

had recorded his speed at the time of the collision; and (3) petitioner is not entitled to benefits, because Sergeant Gruenes was not performing an act of duty involving a special risk at the time of the accident. Petitioner responds that (1) the Village had no right to intervene; (2) the Village waived the issue of the admissibility of the black box by failing to raise the issue in the circuit court; and (3) the circuit court's ruling on the petition was correct and is entitled to deference. We reverse the circuit court's judgment, thereby reinstating the Board's denial of benefits. We conclude that the Board did not abuse its discretion in allowing the Village to intervene. We further conclude that the Board's denial, not the circuit court's judgment, is entitled to deference and that the Board did not err in denying benefits. Because the Village does not need admission of the black box to prevail on the ultimate issue of awarding pension benefits, we do not reach the Village's argument that the black box should have been admitted to prove its case.

FACTS

On May 30, 2003, petitioner submitted a claim for survivor line-of-duty benefits. As a matter of background, we briefly summarize the statutes on which petitioner bases her claim. When a police officer dies as a result of the performance of an "act of duty," his surviving spouse is entitled to line-of-duty benefits pursuant to section 3--112 of the Illinois Pension Code. See 40 ILCS 5/3--112(c), (e) (West 2004). The Pension Code defines an "act of duty" as, in part:

"[a]ny act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment." (Emphasis added.) 40 ILCS 5/5--113 (West 2004).

On October 8, 2003, the Village filed a petition to intervene in the proceedings, and the Board granted the request over petitioner's objection. On January 14, 2005, and June 9, 2005, the Board heard testimony from Crystal Lake Deputy Police Chief David Linder, Johnsburg police corporal Keith Vonallmen, Johnsburg Police Chief Kenneth Rydberg, and petitioner. Most of the facts are undisputed. Sergeant Gruenes was a member of the Johnsburg police department from May 15, 1997, until his death on January 24, 2003. At the time of his death, Gruenes was assigned to the Major Investigation Assistance Team (MIAT). As an active member of MIAT, he was under the direct supervision of and subject to the orders of the MIAT commander, Deputy Chief Linder. According to Deputy Chief Linder, Sergeant Gruenes was on duty 24 hours a day, 7 days a week.

At the time of his death, Sergeant Gruenes and Corporal Vonallmen were working together to investigate a missing person case. Sergeant Gruenes and Corporal Vonallmen photographed a crime scene late on the evening of January 23, 2003, and Sergeant Gruenes arrived home at approximately 2 a.m. On the following morning, Sergeant Gruenes was to get the film developed and travel to the police station for a meeting on the case. Instead, Sergeant Gruenes died in a traffic accident at 9:47 a.m.

Much of the testimony focused on the nature of Sergeant Gruenes' duties and his discretion in executing them. Deputy Chief Linder directed Corporal Vonallmen and Sergeant Gruenes to photograph items at the crime scene, process the film, and attend the next morning's briefing. Deputy Chief Linder did not specify which officer should process the film or where it should be processed. Deputy Chief Linder was unaware of how the two investigators divided up the assignments and left that to them, but he encouraged them to have the film ready for the briefing the following day.

Corporal Vonallmen testified that, as a sergeant with supervisory authority, Sergeant Gruenes could direct others to develop the film if he chose to do so. The Johnsburg police department routinely develops film at the Wal-Mart in McHenry. Corporal Vonallmen recalled that the briefing was initially scheduled for 9 a.m. on January 24, 2003, but was delayed to 10 a.m. so he could collect additional evidence and the photos would be available.

Corporal Vonallmen admitted that he had no personal knowledge of where Sergeant Gruenes was going at the time of the accident because they did not speak after 1 or 2 a.m. that morning. Deputy Chief Linder also lacked personal knowledge of where Sergeant Gruenes was driving at the time of the crash. The collision occurred at the intersection of Thayer Road and Johnson Road in Hebron Township, which was on the route that he usually traveled to work.

Sergeant Gruenes was paid by the Johnsburg police department while assigned to MIAT. Corporal Vonallmen testified that, while working for MIAT, officers were required to take orders from the Johnsburg police department and could be called away from MIAT duties.

Johnsburg Police Chief Rydberg testified that he supplied Sergeant Gruenes with a Johnsburg police department vehicle while he worked on the missing person investigation. Initially, Sergeant Gruenes was assigned Chief Rydberg's police car, and other vehicles were available for Sergeant Gruenes to use. Chief Rydberg directed MIAT team members to use department vehicles, but, on the date of the accident, Sergeant Gruenes drove a black Chevrolet Impala that he had rented while his personal vehicle was being repaired. Sergeant Gruenes allegedly preferred to use his own vehicle rather than those that the department provided. Chief Rydberg was unaware that Sergeant Gruenes was using a vehicle other than one issued by the department, but at all relevant times, a department vehicle was available to Sergeant Gruenes.

Corporal Vonallmen testified that he never used his personal vehicle for MIAT business. Generally, he would drive his vehicle to the MIAT headquarters and either partner with someone who had a vehicle or pick up a department vehicle of his own. Corporal Vonallmen stated that he sometimes drove a department vehicle home and reported for MIAT duties directly from his residence. Regulations required that such use be approved by Chief Rydberg.

Chief Rydberg testified that a duty shift begins, whether working for the Johnsburg police department or MIAT, when the officer reports for duty. When officers report for duty, they take a time sheets and start their daily activity sheets. The officers arrive at the station and check their mail boxes and e-mail before departing on patrol. When officers check in for MIAT duty, they first drive to the station to pick up a squad car. Chief Rydberg testified that, in his opinion, Sergeant Gruenes was not on duty at the time of his death because the officer was in his personal vehicle and had not yet checked in at the police department that morning.

On June 9, 2005, the Board moved to award petitioner survivor line-of-duty pension benefits. The motion failed by a two-to-two vote. The Board made a similar motion to deny benefits, and that motion also failed by the same margin.

On June 27, 2005, petitioner filed a petition for administrative review in the circuit court. On May 3, 2006, the circuit court filed a memorandum opinion, holding that the Board erred in allowing the Village to intervene. The court further held that the denial of benefits was against the manifest weight of the evidence because Sergeant Gruenes was performing an act of duty at the time of his death. The court remanded the cause to the Board for awarding benefits to petitioner. The Village's timely appeal followed.

ANALYSIS

On appeal, the Village argues that (1) the Board correctly allowed the Village to intervene; (2) the Board abused its discretion when it excluded the black box of Sergeant Gruenes' vehicle; and (3) Sergeant Gruenes was not performing an act of duty involving a special risk at the time of the fatal collision. Petitioner responds that (1) the Village had no right to intervene; (2) the Village waived the issue of the admissibility of the black box by failing to raise the issue in the circuit court; and (3) the circuit court's ruling on the petition was correct and is entitled to deference.

A. Standard of Review

This case presents issues of a party's right to intervene, the admissibility of evidence, and the ultimate decision to grant or deny the petition for benefits. As to each issue, the parties dispute the extent to which we should defer to the rulings of the Board and the circuit court. It is well settled that, under the Administrative Review Law (735 ILCS 5/3--101 et seq. (West 2004)), we review the administrative agency's decision, not the circuit court's determination. Village of Stickney v. Board of Trustees of the Police Pension Fund of the Village of Stickney, 363 Ill. App. 3d 58, 62 (2005) (Stickney II). Further, the agency's decisions on questions of fact are deemed to be prima facie true and correct and may be set aside only if they are against the manifest weight of the evidence. An agency's decision is against the manifest weight of the evidence if the opposite conclusion is clearly evident. Stickney II, 363 Ill. App. 3d at 62.

As to the ruling on the Village's intervention, "[a]n administrative agency's decision regarding the conduct of its hearing *** is properly governed by an abuse of discretion standard and subject to reversal only if there is demonstrable prejudice to the party." Wilson v. Department of Professional Regulation, 344 Ill. App. 3d 897, 907 (2003).

Regarding the ultimate decision to grant or deny the petition, "[a] reviewing court does not reweigh the evidence or substitute its judgment for that of the administrative agency, but only ascertains whether the findings of fact are against the manifest weight of the evidence and the opposite conclusion is clearly evident." Lehmann v. Department of Children & Family Services, 342 Ill. App. 3d 1069, 1071 (2003). Petitioner argues that "the Board made no findings of fact nor any decision as to whether to award [petitioner] surviving spouse benefits, thus there are no factual findings of the administrative agency to be considered to be prima facie correct." Petitioner argues that we should defer to the circuit court's factual findings because the Board members split evenly on granting the petition. Contrary to petitioner's assertion, the Board rendered a decision: the petition was denied because a majority of the Board did not vote in favor of granting it. The circuit court did not have the opportunity to hear the witnesses and weigh their testimony, and petitioner cites no authority for deferring to the circuit court's findings.

The Village argues that this case presents a mixed question of law and fact, which is ordinarily subject to reversal only if it is clearly erroneous. Marconi v. Chicago Heights Police Pension Board, 361 Ill. App. 3d 1, 16 (2005). The clearly-erroneous standard of review is between the manifest-weight-of-the-evidence standard and the de novo standard, and it provides some deference to the agency's experience and expertise. Marconi, 361 Ill. App. 3d at 16. However, when faced with undisputed facts, this court has twice applied the de novo standard of review when determining whether a police officer was injured as a result of performing an "act of duty" as that phrase is defined by section 3--114.1 of the Pension Code (40 ILCS 5/2--114.1 (West 2004)). Alm v. Lincolnshire Police Pension Board, 352 Ill. App. 3d 595, 598 (2004); White v. City of Aurora, 323 Ill. App. 3d 733, 735 (2001). As in Alm and White, the facts of this case are essentially undisputed, and the only

substantive issue to be decided is whether Sergeant Gruenes died as a result of an "act of duty" as that phrase is defined by section 5--113 of the Pension Code. Therefore, consistent with Alm and White, we review the ultimate denial of petitioner's claim de novo. However, we first consider petitioner's argument that the Board erred in allowing the Village to intervene.

B. The Village's Intervention

Petitioner argues that she is entitled to a new hearing on her petition because "[t]he Village did not have a right to intervene in pension hearings before the Board." Petitioner relies upon Village of Stickney v. Board of Trustees of the Police Pension Fund of the Village of Stickney, 347 Ill. App. 3d 845, 854 (2004) (Stickney I), in which the Appellate Court, First District, held that a village does not have the statutory right to intervene in a police pension board's proceedings. However, that court further held that the board in that case had "the power to exercise its discretion in deciding whether to allow a party to intervene." Stickney I, 347 Ill. App. 3d at 851. Consistent with Stickney I, we conclude that the Board had the discretion to allow the Village to intervene. Because we review the final decision of the Board and not the circuit court's determination (see Stickney I, 347 Ill. App. 3d at 848), we disregard the circuit court's decision on the issue and instead determine whether the Board abused its discretion (see Stickney I, 347 Ill. App. 3d at 852).

"An administrative agency abuses its discretion when it acts arbitrarily or capriciously." Stickney I, 347 Ill. App. 3d at 852. In this case, the Village petitioned to intervene, and twice the Board gave petitioner the opportunity to respond to the proposed participation. The Board granted the Village's petition to intervene and did not limit the Village's participation. We have examined the record to determine whether the Board acted arbitrarily or capriciously when it allowed the Village to intervene, and we conclude that the Board did not abuse its discretion.

Petitioner states that two of the four Board members were appointed by the Village, and she hints that their votes were biased. Petitioner argues that "[b]y allowing the Village to intervene, the Board unfairly added another voice on it for which the legislature did not intend." "[A] claimant in an administrative proceeding is constitutionally entitled to fair and impartial adjudication." Coyne v. Milan Police Pension Board, 347 Ill. App. 3d 713, 721 (2004). However, establishing partiality requires more than merely stating why an adjudicator might have harbored bias. Persons serving on administrative tribunals are presumed to be fair and honest. "To prove bias or prejudice, a claimant must show that such persons were incapable of judging the controversy fairly and on the basis of its own circumstances." Coyne, 347 Ill. App. 3d at 721. Petitioner has offered no evidence of bias, and we reject that as a basis for declaring the Village's intervention to be an abuse of discretion resulting in reversible error.

C. "Act of Duty"

Finally, we address whether the Board erred in denying the petition. Petitioner is entitled to Sergeant Gruenes' pension benefits if his death was the result of "[a]ny act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment." 40 ILCS 5/5--113 (West 2004).

In several cases, reviewing courts have interpreted the phrase "act of duty" while considering police officers' pension claims. In Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund, 114 Ill. 2d 518 (1986), the police officer was assigned to traffic-control duty at a busy intersection. While the officer was at his assigned post, a citizen standing at a corner of the intersection called to him for assistance regarding a traffic accident. In the process of crossing the

intersection to investigate and respond, the officer slipped on wet pavement and fell, suffering a serious injury. Johnson, 114 Ill. 2d at 520. On review, the supreme court expressly rejected the notion that the term "special risk" contained in section 5--113 encompasses only inherently dangerous activities. Johnson, 114 Ill. 2d at 521. The court observed that, while police officers assigned to duties involving the protection of the public often discharge those duties by performing acts that are similar to those involved in many civilian occupations, "[t]he crux is the capacity in which the police officer is acting." Johnson, 114 Ill. 2d at 522. The supreme court concluded that, although the officer was injured while performing the mundane task of walking across the street, the act of responding to the call of a citizen for assistance qualified as an "act of duty" for the purpose of awarding a disability pension. Johnson, 114 Ill. 2d at 522. The court emphasized that the police officer's sworn duty to respond to the citizen, regardless of the hazard ultimately encountered, was unique to a traffic patrolman and different from any civilian occupation. Johnson, 114 Ill. 2d at 522.

In Alm, the police officer was assigned to the police department's bicycle patrol unit. His shift was from 11 p.m. to 6:30 a.m. The officer testified that his job on the date of his injury "was to do premise checks, check buildings in our industrial park, patrol the parking lots of businesses that are open, the downtown area, and then later on in the night head over to the residential area." Alm, 352 Ill. App. 3d at 596. The assignment involved riding on a variety of terrain, such as up curbs, through grass, and behind buildings; and the officer carried approximately 20 pounds of gear on his person and another 5 to 10 pounds in a police bag attached to the back of the bicycle. As a member of the bicycle patrol unit, the officer had made drug arrests, conducted traffic stops, and issued both parking tickets and tickets for moving violations. During bicycle patrol training, he was taught to stay on his bicycle as much as possible because the bicycle gave him a mechanical advantage over people on foot.

While pedaling his bicycle at about 2 a.m., the officer suffered a serious knee injury without falling or experiencing any other sort of accident. Alm, 352 Ill. App. 3d at 596.

The officer was denied benefits, based on a finding that he was not on duty. On appeal, we reversed the decision, concluding that the officer established that he had incurred a disabling injury while pedaling his bicycle, which qualified as an act of duty. Alm, 352 Ill. App. 3d at 601. We emphasized that the officer faced special risks not ordinarily encountered by civilians because he was required to ride his bicycle at night over varying terrain, looking after his own personal safety while also remaining vigilant in the performance of his patrol duties; and he carried heavy equipment, which increased the risk of falls and collisions and compounded the risk of dangerous encounters with "unsavory elements of society." Alm, 352 Ill. App. 3d at 601.

In Alm, we criticized White, in which an officer assigned to patrol duties slipped and suffered a disabling injury when he exited his squad car to issue a parking ticket. A divided panel of this court held that White was not entitled to line-of-duty benefits. The majority in White compared an officer issuing a parking ticket to a civilian placing a notice or flyer on a windshield, and it noted that the municipality actually employed civilians to enforce traffic regulations. White, 323 Ill. App. 3d at 737. The White court distinguished Johnson, concluding that Johnson " 'ha[d] no option as to whether to respond' " while "White chose, at his own discretion, where and when to stop his vehicle and how and when to exit it." White, 323 Ill. App. 3d at 737, quoting Johnson, 114 Ill. 2d at 522. However, in Alm, we concluded that the discretion mentioned in White should have referred to "discretion to perform the act, not discretion with respect to the manner in which the precise physical components of the act were performed." Alm, 352 Ill. App. 3d at 602. In other words, an officer's discretion to

perform an act is relevant to whether the capacity in which he acts involves a special risk. Alm, 352 Ill. App. 3d at 602.

In this case, the Board members split evenly on the issue of whether Sergeant Gruenes was performing an act of duty involving a special risk, and the Board did not enter any written findings. Petitioner was denied benefits simply because a majority of the Board did not grant her petition. In reversing the denial of benefits, the circuit court entered several written findings and commented as follows:

"[Sergeant Gruenes'] duty involved special risk not usually undertaken by the general public. He worked long, late hours, only to be immediately on duty the following day finishing his assignment. These are intrinsically police activities not usually undertaken by the general public or the ordinary citizen. *** [Sergeant Gruenes'] activities in the investigation of the *** missing person case were an element of his duty to protect and serve the public. This activity inherently involves special risk not ordinarily undertaken by a citizen."

The circuit court based its decision on Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund, 137 Ill. App. 3d 546 (1985), aff'd, 114 Ill. 2d 518 (1986), but we conclude that the court misinterpreted Johnson and its progeny. The Village emphasizes the procedures under which officers like Sergeant Gruenes would check in each morning and the latitude he and his partner enjoyed in dividing their tasks. However, the evidence shows that Sergeant Gruenes and others did not adhere to the check-in procedures strictly. Furthermore, "the discretion involved in performing specific physical activities is not relevant because such discretion does not bear upon the capacity in which the officer [was] acting." Alm, 352 Ill. App. 3d at 602. Indeed, Sergeant Gruenes and Corporal Vonallmen worked late into the night on January 23, 2004, and Sergeant Gruenes'

supervisor directed the investigators to develop the film before the next morning's meeting. Also, the Board heard testimony that, as a member of MIAT, Sergeant Gruenes was on duty 24 hours a day and 7 days a week. Thus, petitioner established that Sergeant Gruenes was on duty on the morning of the accident, but that does not end our inquiry.

While proof that an officer died while "on duty" is necessary to receive survivor line-of-duty pension benefits under section 3--112 of the Pension Code, such proof is not sufficient unless performing the act of duty "inherently involv[es] special risk, not ordinarily assumed by a citizen in the ordinary walks of life." 40 ILCS 5/5--113 (West 2004). We conclude that Sergeant Gruenes was on duty at the time of his death, but his performance of the act of driving to a department store to develop photographic film did not inherently involve special risk, not ordinarily assumed by a citizen in the ordinary walks of life. On the morning of his death, Sergeant Gruenes was not confronted with the types of risks peculiar to police officers; he was simply running an errand routinely completed by civilians. We distinguish this case from Johnson, where the officer was summoned by a citizen reporting a traffic accident, and from Alm, where the officer was patrolling on his bicycle late at night.

This case is more like Morgan v. Retirement Board of the Policemen's Annuity & Benefit Fund, 172 Ill. App. 3d 273 (1988). In Morgan, the appellate court ruled that a line-of-duty benefit is unavailable to an officer performing a function that civilians commonly perform. In Morgan, the officer became disabled when a chair rolled out from under him as he was filling out a police report at his desk, and therefore, he was not entitled to a line-of-duty pension. Morgan, 172 Ill. App. 3d at 276-77. While the traffic fatality in this case is tragic and much more serious than the fall suffered in Morgan, the act performed in each case was a function that civilians commonly perform, and therefore pension benefits should be denied. We conclude that the circuit court erred in reversing the

denial of petitioner's claim for benefits. Petitioner's claim for survivor line-of-duty pension benefits lacks merit.

Finally, we need not comment on the Village's argument that the Board abused its discretion in excluding the black box, which indicated Sergeant Gruenes' speed at the time of the collision. We conclude that the remaining evidence supports the Village on the ultimate issue of awarding pension benefits, and therefore, the black box is unnecessary to defeat petitioner's claim.

For the preceding reasons, we reverse the judgment of the circuit court of McHenry County.

Reversed.

McLAREN and KAPALA, JJ., concur.