2017 IL App (2d) 160308-U
No. 2-16-0308
Order filed February 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE VILLAGE OF VERNON HILLS; JOHN KALMAR, Village Manager of the Village of Vernon Hills; and LARRY NAKRIN, Finance Director of the Village of Vernon Hills, Plaintiffs-Appellants, v. THE VERNON HILLS POLICE PENSION FUND, THE BOARD OF TRUSTEES OF THE VERNON HILLS POLICE PENSION FUND, and JOHN BRISCOE, Applicant, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 15-MR-1055 Honorable Diane E. Winter, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The Village did not have a due process right to intervene in the Board proceedings regarding Briscoe's application for a line-of-duty disability pension, and the Board did not abuse its discretion in denying the Village's petition to intervene. The Board's grant of the application was not against the manifest weight of the evidence, and its determination of Briscoe's pensionable salary was not clearly erroneous. Therefore, we affirmed.

¶ 2 The Village of Vernon Hills (Village), appeals from the trial court's ruling affirming the

decision of the Board of Trustees of the Vernon Hills Police Pension Fund (Board) to grant John Briscoe a line-of-duty disability pension. On appeal, the Village argues that: (1) it should have been allowed to intervene in the proceedings as a matter of right, and the Board violated its due process rights by denying its petition to intervene; (2) even if the Village did not have a right to intervene, the Board abused its discretion by denying the Village's petition; (3) the Board's grant of a line-of-duty disability pension for Briscoe was against the manifest weight of the evidence; and (4) the Board erred in calculating Briscoe's "final pensionable salary." We affirm.

¶ 3 I. BACKGROUND

¶ 4 Briscoe joined the Vernon Hills Police Department (Department) in October 1990. On November 27, 2012, he held the position of "watch commander." He was allegedly injured while on duty, responding to a call of a home invasion in progress. The suspect was not found in the home, so Briscoe and other officers began searching the yard and surrounding area. Briscoe was allegedly running between two houses when he fell.

¶ 5 On January 11, 2013, Briscoe had surgery to repair a torn meniscus in his left knee. In August 2013, Briscoe underwent back surgery. An April 2014 functional capacity evaluation concluded that Briscoe was able to work eight hours per day in a "medium level" or "sedentary level desk/work position." Therefore, Briscoe returned to work on May 5, 2014. However, on May 12, 2014, he submitted a written request to the Fund for a line-of-duty disability pension. Later that month, he submitted a doctor's note requesting that he be excused from work; his last day of work was May 22, 2014. Briscoe used sick and other paid benefit time until November 19, 2014. Thereafter, he was placed on administrative leave.

¶ 6 A. Petition to Intervene

¶ 7 Meanwhile, on June 16, 2014, the Village filed a petition to intervene in the Board

proceeding. It argued that it had a significant financial interest in the proceeding's outcome due to its impact on future pension contributions, Briscoe's pending workers' compensation claim, and any claim that he could make for health insurance premium benefits under the Public Safety Employee Benefits Act (PSEBA) (820 ILCS 320/10 *et seq.* (West 2014)). It argued that, as an employer, it also had both an interest and an obligation to ensure that its benefits were fairly, equitably, and properly administered and that employees with legitimate injuries were properly compensated, while protecting the taxpayers from those who were not. The Village also sought to depose Briscoe, his treating physicians, and the Board's appointed physicians, as well as conduct an independent medical exam of Briscoe at its own expense.

¶ 8 In his response, Briscoe argued that the Vernon Hills Police Pension Fund (Fund), rather than the Village, had the obligation to ensure that its benefits were properly awarded. Briscoe argued that the Village was already allowed to appoint two trustee members of the Board. He argued that he had not applied for any benefits under PSEBA and that, even otherwise, the Village had the legal authority to conduct its own hearing to determine whether he would qualify for such benefits. Briscoe argued that the Village's intervention to advocate against other benefits would infringe upon his due process rights by adversely affecting his right to a fair and impartial hearing before the Board.

¶ 9 The Board denied the Village's petition to intervene on October 9, 2014. It stated that it had the exclusive statutory authority to control and manage the Fund and to conduct pension hearings and decide who could participate. It stated that it had a fiduciary duty to act solely in the interest of the Fund's participants and beneficiaries to provide benefits and defray reasonable expenses of administering the Fund. The Board stated that Briscoe had a right to due process of his request, which would be jeopardized by allowing the Village to intervene. Finally, the Board

stated that the Village's interests in intervening were limited to financial considerations, which were insufficient to warrant intervention given the overriding interest in providing Briscoe with procedural due process.

¶ 10 B. Board's Hearing

¶ 11 The Board held a hearing on Briscoe's application for a line-of-duty disability pension on February 5, 2015. Department patrol officer Kenneth Maier testified that on the night of November 27, 2012, he responded to an emergency call of a home invasion. Maier was outside of the house, near the walkout basement, and saw Briscoe "on the ground trying to push himself back up." Maier did not see Briscoe fall. Briscoe was about 50 yards away, on the side of the house. Briscoe struggled to get up and then slowly moved to the front of the house. Maier spoke to Briscoe at the station later that night, and Briscoe said that he had fallen down and hurt himself, and that his leg was "kind of" sore.

¶ 12 We next summarize Briscoe's testimony. He joined the department on October 26, 1990. He had passed a physical exam at that time, and he did not have any restrictions as to his back or left knee. Briscoe moved up through the ranks and was promoted to commander in September 2012. He had the midnight watch commander position, which was the highest position of authority working on any given night. He supervised personnel by inspecting their work and conduct, and he was responsible for their safety "as much as reasonably possible." As a commander, he was a sworn and commissioned police officer, and his job also entailed the duties and responsibilities of a police officer. Briscoe believed that his position required him to be on-scene to manage emergencies. The job description stated that, during emergency situations, he needed to assume control, make assignments of personnel, and coordinate their efforts for maximum efficiency and effectiveness. As part of "assuming control," he would have to

participate in calls and use force, if necessary.

¶ 13 Prior to November 27, 2012, he did not have any limitations with respect to his back or left knee, nor had he ever injured them. On that night, around 7 p.m., there was a 911 call of an intruder in a home. The dispatcher told Briscoe that the on-scene sergeant stated that Briscoe was needed immediately at the scene. Briscoe arrived there in a few minutes. Officers were inside the house and soon after deemed it clear, so Briscoe's priority was "holding the perimeter" in case the offender was outside. Briscoe began to search in between two houses, running up an incline towards the front of the residence. It was very dark, and he had a mini flashlight. As he was running, Briscoe felt his left foot plant, his ankle buckle, and his knees lock. He "went over [him]self, over [his] legs and landed on the ground." He also jammed his wrist. Briscoe got up right away because the call was still in progress, and he continued to the front of house. Briscoe issued more instructions, and he later went to respond to a separate call about a gas leak. When he eventually returned to the station, he felt a stiffness in his back, wrist, ankle, and leg. He did not remember if he mentioned it to anyone. Briscoe was never told that he should not have responded to the home invasion call or that it was not a part of his job duties, nor was he ever disciplined for responding to the call. An offender was never found.

¶ 14 Briscoe completed a Department injury report form on December 5, 2012. There was a delay in completing the form because Briscoe was off for two days after the incident, and then he called in sick for two days.

¶ 15 The same week as the incident, Briscoe called his treating physician, Dr. Santiago Candocia, though he could not get an appointment until the following week. Dr. Candocia ordered x-rays and an MRI, and based on the results, Briscoe was referred to Dr. Warren Jablonsky for treatment for his left knee. Briscoe complained that his back was bothering him,

and he was eventually referred to Dr. Jonathan Citow for back treatment. Briscoe had surgery on his left knee on January 11, 2013, and surgery on his back on August 6, 2013.

¶ 16 Briscoe never returned to full unrestricted duty after his injury. There were periods where he worked light duty for four to six hours. He tried to return to eight-hour days in May 2014 but was unable to do so. His neuropathy required pain medication, and the medication clouded his judgment. He continued to take pain killers and muscle relaxants. At the time of his testimony, his left leg was completely numb to the tip of his foot; he had "a needle sensation" on the left side of his foot; and he had about 35% less strength in his left leg than his right leg. Briscoe was currently seeing Dr. Yaacoub at the Illinois Pain Management Institute and engaging in aqua therapy. Dr. Candocia managed most of his medication on a monthly basis. His doctors had also recommended cortisone injections in his knee and back.

¶ 17 The Board had asked Briscoe to attend three independent medical exams, and he was honest with those physicians about his history and treatment. The Village had also ordered him to attend two of its own independent medical exams, and he had tendered exhibits regarding those exams to the Board.

¶ 18 The Village never indicated that it had a permanent light duty position as a watch commander available, and the Village had not passed an ordinance establishing such a position. None of the doctors he had seen had released him to full unrestricted duties, or duties beyond a sedentary level. He did not feel that he could perform the duties and responsibilities of a watch commander because the position required a certain amount of agility, flexibility, squatting, running, and jumping to be able to protect himself and his coworkers in an emergency situation. Also, the medication that he took often slowed his thinking and put him in a "medicated cloud." The duties of a watch commander required quick thinking during critical times, and he did not

feel that he was capable of doing that.

¶ 19 Briscoe last received wages in May 2014. He had exhausted all of his personal benefit time by November 2014 and had not received any income since then. In the prior 2½ years, he had worked a total of about 60 hours conducting law enforcement training classes. The classes were all light, sedentary-type work.

¶ 20 C. Board's Findings and Pensionable Salary

¶ 21 On February 12, 2015, the Board orally voted three to two to grant Briscoe a line-of-duty disability pension. The Board held a public meeting on March 5, 2015, to determine Briscoe's pensionable salary.

¶ 22 At that meeting, the Village argued as follows. On May 22, 2014, which was the last day that Briscoe reported for active duty, his salary was approximately $119,000. Subsequently, when Briscoe was on medical leave and using paid benefit time, the Village received information that he was improperly engaging in secondary employment, violating Department policies. After an investigation, Briscoe was disciplined in the form of a reduction of his salary grade to the first step of the commander pay scale, which was $91,918.

¶ 23 The Village further stated that two Board members had requested a meeting with the Village to determine Briscoe's pensionable salary, and during that meeting, they spoke with and participated in drafting and sending an e-mail to the Department of Insurance. The Department of Insurance opined that the salary to be used was Briscoe's salary on November 19, 2014, which was $91,918, and the Village argued that this determination was binding on the Board.

¶ 24 A Board member responded that the opinion was advisory and that the Village's e-mail inquiry had been changed from the original draft. Briscoe's attorney argued in favor of applying his pre-discipline salary, plus additional amounts for "longevity" and "career development

program pay." Both he and the Village responded to questions from the Board. After going into closed session, the Board determined that Briscoe's salary was $124,027 for pension purposes.[1]

¶ 25 On May 20, 2015, the Board issued its formal written findings granting Briscoe's line-of-duty disability police pension. It found as follows. Briscoe became a member of the Department and Fund on October 26, 1990. Prior to that time, he underwent a physical examination and was cleared for police work. Briscoe testified that he did not have any problems with his back or knee prior to joining the Department. Briscoe was promoted to watch commander in September 2012, and he testified that the role required that he remain a sworn and commissioned police officer with police powers. As watch commander, his job duties included assuming control during emergency situations, making personnel assignments, and coordinating their efforts for maximum efficiency and effectiveness. Briscoe testified that the job required him to participate in emergency calls and use force, if necessary.

¶ 26 On November 27, 2012, while serving as a watch commander, Briscoe was required to respond to an emergency in the form of a reported in-progress home invasion. Upon arriving at the scene, Briscoe maintained a position outside the residence. Once it was determined that the home's interior was clear, Briscoe began searching in-between houses and making his way to the front of the home. He testified that as he ran between the houses, simultaneously checking the area for the offender, he felt his left foot plant and his ankle and knee buckle, causing him to fall. Briscoe testified that he knew that he had hurt himself but got up and kept running due to the serious nature of the call. Officer Maier testified that he saw Briscoe lying on the ground on the side of the house, trying to push himself back up, and that he struggled back up and exhibited a

[1] As we later discuss, salary for pension purposes includes certain amounts in addition to annual income. See *infra* ¶ 75.

slow-moving demeanor as he continued moving to the front of the house. During the remainder of his shift, Briscoe experienced a stiffness in his back, wrist, ankle, and leg.

¶ 27 The Board further found that on December 10, 2012, Briscoe sought treatment with Dr. Candocia who recommended that he obtain an MRI and see a knee surgeon. Briscoe underwent an MRI of his left knee on December 21, 2012, and it showed a tear in the meniscus and grade II chondromalacia. On December 31, 2012, Briscoe sought treatment with Dr. Jablonsky, who determined that surgery was necessary to repair the torn meniscus, and Briscoe underwent this surgery on January 11, 2013. A few days later, Dr. Jablonsky recommended physical therapy. Briscoe testified that his knee injury and subsequent movement limitations caused him to experience back pain. On April 3, 2013, he sought treatment for his back with Dr. Citow, who recommended an MRI and epidural steroid injection. On May 8, 2013, Dr. Citow identified severe L5-S1 foraminal narrowing and discussed the possibility of back surgery, which Briscoe underwent on August 8, 2013. At a follow-up evaluation on October 25, 2013, Dr. Citow found that Briscoe could return to sedentary work for up to four hours per day. At a March 28, 2014, follow-up evaluation, Dr. Citow noted that Briscoe was experiencing back pain, leg soreness, and left foot numbness, and he recommended water therapy. Briscoe testified that in May 2014, after he submitted his application for a disability pension, the Village stopped paying his wages and benefits, including medical care coverage. Briscoe testified that in his current physical condition, he has left leg numbness and weakness. He also testified that he did not feel that he could perform the duties and responsibilities of watch commander because his lack of agility and flexibility, and his inability to squat, run, and jump, would leave him unable to protect himself and his coworkers or deal with a combative situation.

¶ 28 The Board stated that it had reviewed the reports of the three independent physicians

whom it had appointed to examine Briscoe. Dr. Pietro Tonino certified that Briscoe was not disabled as a result of his left knee. Dr. Daniel Samo certified that Briscoe was disabled to a point that he was unable to perform his duties as a watch commander. He opined that Briscoe's back condition predated the November 2012 event, but that the event may have indirectly triggered the onset of Briscoe's back symptoms. Dr. Howard Freeberg opined that Briscoe was disabled from performing his duties as a watch commander. He specified that Briscoe could not perform the duties of lifting, carrying, and potentially apprehending suspects, and that Briscoe had difficulty running, pushing, and pulling. The Board concluded that the November 27, 2012, on-duty injury to Briscoe's left knee and back caused him to become permanently disabled, "with regard to his back injury," for service as a watch commander.

¶ 29 D. Trial Court Proceedings

¶ 30 Within 35 days, the Village filed an action in the circuit court seeking administrative review of the Board's decision. The Village also alleged two counts of violations of the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2014)). The Fund, Board, and Briscoe (collectively defendants) sought to dismiss the Open Meetings Act counts as untimely, and the trial court granted their motion on December 30, 2015. Those counts are not at issue on appeal.

¶ 31 The trial court affirmed the Board's ruling on March 30, 2016. Regarding the subject of intervention, the trial court stated as follows. The Village clearly had a financial interest in the hearing's outcome, but under *Williams v. Board of Trustees*, 398 Ill. App. 3d 680 (2010), something more was required. The Village cited additional reasons, but those reasons could apply to every pension case and would result in shifting the Board's responsibilities to the Village. Pension boards were statutorily empowered to verify an applicant's disability and right to receive benefits, and the Board was ultimately responsible for administering the Fund and

designating beneficiaries. It had the fiduciary duty to make findings of fact, properly administer the pension plan, ensure the validity of claims, and assess an applicant's credibility. The Board had discretion and did not arbitrarily or capriciously deny the Village's petition to intervene to perform these same functions. Additionally, unlike a judicial proceeding, an administrative proceeding was designed to ascertain and make findings of fact, and the Village's desire to turn it into an adversarial process contradicted the function of the pension board hearing.

¶ 32 The trial court stated that the Village further argued that the discretionary standard for allowing intervention set forth in *Williams* and *Stickney v. Board of Trustees*, 347 Ill. App. 3d 845 (2004), no longer applied following *Village of Vernon Hills v. Heelan,* 2015 IL 118170, and that due process required that it be allowed to intervene. The argument was taken from the dissent in the appellate court's ruling in *Village of Vernon Hills v. Heelan,* 2014 IL App (2d) 130823, but the supreme court referred to the dissent without choosing to follow it. Instead, the supreme court declined to address a pension board's legal obligation for allowing intervention in administrative proceedings. Therefore, *Williams* and *Stickney* continued to be the established precedent concerning intervention. Moreover, in its petition to intervene, the Village was able to outline detailed evidence questioning whether Briscoe could have been injured in the manner alleged. The Board further allowed the Village to submit all of its records, including the documents from Briscoe's personnel file, the results of the Village's investigations regarding Briscoe's injury, and the Village's evidentiary depositions of two physicians who performed "ADA" evaluations of Briscoe. The Board also allowed the Village to argue regarding Briscoe's correct pensionable salary.

¶ 33 Regarding the Village's challenge to the Board's decision to award Briscoe a line-of-duty disability pension, the trial court stated as follows. The Village initially contested the Board's

determination that Briscoe's injury arose from an act of duty. It suggested that Briscoe was not even at the scene, relying on: a dispatch log that showed that he was on the scene and cleared and available within 22 seconds; an unsworn declaration of Deputy Chief Rick Davies that stated that when Briscoe called him on November 27, 2012, about the home invasion, he did not mention that he or any other officer was injured; the incident report, which did not show that Briscoe was present; and a statement by Sergeant Levicki that Briscoe was not on the scene. However, each of these pieces of evidence were questionable, in that the dispatch log and incident report contradicted each other; Deputy Chief Davies's statement was not an affidavit; and the alleged statement by Sergeant Levicki was hearsay. In contrast, Officer Maier testified that he saw Briscoe on the scene, on the ground trying to push himself back up. Briscoe testified and described his actions at the scene and his fall. The record thus clearly contained evidence supporting the Board's determination that Briscoe's injury arose from an act of duty.

¶ 34 The Board further relied on the reports from the three physicians selected by the Board to determine that Briscoe was disabled for service in the Department. The Village argued that Briscoe's knee and back surgeons found him able to return to work as of May 2, 2014, and when Briscoe continued to have issues, he went to an internist to obtain a recommendation that he was unfit for duty. The Village also argued that the Board ignored the reports of the physicians the Village had hired to perform independent medical exams. The Board did not cite to or distinguish any part of the voluminous record that the Village provided, but its failure to do so was not grounds for reversal. The Board's opinion did cite to one of its appointed physician's opinions that Briscoe was not disabled, showing that the Board considered the possibility. There was evidence in the record supporting the Board's determination that Briscoe was disabled, and the trial court would not reweigh the evidence.

¶ 35 The Village further argued that the opinions of the Board-appointed physicians were based on the wrong job description because the position of watch commander did not involve running or apprehending suspects. However, the position description for watch commander, and police chief Mark Fleischhauer's June 20, 2014, letter to Briscoe both showed that a commander was sometimes required to provide on-scene supervision. Being on scene meant physical presence at a potentially uncontrollable situation where offenders may become violent. Briscoe was participating in a home invasion call when he got injured, and he was never reprimanded or told that it was not part of his job duties. Arguing that Briscoe would never have to run or use force with a suspect while supervising on scene ignored the reality of being a police officer. There was evidence in the record clearly supporting the Board's determination that Briscoe could no longer be " 'of service' " to the Department. While there was also evidence that could support the opposite conclusion, including Briscoe's secondary work as an instructor and a video showing him sitting on bleachers through a football game and then walking up and down the stairs, this evidence did not necessarily indicate that Briscoe could presently perform the duties of a commander. Moreover, when there was conflicting evidence in the record, it was the Board's function to assess witness credibility and ascertain the true extent of Briscoe's physical limitations.

¶ 36 As for the question of Briscoe's pensionable salary, the trial court stated that the last date that he received a salary for the purpose of calculating pension benefits was his last day of work on May 22, 2014, when his salary equaled $124,027. It stated that from then until his last check on December 5, 2014, Briscoe was being compensated for accumulated unused benefit time, and administrative regulations made clear that such time was not considered compensation for calculating either pension contributions or pension benefits. The trial court stated that even

though pension contributions were being deducted from those checks, it did not make them pensionable salary. Finally, it stated that although the Department of Insurance had provided a different opinion which focused on the salary as of the date of suspension of duty or retirement, the opinion was contrary to regulations, and it was further advisory and not binding on the Board.

¶ 37 The Village timely appealed. Briscoe has filed an appellee's brief, and the Fund and Board have also filed an appellee's brief.

¶ 38 II. ANALYSIS

¶ 39 A. Standard of Review

¶ 40 We begin by setting forth the standard of review. In an appeal to the appellate court following the decision by a circuit court on administrative review, we review the decision of the administrative agency rather than the circuit court's judgment. *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 386 (2010). When the parties dispute an administrative agency's factual findings, we apply a manifest weight of the evidence standard. *Id.* at 387. Where the dispute is over an agency's conclusion on a point of law, we review the agency's decision *de novo*. *Id.* We review mixed questions of law and fact for clear error. *Provena Covenant Medical Center*, 236 Ill. 2d at 387.

¶ 41 B. Intervention as a Matter of Right

¶ 42 The Village first argues that it should have been allowed to intervene in the pension proceedings as a matter of right. This presents a legal question that we review *de novo*. See *id.*

¶ 43 As the Village recognizes, *Stickney* and *Williams* explicitly held that pension boards have discretion as to whether municipalities may intervene. In *Stickney*, the municipality sought to intervene to cross-examine the applicant and review the evidence to make sure that it was

admissible, but the pension board denied its request. *Stickney*, 347 Ill. App. 3d at 847. The appellate court stated that section 3-132 of the Illinois Pension Code (40 ILCS 5/3-132 (West 2002)) gave the pension board the authority to exclusively " 'control and manage *** the pension fund, *** investment expenditures and income,' " and all money paid and assessed for disabled and retired police officers. *Id.* at 852. The court stated that because the pension board had exclusive authority over eligibility and participation in the fund, it followed that the board also had the authority to hold hearings, establish procedures for those hearings, and decide whether and to what extent to allow participation in the hearings. *Id.* The appellate court therefore held that the pension board had the discretion to decide whether to allow the municipality to intervene. *Id.*

¶ 44 The appellate court followed *Stickney* in *Williams*. There, the municipality successfully sought to intervene in the hearing on a firefighter's application for a line-of-duty disability pension. *Williams*, 398 Ill. App. 3d at 681. The court stated: "A board's exclusive authority to control the pension fund and disability payments includes the power to conduct the hearings and the discretion to decide who can participate in those hearings and to what extent." *Id.* at 688-89. The court stated that, under *Stickney*, a municipality's desire to cross-examine an applicant and create a full administrative record was not sufficient to support its request to participate. *Id.* at 689. "However, protecting a municipality's interest in the proper expenditure of funds may be a sufficient basis for permitting intervention when combined with another interest." *Id.* It held that the pension board did not abuse its discretion in allowing the municipality to intervene because the municipality filed its petition before the hearing started, the issue was fully briefed by the municipality and the applicant, board members were provided with the relevant case law,

and the municipality described some of the additional evidence that it would offer to assist the Board with its fact-finding. *Id.* at 690.

¶ 45 The applicant argued that his due process rights were violated because, among other things, allowing municipal officials to remain on the board after the intervention created a *per se* conflict of interest. The court stated that the applicant had a right to a fair and impartial hearing before a disinterested tribunal. *Id.* at 694. It stated that an administrative hearing was not a partisan hearing but rather an administrative investigation to ascertain and make factual findings. *Id.* at 692. The court stated that participation of municipal officials as board members did not create a *per se* conflict of interest. *Id.* at 692. However, it also noted that one of the municipality's appointed board members, who was also the municipal attorney, had provided a copy of the board's exhibits to an outside municipal attorney before the hearing and had advocated on the municipality's behalf during the hearing, contrary to the role of a disinterested decision-maker. The court held that these actions denied the applicant a fair and impartial hearing. *Id.* at 694-95.

¶ 46 The Village argues that the aforementioned cases' holdings regarding a board's discretion to allow intervention are no longer precedential in light of our supreme court's decision in *Heelan*, in which the Village was also a party.[2] In *Heelan*, the supreme court noted that the

[2] The Village additionally cites this court's decision in *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, but does not discuss that case, thereby forfeiting any reliance on it. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not argued are forfeited). Regardless, *Richer* held that the municipality was collaterally estopped from relitigating the findings made in conjunction with its settlement agreement for various workers' compensation claims, in a subsequent case regarding the employee's PSEBA claim. *Richter*, 2011 IL App (2d) 100114, ¶

PSEBA's purpose is to continue employer-sponsored health insurance coverage for public safety employees and their families if an employee is killed or "catastrophically injured" in the line of duty. *Heelan*, 2015 IL 118170, ¶ 20. The supreme court reaffirmed its holding, previously expressed in *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 400 (2003), and *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 12, that a pension board's award of a line-of-duty disability police pension establishes as a matter of law that the employee suffered a "catastrophic injury" as required to receive the PSEBA's health insurance benefits. *Id.* ¶ 25.

¶ 47 The Village argued in *Heelan* that it was denied its right to procedural due process because, under such reasoning, it was not allowed to conduct discovery and defend against the applicant's claim that he was entitled to PSEBA benefits. *Id.* ¶ 30. The court noted that procedural due process refers to whether the procedures employed to deny a person's life, liberty, or property interests were constitutionally adequate. *Id.* ¶ 31. It stated that due process requires an orderly proceeding in which a person is served with notice, has an opportunity to be heard and present objections, in a meaningful time and manner, in a hearing appropriate to the case's nature. *Id.* The court stated that the establishment of the PSEBA itself, which lacked specific criteria for benefits, made the grant of benefits a legislative rather than adjudicative decision, giving the Village all of the process that it was due. *Id.* ¶¶ 34-35. It quoted *United States v. Locke*, 471 U.S. 84, 108 (1985), in which the Supreme Court stated:

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24. One of the findings was that the employee sustained a work-related shoulder injury during an emergency response. *Id.* *Richer* is distinguishable because the municipality there was a party to the workers' compensation case and stipulated to various facts in a settlement agreement, which is not the situation here.

> " 'In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.' " *Heelan*, 2015 IL 118170, ¶ 34 (quoting *Locke*, 471 U.S. at 108).

The court stated that the rule applied to legislative changes to entitlements to public benefits, such as the PSEBA's lengthening of employer-sponsored health insurance coverage beyond the award of a line-of-duty disability pension. *Id.*

¶ 48 In *Heelan*, the Village additionally raised issues regarding its standing to petition for and obtain leave to intervene in the line-of-duty disability proceeding. *Id.* ¶ 36. The supreme court stated:

> "[T]o the extent that the Village's 'inability to litigate' at Heelan's disability pension proceeding refer[ed] to his catastrophic injury as provided in section 10(a) of the [PSEBA], the enactment of the statute itself afforded the Village all of the process that it was due." *Id.* ¶ 37.

The court continued that "to the extent that the Village's 'inability to litigate' at Heelan's disability pension proceeding refer[ed] to his award of a line-of-duty disability pension, the Village forfeited any procedural due process claim by failing to seek to intervene in the disability pension proceeding or otherwise object to the board's decision." *Id.* ¶ 38.

¶ 49 The Village now argues that the supreme court made clear that the proper venue for contesting the nature, extent, and causation of an officer's injuries is at the pension board level. The Village argues that a municipality cannot be bound by a proceeding if it had no right to

participate in the first instance, so the Board cannot be vested with discretion to deny intervention if due process is to be satisfied. The Village argues that its interests were at odds with Briscoe's and were also not represented by the Board, which was supposed to act as a neutral fact finder. The Village cites Justice McLaren's dissent when *Heelan* was before this court, in which he stated that the Village never had notice and an opportunity to be heard regarding the evidence of a catastrophic injury, which was the evidence upon which its liability for the PSEBA health insurance premiums was based. *Heelan*, 2014 Ill. App. (2d) 130823, ¶ 52. He stated:

> "Due process is not served when findings of fact and conclusions of law of a different tribunal, with no subject matter jurisdiction over the issue raised, in a different case in which the litigant was not a party and in which the litigant had no right to intervene, are binding on the trial court such that the litigant cannot contest the cause of action, demand strict proof thereof, obtain discovery, present evidence, have the trial court determine the credibility of the witnesses and the weight to be accorded to their testimony, and generally defend against judgment being entered against it." *Id.* ¶ 49 (McLaren, J., dissenting).

The Village asserts that it cannot constitutionally be bound by a determination made in a proceeding to which it was not a party.

¶ 50 Briscoe argues that the Village forfeited its due process argument by failing to raise it before the Board. A party that fails to raise an issue before an administrative body, including the issue of constitutional due process rights, forfeits that issue on appeal. *Perez v. Illinois Concealed Carry Licensing Review Board*, 2016 IL App (1st) 152087, ¶ 28. However, we believe that the Village adequately preserved this issue through its petition to intervene and its

argument below. Briscoe also argues that the Village does not have any due process rights to an individual employee's pension benefit. Briscoe further cites *Village of Riverwoods v. Department of Transportation*, 77 Ill. 2d 130, 136 (1979), for the proposition that a municipal corporation is not entitled to the protection of the due process clause in cases against the State.

¶ 51 It is true that a municipality cannot assert a constitutional claim against the State or its statutes, as the State is sovereign (*Village of Northbrook v. County of Cook*, 126 Ill. App. 3d 145, 147-48 (1984)), though this does not equate to the lack of any due process rights. Indeed, the *Heelan* court addressed many aspects of the Village's due process argument instead of simply stating that the Village was not entitled to due process. Also, the Village's argument regarding due process centers on its alleged rights regarding its obligation to pay PSEBA benefits, rather than the underlying disability pension. Whether the Village's rights were violated is a separate issue.

¶ 52 The Village's position that it had a right to intervene in the pension proceeding is only viable if *Heelan* changed the prior precedent, discussed in *Stickney* and *Williams*, that pensions boards have the discretion to decide whether a municipality may intervene. We conclude that *Heelan* created no such change. As the Fund points out, *Heelan* did not decide as an issue of first impression that an award of a line-of-duty disability pension established as a matter of law that a public safety employee suffered a catastrophic injury under section 10 of the PSEBA, but rather reaffirmed this holding based on the supreme court's own established precedent. *Heelan*, 2015 IL 118170, ¶¶ 23, 25. The first of those cases, namely *Krohe*, was from 2003, predating both *Stickney* and *Williams*. In other words, *Heelan* does not represent a new view of the law that requires that *Stickney* and *Williams* be reevaluated.

¶ 53 Additionally, *Heelan* held that the Village was not denied due process just because it could not litigate whether the applicant had suffered a catastrophic injury, as the statute used that phrase as a term of art to refer to an injury resulting in the award of a line-of-duty disability pension, and the fact that the statute was enacted gave the Village all of the process that it was due. *Id.* ¶ 23, 37. We recognize that *Heelan* further held that the Village had forfeited any argument regarding whether it suffered a procedural due process violation through the applicant's award of a line-of-duty disability pension, because the Village did not petition to intervene in that proceeding or object to that decision. *Id.* ¶ 38. However, the *Heelan* court did not hold that had the Village done so, it should have been allowed to intervene as a matter of right. Given that the court held that the extension of benefits under the PSEBA was a legislative rather than an adjudicative decision (*id.* ¶¶ 34-35), it is unlikely that the *Heelan* court would have concluded that the Village had a right to intervene in the underlying pension proceeding. Municipalities are not left without any remedy under such reasoning, as they do have the right to seek administrative review of a pension board's decision to award a pension (*Stickney*, 347 Ill. App. 3d at 851), and an applicant seeking PSEBA benefits must also show that the disability occurred during an emergency response. 820 ILCS 320/10(a) (West 2014). The Village's reliance on Justice McLaren's dissent for a contrary outcome is not persuasive, as the supreme court acknowledged aspects of his position but disagreed with him (see *id.* at ¶ 24 n.6, ¶ 32 n.7), and it ultimately affirmed the majority appellate court opinion.

¶ 54 Accordingly, *Heelan* did not undermine the analysis in *Stickney* and *Williams*, leading to the conclusion that pension boards still have discretion regarding whether to allow a municipality to intervene. Tellingly, section 3-132 of the Illinois Pension Code, on which those cases primarily rely as a statutory basis for that discretion (see *supra* ¶ 43), has not been amended.

Moreover, as *Williams* stated, an administrative hearing is not a partisan hearing. *Williams*, 398 Ill. App. 3d at 692; see also *Beggs v. Board of Education*, 2016 IL 120236, ¶ 62 (same). Allowing municipalities the *automatic* right to intervene as quasi-defendants to contest applicants' qualifications for line-of-duty disability pension could change the proceedings' fundamental nature and make them adversarial processes, contrary to established precedent. To the extent that a municipality's primary basis for intervention was to advocate against a future PSEBA claim, it could also be interjecting the proceedings with an issue that was not before the pension board. Thus, we conclude that the Village did not have the automatic right to intervene in Briscoe's line-of-duty disability pension proceeding.

¶ 55 C. Intervention as a Matter of Discretion

¶ 56 The Village next argues that even if the Board had the discretion to deny its petition for intervention, the Board abused its discretion by doing so. The Village argues that the Board erroneously ruled that allowing the Village to intervene would jeopardize Briscoe's due process rights. The Village maintains that Briscoe still would have had the opportunity to have a hearing, present evidence, call witnesses on his own behalf, and cross-examine witnesses. The Village further contends that the Board erroneously found that the Village's interests were limited to financial considerations, which was insufficient to warrant intervention. The Village argues that while it had an obligation to ensure that tax dollars were being properly spent, it also had an interest in ensuring that: only a deserving applicant received a pension; fraudulent claims were exposed; the correct job description was considered; the proper formula and financial data were considered for a pension; its officers were present for work when they were truly able to do so; and it would not be bound, in other pending worker's compensation and PSEBA litigation, to a judgment to which it was not a party. The Village argues that unlike *Stickney*, where the

appellate court affirmed the denial of the municipality's request for intervention, and akin to *Williams*, where the appellate court affirmed the grant of the municipality's request for intervention, it sought intervention many months before the hearing, and the issue was fully briefed by both sides.

¶ 57 We emphasize that the question before us is not whether the Board could have acted within its discretion by allowing the Village to intervene, but rather whether it abused its discretion by denying the Village's petition to intervene. "An administrative agency abuses its discretion when it acts arbitrarily or capriciously." *Stickney*, 347 Ill. App. 3d at 852. We further note that we may affirm an agency's decision on any basis appearing in the record, regardless of its reasoning. *Ball v. Board of Education*, 2013 IL App (1st) 120136, ¶ 27.

¶ 58 The Village's petition to intervene highlighted the financial ramifications of the proceeding on it, including for potential PSEBA benefits. It sought to depose Briscoe, his treating physicians, and the Board's appointed physicians, and to conduct an independent medical exam of Briscoe at its own expense. It stated that it wanted to explore and develop evidence regarding various aspects of Briscoe's claimed injury, specifically the nature, extent, causation, and severity of the injury; whether it was disabling; whether he was unable to perform his duties as a watch commander; whether the injury resulted from the performance of an act of duty; and whether the injury aggravated a preexisting condition. Thus, the tenor of the Village's petition and subsequent argument indicated that it sought to challenge Briscoe's claim in the manner of a full defendant. Indeed, in its reply brief, the Village argues that although defendants take the position that the informal and non-adversarial nature of pension board proceedings must be preserved, it should be an adversarial process with a municipal entity asking "the tough questions" and subjecting the applicant to cross-examination.

¶ 59 However, as stated, an administrative hearing is not a partisan hearing (*Williams*, 398 Ill. App. 3d at 692), nor are potential PSEBA claims an issue before the Board. Moreover, a pension board is not a rubber stamp for an applicant's disability pension request. Board members owe fiduciary duties to participants and beneficiaries (40 ILCS 5/1-109 (West 2014)), which include "the screening of unqualified or fraudulent disability claims, so that funds are not unfairly diverted to undeserving applicants." *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497, 544 (2006). The Board also had Briscoe evaluated by three independent physicians. See 40 ILCS 5/2-115 (West 2014)). The Board did not completely shut the Village out of the proceedings, as the Village was able to submit and argue its petition to intervene, which included evidence questioning Briscoe's version of events and his reported medical issues. The Board also issued an open-ended subpoena for evidence from the Village, and the Village turned over more than 1,800 pages of documents, including Briscoe's personnel records, reports and depositions of doctors hired by the Village for ADA evaluations, and video evidence. The Village was also able to thoroughly argue the issue of Briscoe's correct pensionable salary. Therefore, we conclude that the Board acted within its discretion when it denied the Village's petition to intervene.

¶ 60 D. Grant of Line-of-Duty Disability Pension

¶ 61 The Village next argues that the Board erred in granting Briscoe a line-of-duty disability pension. A police officer is entitled to a line-of-duty disability pension if, "as the result of sickness, accident or injury incurred in or resulting from the performance of an act of duty," the officer "is found to be physically or mentally disabled for service in the police department." 40 ILCS 5/3-114.1(a) (West 2014). Statutes regarding police officer pensions are to be liberally construed in the applicant's favor. *Mingus v. Board of Trustees*, 2011 IL App (3d) 110098, ¶ 12.

Still, the plaintiff bears the burden of proof in an administrative proceeding. *Marconi*, 225 Ill. 2d at 532. It is the pension board's function, as the finder of fact, to assess the credibility of documentary evidence and witness testimony, and to determine the appropriate weight to be given to the evidence. *Id.* at 540. We review the grant or denial of a disability pension under the manifest-weight-of-the evidence standard. See *Kouzoukas v. Retirement Board*, 234 Ill. 2d 446, 449 (2009).

¶ 62 The Village initially maintains that the Board refused to provide its three appointed physicians with evidence that Briscoe was capable of working an eight-hour day, specifically the Village's evidence depositions of two orthopedic surgeons and a copy of a video. However, as the Board points out, it did not receive the evidence cited by the Village until after the independent evaluations had taken place. In fact, the Village's physicians were not even deposed until after those evaluations. Moreover, the independent physicians did reference some of the initial documents that the Village had submitted, and Briscoe himself submitted the reports and evidence depositions of the two orthopedic surgeons as exhibits.

¶ 63 The Village next argues that under the Illinois Pension Code, an officer is disabled only if he can show that he is no longer able to provide "service to the police department." 40 ILCS 5/3-114.1 (West 2014). The Village cites *Kouzoukas*, 234 Ill. 2d at 469-70, where the supreme court stated that an officer is not eligible for a disability pension if he can perform "any assigned duty." The Village refers to its police chief's June 20, 2014, memo to Briscoe regarding his anticipated return to work. The chief stated that the memo was to set forth the department's "expectation of [his] job duties." He stated that unlike a patrol officer, the watch commander acted in "purely a supervisory and managerial function." The watch commander was not expected to respond to calls, except in instances that might require on-scene command

supervision, but even then the role was supervisory and managerial in nature, rather than involving active pursuit of the offender. The chief stated that the position was "essentially a desk job." He stated that the Department believed that the position could reasonably accommodate any physical limitation or medical condition that Briscoe may have, and that Briscoe should let them know if he would require any accommodation to perform his essential job functions. The chief stated that he was enclosing a copy of the watch commander position description; that description was also one of the exhibits before the Board.

¶ 64 The Board found that Briscoe's job duties as watch commander included assuming control during emergency situations, making assignments of personnel, and coordinating their efforts for maximum efficiency and effectiveness. It stated that Briscoe testified that his role as a commander required that he remain a sworn and commissioned police officer with police powers. It stated that he testified that his job duties required him to participate in emergency calls, and, if necessary, use force. It stated that Briscoe further testified that his lack of agility and flexibility, and his inability to squat, run, and jump, made his unable to protect himself and his coworkers while performing his job duties.

¶ 65 The Village argues that the chief and the Department define the expectations for Briscoe's assigned duties, not the Board or Briscoe's self-serving testimony. The Village argues that the Board improperly ignored the chief's memo and applied a patrol duties test by considering whether Briscoe could engage in a "hands on" manner.

¶ 66 The Board responds that the chief's memo did not say that Briscoe would never have to respond to a call, so the risks that Briscoe described would be present at every call that he was assigned to attend. The Board argues that Briscoe also took pain medication that had the side effect of clouding his judgment, and that the watch commander position required quick-thinking.

The Board contends that the chief's memo clearly required Briscoe to engage in directing, supervising, and managing officers, and it was irreconcilable that Briscoe would be able to perform these duties quickly while his medication was negatively affecting his judgment.

¶ 67 The Board additionally argues that although the memo referenced revised duties for Briscoe based on his injuries, there was no evidence that these revised duties were permanent, had been established by Village ordinance, or were approved by the collective bargaining agreement between the department and the Village. The Board argues that this type of "tenuous" light duty position was denounced in *Pierce v. Board of Trustees*, 177 Ill. App. 3d 915 (1988), and *Danko v. Board of Trustees*, 240 Ill. App. 3d 633 (1992). In *Pierce*, this court held that a police officer does not have to be suspended or retired before applying for disability pension benefits. *Pierce*, 177 Ill. App. 3d at 922. We stated:

> "We also find that plaintiff was serving on limited duty at the *convenience* of the police chief. There were no safeguards or rules protecting his limited-duty status, which, apparently, could be terminated, with minimal notice, at any time. Under such circumstances, it is unreasonable to expect a disabled officer to delay applying for disability, on the tenuous hope that such limited-duty status will continue indefinitely." (Emphasis in original.) *Id.*

In *Danko*, the court stated, "A blanket statement that the department has always tailored light duty to fit the injured officer and will 'tailor' the position to fit plaintiff is insufficient absent evidence that it can be done." *Danko*, 240 Ill. App. 3d at 647. The court held that there was no established full-time light duty position at the police department, and that if there was, it was created solely to deprive the plaintiff of his pension. *Id.*

¶ 68 We agree with the Board that, as in *Pierce* and *Danko*, there was no evidence that the department had a permanent full-time light duty position. To the extent that the Village argues that watch commander was such a position, the types of activities that Briscoe would have to engage in as a watch commander was a factual question for the Board to decide. The position description for watch commander included "the enforcement of all laws and ordinances of which the Department is cognizant." It further included "[d]irect[ing] police operations at special events, regulating flow of traffic, movement of crowds and the maintenance of order" and "[d]uring emergency situations, assume control, make assignments of personnel and coordinate their efforts for maximum efficiency and effectiveness." The chief's memo also spoke of the potential for "on scene command supervision." Briscoe testified that the job required him to use force if necessary during emergency calls. Tellingly, his injury stemmed from an active search for a suspect while he was in the watch commander position, and there is no indication in the record that the Department believed that he exceeded his role by taking such action. Thus, it was not against the manifest weight of the evidence for the Board to find that the watch commander position could require the use of force in emergency situations.

¶ 69 The Village next argues that although the Board subpoenaed documents from the Village, it did not cite a single one of those documents, thereby ignoring evidence that contradicted Briscoe's unsubstantiated and self-serving testimony. The Village maintains that the Board did not subpoena Deputy Chief Davies, who could have established that Briscoe was on the scene for only 22 seconds, or Sergeant Levicki, who could have testified that he did not see Briscoe there. The Village argues that the Board also did not consider the video evidence showing Briscoe sitting for hours in bleachers at a football game and climbing up and down them without difficulty. The Village maintains that the Board further ignored that both of Briscoe's surgeons,

Drs. Jablonsky and Citow, returned Briscoe to his duties as watch commander as of May 2, 2014, and that Briscoe thereafter went to his internist, Dr. Candocia, for a note that he could not work. Finally, the Village argues that the Board completely ignored the reports and evidence depositions of Drs. Mirkovic and Ho, who testified that Briscoe was capable of performing the job duties of a watch commander.

¶ 70 The evidence that the Village refers to represents, at best, conflicts in the evidence that were up to the Board to resolve. Regarding Briscoe's presence at the scene, the Village ignores Officer Maier's testimony that he saw Briscoe on the ground, struggling to get up. Officer Maier also testified that Briscoe told him later that night that he had fallen down and hurt himself. Briscoe filled out a Department injury report form on December 5, 2012, and he thereafter went to see various doctors for his knee and back pain. It is undisputed that he had knee surgery in January 2013 and back surgery in August 2013.

¶ 71 Regarding Briscoe's condition, the Board had him evaluated by three independent physicians. Dr. Samo opined that Briscoe's knee injury was a direct result of the fall. He opined that his back pain was due to a pre-existing condition, but the fall may have indirectly triggered the onset of symptoms. Dr. Samo opined that based on his back pain, he would not be able to assist officers in any pursuit or apprehension or be able to sit in a squad car for extended periods of time. Dr. Freeberg opined that Briscoe was not able to perform his duties as a watch commander. He opined that Briscoe was able to work only four hours per day and could not perform the duties of lifting, carrying, and apprehending suspects. Dr. Freeberg opined that Briscoe also had difficulty with any type of running, pushing, and pulling. In contrast, Dr. Tonino, whom the Board also cited in its ruling, opined that Briscoe was able to perform his normal duties as a police officer.

¶ 72 Even looking at the reports of the doctors hired by the Village, Dr. Ho opined that Briscoe's physical condition prevented him from performing some of the duties and responsibilities of watch commander, specifically standing more than 20 to 30 minutes at a time, climbing or descending stairs more than two to three times per hour, kneeling, squatting, or crawling, and any physically demanding task such as restraining or apprehending a suspect. Dr. Mirkovic opined that Briscoe could work at "a light sedentary level" but could not engage in any direct police operations, such a participation in emergency situations.

¶ 73 "If the record contains evidence to support the agency's decision, that decision should be affirmed." *Marconi*, 225 Ill. 2d at 534. Here, based on the above-cited evidence, there was ample support for the Board's determination that Briscoe was injured while performing an act in the line of duty and was disabled for service as a watch commander in the Department. In other words, the Board's award of line-of-disability pension benefits for Briscoe cannot be said to be against the manifest weight of the evidence.

¶ 74 E. Salary

¶ 75 Finally, we address the Village's argument that the Board incorrectly determined that Briscoe's pensionable salary was $119,093, as opposed to $91,918. Section 3-114.1(a) of the Illinois Pension Code states that a line-of-duty disability pension shall be, as pertinent here, "65% of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement." 40 ILCS 5/3-114.1(a) (West 2014). The Illinois Administrative Code (Administrative Code) defines "salary" as:

> "any fixed compensation received by an employee of a municipality that participates in one of the pension funds established under Article 3 or 4 of the Illinois Pension Code, which has been approved through an appropriations ordinance of the municipality.

> Salary is received regularly and is attached to the rank or class to which the firefighter or police officer is assigned." 50 Ill. Admin. Code 4402.30 (1996).

Included in the salary for pension purposes are base pay and other types of pay, such as "[l]ongevity." 50 Ill. Admin. Code 4402.35 (1996). The Code further provides that "[f]or purposes of calculating pension contributions and pension benefits," "[c]ompensation for unused accumulated vacation, sick, or personal time earned during employment, regardless of whether the compensation is received during employment or after termination," "shall not be considered compensation." 50 Ill. Admin. Code 4402.40 (1996).

¶ 76 Citing *Balderman v. Board of Trustees*, 2015 IL App (1st) 140482, the Village argues that the lack of written findings regarding the Board's calculation of Briscoe's pensionable salary renders the determination unreviewable, requiring reversal. However, we agree with the Board that *Balderman* is distinguishable because that case contained many procedural irregularities, including that the board never voted to grant the application or set the amount of the pension. *Id.* ¶ 34. Here, the Board made written findings regarding its grant of the line-of-duty disability pension and discussed the salary issue at a transcribed public meeting.

¶ 77 The Village further argues that the Board lacked authority to override the Village's decision on Briscoe's salary level. While the Board could not and did not purport to set Briscoe's level of pay as a police officer, a pension board's statutory duties include determining what an officer's annual salary should be for the purpose of calculating benefits. See *Sedlock v. Board of Trustees*, 367 Ill. App. 3d 526, 528 (2006). The *Sedlock* court additionally stated that the pension board was in the best position to determine whether the officer's most recent salary included overtime, holiday, bonus, or merit pay. *Id.* at 529.

¶ 78 The Village also asserts Board was required to follow the Department of Insurance opinion, which stated:

> "It is the Department of Insurance Public Pension Division's opinion based on the plain language of 40 ILCS 5/3-114.1(a), 'salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement,' that the salary to be used in computing a disabled police officer's pension is the salary *at the time the officer was suspended from duty or last day on payroll* and last date contributing to the pension fund. Under the scenario presented in your inquiry[,] it is the Department of Insurance Public Pension Division's opinion that the date of suspension for the officer in question was November 19, 2014; therefore, the salary to be used in computing the officer's disability pension is to be the salary the officer was being paid on November 19, 2014, equal to $91,000." (Emphasis added.)

The Village argues that the Department of Insurance opinion and section 3-114.1(a)'s plain language both make clear that the salary to be considered is the officer's salary on "the date of suspension of duty or retirement," and that Briscoe remained employed until May 20, 2015, when the Board granted his pension.

¶ 79 The Village's argument regarding the finality of the Department of Insurance opinion is without merit. Section 1A-106 of the Illinois Pension Code (40 ILCS 5/1A-106 (West 2014)) allows the Department of Insurance to "render advisory services to the pension funds on all matters pertaining to their operations." See also *Smith v. Board of Trustees*, 405 Ill. App. 3d 626, 628 (2010). In addition to the statute's plain language labeling such an opinion by the Department of Insurance as "advisory," the appellate court has explicitly stated that pension

boards are not required to follow or adopt such recommendations. *Kosakowski v. Board of Trustees*, 389 Ill. App. 3d 381, 386 (2009).

¶ 80 That being said, we recognize that where the legislature expressly or implicitly gives an agency the authority to clarify and define a statute, the administrative interpretation should be given substantial weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *Roselle Police Pension Board v. Village of Roselle*, 232 Ill. 2d 546, 559 (2009). We therefore address the language of section 3-114.1(a) and relevant regulations, beginning with principles of statutory construction.

¶ 81 In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, which is best indicated by the statute's language, when given its plain and ordinary meaning. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 25. The construction of a statute is a question of law that we review *de novo*. *Bueker v. Madison County*, 2016 IL 120024, ¶ 13. We likewise review an agency's rules and regulations *de novo*, though the agency's interpretation enjoys a presumption of validity. *Campbell v. Department of Children and Family Services*, 2016 IL App (2d) 150747, ¶ 17. Finally, this issue also involves the application of facts to the law, which we review for clear error. *Provena Covenant Medical Center*, 236 Ill. 2d at 387. An administrative body's decision is clearly erroneous only where the reviewing court is left with a definite and firm conviction that the agency committed a mistake. *Id.* at 387-88.[3]

[3] Even if the Board's determination of Briscoe's salary could be considered a factual finding that is reviewed under the manifest-weight-of-the-evidence standard, our conclusion would remain the same.

¶ 82 As stated, the Illinois Pension Code provides that a line-of-duty disability pension is to be based on the salary attached to the rank that the officer held "at the date of suspension of duty or retirement." 40 ILCS 5/3-114.1(a) (West 2014). Courts have used dictionaries as a resource to determine the plain and ordinary meanings of words. *Castro v. Police Board*, 2016 IL App (1st) 142050, ¶ 32. Black's Law Dictionary defines "suspension" as, in relevant part:

> "1. The act of temporarily delaying, interrupting, or terminating something *** 2. The state of such delay, interruption, or termination *** 3. The temporary deprivation of a person's powers or privileges *** 4. The temporary withdrawal from employment, as distinguished from permanent severance." Black's Law Dictionary 1460 (7th ed. 1999).

¶ 83 The Village takes the position that it did not "suspend" Briscoe from duty, but rather that he unilaterally chose to stop working, and that he remained on the Village's payroll and continued to receive Village-sponsored health insurance until the grant of the pension on May 20, 2015. However, while the definition of "suspension" includes a "deprivation of a person's powers or privileges," such as if the Department suspended Briscoe, the definition also includes "the state of such delay, interruption, or termination" and the "temporary withdrawal from employment." Thus, the date of Briscoe's "suspension of duty" could include the last day he actually worked.

¶ 84 Significantly, the Village's use of May 20, 2015, as the date to compute Briscoe's salary cannot logically be applied to the facts of this case. The Administrative Code defines "salary" as fixed compensation that the employee received "regularly" (50 Ill. Admin. Code 4402.30 (1996)), and Briscoe last received his regular salary on May 22, 2014, and did not receive any money after November 19, 2014. Even if the Village continued to pay his health insurance

premiums until May 2015, such premiums are not considered part of an officer's salary. *Jahn v. City of Woodstock*, 99 Ill. App. 3d 206, 209 (1981).

¶ 85 We next look at the date of November 19, 2014, which is the date the Department of Insurance used. On December 3, 2014, the Department reduced Briscoe's pay as a disciplinary measure retroactive to November 12, 2014.[4] However, Briscoe was using benefit time from May 23, 2014, to November 19, 2014, so the decrease affected only his benefit payments. Such payments would not fall into the Administrative Code's definition of fixed compensation that the employee received "regularly" (50 Ill. Admin. Code 4402.30 (1996)), and the Administrative Code further provides that "[c]ompensation for unused accumulated vacation, sick, or personal time earned during employment, regardless of whether the compensation is received during employment or after termination," is not to be considered compensation "[f]or purposes of calculating pension contributions and pension benefits" (50 Ill. Admin. Code 4402.40 (1996)). Moreover, the Department of Insurance stated that it was looking at the salary "at the time the officer was suspended from duty or last day on payroll," but the phrase "last day on payroll" is not present in Section 3-114.1(a) and is therefore contrary to its plain language. Accordingly, we do not defer to the Department of Insurance's opinion. See *Prazen v. Shoop*, 2013 IL 115035, ¶ 40 (if the agency's interpretation is erroneous, it will be rejected).

¶ 86 Given the liberal construction of pension statutes in favor of the applicant, (*Mingus*, 2011 IL App (3d) 110098, ¶ 12), we conclude that the Board's use of Briscoe's last day on duty, May 22, 2014, as "the date of suspension of duty or retirement" (40 ILCS 5/3-114.1(a) (West 2014)) was not clearly erroneous. *Cf. Kosakowski*, 389 Ill. App. 3d at 386-87 (the pension board used

[4] Briscoe states in his brief that he has filed a federal lawsuit claiming that the application of retroactive discipline to accrued benefits was unlawful.

the plaintiff's salary on the last day that he worked to determine his pension benefits, and the use of that date was not an error that would allow the pension board to later modify the pension). The Village does not contest the Board's application of other factors, such as longevity (see 50 Ill. Admin. Code 4402.35 (1996)) in determining that his salary on that date was $124,027 for pension purposes, so we need not address the issue further.

¶ 87 III. CONCLUSION

¶ 88 For the reasons stated, we affirm the judgment of the circuit court of Lake County, which affirmed the Board's grant of a line-of-duty disability pension for Briscoe based on a salary of $124,027.

¶ 89 Affirmed.