionally, it is clear from the Board's written decision that it applied the correct standard. Specifically, the Board concluded that Sosnoski was disabled for service as both a patrol officer and investigator and that he could not "physically perform any full-time sworn police position with the Vernon Hills Police Department." To the extent that the Village criticizes the Board's factual findings, we have already held that the Board's decision was not against the manifest weight of the evidence. As to the Village's argument that the pre-printed forms sent to the physicians were somehow improper, we note that the Village had ample opportunity during discovery depositions to elicit their opinions as to whether Sosnoski could work as a full-time investigator.

¶ 98 Burden of Proof

¶ 99 Furthermore, the Village criticizes paragraph 110 of the Board's written decision, in which it found that "[i]t has not been *conclusively* established that the four hour per day modified investigator position would be available to [Sosnoski] for the rest of his career." (Emphasis added.) The Village suggests, without elaboration, that the Board "improperly shifted the

burden and applied an incorrect legal standard" by requiring the Village to " 'conclusively' establish that a permanent light duty investigator position" was available. The Village notes that elsewhere in the decision, the Board concluded that Sosnoski had proved that he was disabled "by a preponderance of the evidence."

¶ 100 In the paragraph of the decision at issue, the Board did not purport to impose any burden of proof or persuasion on the Village. Instead, as it did in several other places in the decision, the Board simply attempted to articulate its doubts that the limited-duty investigator position was available to Sosnoski so as to defeat his claim of being disabled within the meaning of section 3-114.1 of the Pension Code. As we explained above, the Board's findings in this respect were not against the manifest weight of the evidence. In the context of the entire decision, we cannot say that the Board applied an incorrect legal standard.

¶ 101 Hearsay Evidence

¶ 102 The Village also complains that the Board erroneously admitted hearsay evidence regarding a nurse's purported statement to Sosnoski that he could no longer be a police officer. The Village does not cite any legal authority in support of this argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (appellant's brief must contain citation to authorities). Nor does it meaningfully attempt to articulate a reason why this constituted reversible error. See 735 ILCS 5/3-111(b) (West 2014) ("Technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her."). Accordingly, the argument is forfeited. See *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151,

¶ 13 (" 'The appellate court is not a depository into which a party may dump the burden of research.' " (quoting *People v. O'Malley*, 356 Ill. App. 3d 1038, 1046 (2005))).

¶ 103 Limitations on Discovery and Witnesses

¶ 104 The Village argues that the Board improperly limited discovery and witnesses, purporting to appeal from a February 14, 2012, ruling. The Village represents in its brief that the Board denied its requests for an IME, to depose Sosnoski, and to submit its own expert testimony on the issue of Sosnoski's condition. The Village argues that "[t]his error was compounded when [Sosnoski] was permitted to cross-examine Village witnesses about the fact that the Village had not had [Sosnoski] examined by another doctor—suggesting that the Village had no evidence to contradict the medical evidence of record or that such efforts would have been futile."

¶ 105 The Village acknowledges that there is no transcript of the February 14, 2012, proceedings in the record on appeal. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). This rule applies equally in the administrative review context if the appellant fails to provide a necessary transcript from an administrative hearing. See *Burns v. Department of Insurance*, 2013 IL App (1st) 122449, ¶ 15. Accordingly, in the absence of a transcript of the relevant proceedings, we presume that the Board's order was in conformity with law and had a sufficient factual basis. Moreover, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), the Village cites no authority in support of these arguments. Therefore, on top of failing to present a sufficient record, the Village has forfeited its contentions.

¶ 106 Involvement of Board Member Briscoe

¶ 107 The Village also argues that the Board acted improperly with respect to several motions pertaining to the involvement of Board president Briscoe. The following additional factual background is necessary for an understanding of these issues.

¶ 108 The Board scheduled the pension hearing for April 10 and April 16, 2013. On April 5, 2013, counsel for the Village wrote a letter to Sosnoski's attorney and the Board's attorney expressing his intent to call certain witnesses at the hearing, including Briscoe. On April 10, 2013, the Village presented to the Board a motion to disqualify Briscoe from the Board for purposes of the Sosnoski hearing. According to the motion, Briscoe had previously been Sosnoski's direct supervisor. The Village alleged that Briscoe "had one or more conversation [*sic*] with Officer Sosnoski concerning his ability to return to work and instructions he was provided by his doctor." The Village referred to a September 17, 2010, memorandum that Briscoe had written to deputy chief Bill Price, which provided as follows:

> "I spoke with Mark Sosnoski and he stated that he is not able to work light duty according to the directions of his doctor. Mark stated that his knee is still not tracking correctly and it is possible that he may need yet another surgery if the problem does not resolve itself. Mark stated that he is still on blood thinner medication and that he will be on that medication until October 8th, 2010. He subsequently dropped off the attached note from his doctor.
>
> I asked him to keep me informed of any changes and I advised I would foreword [*sic*] the information onto [*sic*] you for update."

¶ 109 Relying on this memorandum, the Village asserted in its motion that Briscoe had "outside information concerning the nature and extent of Sosnoski's medical condition." Accordingly,

the Village believed that Briscoe was "necessarily a fact witness in this matter," requesting that he recuse himself from participating in the proceedings or be disqualified. Attached as an exhibit to the motion was a chart reflecting Sosnoski's and Briscoe's shift schedules. According to the Village, Briscoe supervised Sosnoski from January 4, 2009, to February 12, 2009; May 10, 2010, to September 25, 2010; and May 23, 2011, to June 3, 2011.

¶ 110 Also on April 10, 2013, Sosnoski presented to the Board his motion to strike the Village's designation of Briscoe as a witness. At the hearing on these motions, Briscoe stated the following on the record:

> "You know, the comment that I can make is I filled a vacancy for a commander that had retired. I was running that shift temporarily. As memory serves me, Officer Sosnoski was not assigned—he may have been assigned to me but he wasn't physically working under my control.
>
> I was contacted and asked to see how he's doing. I made a call to him. He provided that information of which [*sic*] I passed along to the deputy chief. That's the extent of the involvement that I had with that memo.
>
> From a personal standpoint, I feel I am objective. I promise to look at the evidence for the merit that's involved with the evidence and make my determination based solely upon that information.
>
> So that's really the—I think I can listen to the matter and be unbiased, I believe I can be objective and I will look forward to listening to the Village and the Applicant and the evidence that comes out of that hearing."

With respect to the other periods of time identified by the Village, Briscoe said that he did not "remember physically seeing the officer on a day-to-day basis," because he believed that

Sosnoski was not working. When counsel for the Village was asked what he "expect[ed] to get" from Briscoe's testimony, he expressed his intent to question Briscoe about conversations with Sosnoski and the opportunities to observe him.

¶ 111 The Board voted 3-1 to grant Sosnoski's motion to strike Briscoe as a witness, with Briscoe abstaining from voting. Later in the hearing, Briscoe declined to recuse himself and reiterated his belief that he could be unbiased. The Board's attorney then expressed his opinion that the Board did not have the authority to disqualify Briscoe. The Board declined to call the Village's motion to disqualify Briscoe to a vote.

¶ 112 Although "[a]dministrative proceedings are not judicial proceedings," the litigants "are entitled to a fair hearing before a disinterested tribunal." *Williams*, 398 Ill. App. 3d at 694. Accordingly, "no person may play a decision-making role in a judicial or administrative proceeding in which he or she has a personal interest." *Board of Education of Niles Township High School District 219 v. Regional Board of School Trustees of Cook County*, 127 Ill. App. 3d 210, 213 (1984). If a party claims that an administrative tribunal was biased, he or she must prove that its members "had to some extent adjudged the facts as well as the law of the case in advance of hearing it." *Turcol v. Pension Board of Trustees of Matteson Police Pension Fund*, 359 Ill. App. 3d 795, 804 (2005). To that end, "[t]here must be more than 'the mere possibility of bias or that the decisionmaker is familiar with the facts of the case.' " *Williams*, 398 Ill. App. 3d at 693 (quoting *Danko*, 240 Ill. App. 3d at 641)). The participation of even a single member who is not disinterested renders the administrative body's actions voidable. *Bender v. Board of Fire and Police Commissioners of Dolton*, 254 Ill. App. 3d 488, 491 (1993).

¶ 113 To the extent that the Village complains of the Board's decision to grant Sosnoski's motion, the Village has not even attempted to explain why the Board's refusal to allow Briscoe

to testify constituted reversible error or amounted to an abuse of discretion. See *Trettenero*, 333 Ill. App. 3d at 801 (pension board's decision to exclude evidence was reviewed for abuse of discretion). "Technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2014). This principle applies to decisions regarding the exclusion of testimony. See *Huff v. Rock Island County Sheriff's Merit Commission*, 294 Ill. App. 3d 477, 483 (1998). Briscoe apparently was Sosnoski's supervisor for several periods of time after the injury but before the application for benefits. However, it appears from Briscoe's statements on the record that his interaction with Sosnoski was minimal. Indeed, the only evidence cited by the Village to support its contention that Briscoe had independent knowledge of Sosnoski's physical condition is the September 17, 2010, memorandum, in which Briscoe merely documented what Sosnoski had told him. Under these circumstances, the Village has not shown that the Board erred in granting Sosnoski's motion to strike Briscoe as a witness.

¶ 114 Furthermore, the Village has not identified any instance where Briscoe exhibited bias, and it does not argue that he had a personal interest in the outcome of the proceedings. Nor has the Village shown that Briscoe's presence on the Board rendered the proceedings unfair in any way. It must be emphasized that, pursuant to statute, two members of the Board are "appointed by the mayor or president of the board of trustees of the municipality involved"; two are "elected from the active participants of the pension fund by such active participants"; and one is "elected by and from the beneficiaries." 40 ILCS 5/3-128 (West 2014). Counsel for the Village asserted at the April 10, 2013, hearing that Briscoe had been "designated by the current police

officers." With the Board so comprised, it is not surprising that in all but the largest municipalities, some of the officials presiding over an application for disability benefits may either have worked with the applicant or been familiar with his or her injuries. Indeed, another member of the Board, Patrick Zimmerman, disclosed during the pension hearing that Sosnoski had been assigned to him from June through December 2012. Zimmerman stated on another occasion that he was in charge of the investigations unit. Nevertheless, the Village did not challenge Zimmerman's continued service on the Board.

¶ 115 Case law supports that a board member's familiarity with the applicant is not enough, in itself, to require recusal in disability hearings held under Article III of the Pension Code. For example, in *Turcol*, the applicant moved for the recusal of two board members, Sergeant Sutorious and Officer Nagel. *Turcol*, 359 Ill. App. 3d at 800. According to the applicant's affidavit, Sutorious disliked him and had created a conflict between the applicant and Nagel. *Turcol*, 359 Ill. App. 3d at 800. The applicant averred that Nagel had then thrown a paper in his direction "for the purpose of engaging in a verbal confrontation." *Turcol*, 359 Ill. App. 3d at 800. Sutorious and Nagel provided counteraffidavits denying the allegations and insisting that they could be impartial. *Turcol*, 359 Ill. App. 3d at 800. The court held that "[i]n light of these counteraffidavits," the applicant's affidavit fell "far short of demonstrating that members of the Board had to some extent adjudged the facts as well as the law of the case in advance of hearing it." *Turcol*, 359 Ill. App. 3d at 804.

¶ 116 Furthermore, in *Danko*, although the applicant's former supervising officer—the current chief of police—served on the pension board, that fact alone did not render the proceedings unfair. *Danko*, 240 Ill. App. 3d at 636. Instead, it was improper that the chief was antagonistic toward the applicant to the extent that "a disinterested observer would conclude that

[he] had prejudged [the applicant's] claim." *Danko*, 240 Ill. App. 3d at 642. According to the court, the chief was "not simply familiar with the facts of the case," but rather was "a prominent player in the events unfolding before the Board." (Internal quotation marks omitted.) *Danko*, 240 Ill. App. 3d at 644. In the present case, the record does not indicate that Briscoe was either antagonistic toward the Village or a prominent player in the matters before the Board.

¶ 117 The Village relies on *Business and Professional People for the Public Interest v. Barnich*, 244 Ill. App. 3d 291 (1993), in which the court held that a commissioner of the Illinois Commerce Commission had duties that "were similar to those of a judge" and that "the judicial conduct principles applied to him resulting in a duty to recuse himself when his impartiality was reasonably questioned." *Barnich*, 244 Ill. App. 3d at 297. However, there is simply no reason to question Briscoe's impartiality. Nor did his presence on the Board create an appearance of impropriety. Once again, given the nature of these proceedings and the statutory composition of the Board, it is neither surprising nor improper that some of the Board members may have known Sosnoski or worked with him prior to the hearing. Under the facts presented, *Barnich* is readily distinguishable, and we cannot conclude that Briscoe's presence on the Board rendered the proceedings unfair.

¶ 118 Motion to Disqualify Sosnoski's Counsel

¶ 119 Finally, the Village argues that the Board improperly refused to consider its motion to disqualify Sosnoski's attorney, Charles Smith. At the April 10, 2013, hearing on the motions relating to Briscoe, the Village moved to disqualify Smith due to his law partner's connections to the Village.[2] The Board voted 4-1 to strike the motion without considering the merits. The

[2] Smith's law partner, Larry LaLuzerne, apparently served on the Village's traffic advisory committee and the board of fire and police commissioners, neither of which were involved in the

Village argues that the Board's failure to rule on the motion "demonstrates bias and is reversible error."

¶ 120 The Village argues passionately that Smith's representation of Sosnoski was inappropriate under the rules of ethics. However, it puts the cart before the horse. The Village cites no authority, and we are aware of none, to support the proposition that the Board had the power to grant the relief requested. The cases that the Village cites pertain to situations in which *courts* entertain motions to disqualify opposing counsel. See, *e.g.*, *In re Estate of Klehm*, 363 Ill. App. 3d 373, 376-77 (2006) ("Courts have vital interests in protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings. [Citation.] To protect these vital interests, courts have the authority to disqualify an attorney from representing a particular client." (Internal quotation marks omitted)); *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979, 989 (1993) (disqualification of counsel is "a drastic measure which courts should grant only when necessary"). The Village states in its brief that *Klehm* indicates that "[c]ourts and other quasi-judicial bodies" may disqualify attorneys. However, *Klehm* says nothing about "quasi-judicial bodies."

¶ 121 At oral argument, counsel for the Village suggested that the Board possessed the inherent power to address the motion. "A board of trustees for a pension fund possesses no powers other than those given to it in the act creating it." *Eckman v. Board of Trustees for the Police Pension Fund for the City of Elgin*, 143 Ill. App. 3d 757, 765 (1986); see also *Vuagniaux v. Department of*

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instant proceedings. Although our resolution of the Village's argument renders it unnecessary to address in detail the nature of any potential conflict or appearance of impropriety, we note that there is nothing in the record suggesting that LaLuzerne had an attorney-client relationship with the Village. Nor were the pension proceedings related to or affected by LaLuzerne's work.

Professional Regulation, 208 Ill. 2d 173, 187 (2003) ("administrative bodies *** are creatures of statute and possess no general or common law powers"). Accordingly, the Board's "authority must either arise from the express language of the statute or 'devolve by fair implication and intendment from the express provisions of the [statute] as an incident to achieving the objectives for which the [agency] was created.' " *Vuagniaux*, 208 Ill. 2d at 188 (quoting *Schalz v. McHenry County Sheriff's Department Merit Comm'n*, 113 Ill. 2d 198, 202-03 (1986)); see also *Caldwell v. Nolan*, 167 Ill. App. 3d 1057, 1062 (1988) (statutory authorization for an electoral board to adopt procedures with respect to introducing evidence and presenting arguments did not authorize the board to consider a motion for rehearing). Any action by a pension board that exceeds its statutory authority is void. *Kosakowski v. Board of Trustees of the City of Calumet City Police Pension Fund*, 389 Ill. App. 3d 381, 383 (2009).

¶ 122 In *Village of Stickney v. Board of Trustees of the Police Pension Fund of the Village of Stickney*, 347 Ill. App. 3d 845, 852 (2004), the court determined that an Article III pension board had "the authority to hold hearings and establish procedures for those hearings," which gave it discretion to decide whether to allow a village to participate in the proceedings. Unlike deciding whether to allow a potential intervener to introduce evidence or cross-examine witnesses, enforcing ethical rules has nothing to do with the objectives for which the Board was created. Nor would a pension board be likely to have the legal expertise necessary to recognize the existence or extent of an attorney's conflict of interest. Nothing in Article III of the Pension Code states or implies that a pension board has the power to disqualify counsel. Lacking the statutory authorization to grant the relief requested, the Board did not err in declining to consider the Village's motion.

¶ 123 III. CONCLUSION

¶ 124 We confirm the decision of the Board of Trustees of the Vernon Hills Police Pension Fund granting Sosnoski line-of-duty disability benefits and affirm the circuit court's judgment confirming the Board.

¶ 125 Affirmed.