2013 IL App. (1st) 123665-U

FIFTH DIVISION
December 20, 2013

No. 1-12-3665

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREGORY H. LITTLE, Plaintiff-Appellant, v. ILLINOIS CIVIL SERVICE COMMISSION; CHRIS KOLKER, Chair, BARBARA J. PETERSON, Commissioner, BETTY A. BUKRABA, Commissioner, RAYMOND W. EWELL, Commissioner, ARES G. DALIANIS, Commissioner, DANIEL STRALKA, Administrative Law Judge; THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS; and BRIAN A. HAMER, Director, The Department of Revenue, Defendants-Appellees.	Appeal from the Circuit Court of Cook County 11 CH 31923 Honorable Michael B. Hyman, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

HELD: Sanction of termination of employment with State agency was warranted where plaintiff was a supervisor and repeatedly and unjustifiably entered inaccurate times on his time sheets.

¶ 1 Plaintiff Gregory H. Little was fired from his job as a salaried supervisor of investigators for the defendant Illinois Department of Revenue (Department), on grounds that he

falsified time sheets in 2010. Little's action for administrative review by the circuit court of Cook County was unsuccessful and he now seeks further review in this appellate court. He contends the manifest weight of evidence does not show he falsified his time records or, in the alternative, that the sanction of termination was excessive.

¶ 2 The record includes exhibits and transcripts of testimony given by investigative personnel, administrative personnel, and Little's supervisors and subordinates. It shows the following.

¶ 3 Little's 24 years of employment with the Department began on June 28, 1986. In February 2008, he took the position at issue supervising the Northern Enforcement Division of the Department's Bureau of Criminal Investigations. The bureau investigates criminal violations of tax laws. Little's official title was "Senior Public Service Administrator," his office was in Des Plaines, Illinois, and as the northern division supervisor, Little directed the work of 16 field agents. Little has described the northern territory as the 20,000 square miles of Illinois that lie north of Interstate Highway 80. Accurate timekeeping was a priority for the Department from the very beginning of Little's tenure as a supervisor, although initially the focus of attention was the practices of his field agents. According to Little's testimony, the northern division had gone without a local supervisor for about three years prior to his arrival and Little's supervisor, the program administrator for tax enforcement, Patrick Welch, who worked in Springfield, Illinois, was "very concerned" the northern agents had become lax in their job performance and time recording. Consequently, Little reimplemented a statistical reporting system that had been used in the 1980's so the agents could see what their peers were reporting and Little could compare

field hours with field activity reports, to ensure that the agents were being productive with their time and efforts.

¶ 4 According to the Department, Little's position was salaried but required a fixed work schedule with prior notice to a supervisor by telephone or email when a divergence from the schedule was necessary. Little's own timekeeping practices came to his supervisor's attention in April 2008 when Little submitted his first two months of time sheets at once. Welch told Little that he needed to be filing the weekly time sheets without delay. Then, in August 2008, the administrative aide who was processing Little's time sheets in Springfield told Welch that Little missed some of his scheduled hours without requesting leave. When the aide had pointed out this discrepancy to Little, he submitted a leave slip for a Friday when he "decided to take a day's vacation" but he refused to complete a leave slip for missing 2.5 hours on a Monday morning because he believed he had worked enough hours to take the time off without using benefit time. Welch, however, told Little and the aide through email, that in accordance with the Department's employee handbook, Little would have to submit a leave slip for his late Monday arrival to the Des Plaines office, and Welch also told Little to take the time to read the entire handbook. Little then turned in a leave slip for the 2.5 hours, but contended that as a black male he was being harassed and treated differently than Welch treated one white female investigative agent who was having "child care issues" and all of Little's predecessors in the supervisory position, who had been white males. Little excused his 2.5 hour absence as the use of "supervisory discretion to flex [his] schedule" and he asked how he would be compensated for having ever worked outside the "normal work hours of 8:30 AM to 5:00 PM," such as when he was getting his State vehicle

serviced. Welch responded that the employee handbook addressed all of Little's concerns and indicated Little had to be in the Des Plaines office by 8:30 a.m. in order to supervise the employees under his supervision; "Management does not get paid for overtime, or receive compensatory time;" and any employee taking "flextime hours" had to get prior authorization. Little responded that the Department's employee handbook seemed to conflict with the handbook for the investigatory bureau he worked for, because when the bureau's manual stated supervisors should be available to answer their cell phones outside the hours of 8:30 a.m. and 5:30 p.m., Little took this to mean "supervisors have some discretion in their work schedules." Little also said he had standing authorization to use "flextime" in order to teach at Triton College. Little reiterated that he felt Welch was harassing him and creating a hostile environment. The Department's chief of staff, Lainie Krozel, was also participating in the email conversation with Welch, Little, and the administrative aide that processed time sheets. Krozel replied to Little that the Department took allegations of harassment and work place hostility seriously and to her email she attached an "Employment Discrimination Complaint" form for Little to complete and submit to the Equal Employment Opportunity Commission (EEOC). Continuing, Krozel acknowledged Little garnered approval in 2008 for his secondary employment at Triton College, but, pointed out that on the form he filled out to request approval, Little said he taught after 7 p.m. on Wednesdays and that although his teaching schedule might change from semester to semester, there would be " 'No conflict' " and " 'my teaching assignments would always be opposite of my assigned or necessary hours.' " A couple of weeks later, in September 2008, Welch also followed up with Little and told him the employee manuals governing the Department and its investigative

bureau were consistent; Welch reiterated that Little did not have "authority to flex [his] own schedule;" and, because Little had used the need to service his State vehicle as an excuse for arriving late one morning, Welch told Little, "All vehicle maintenance must be done during work hours, not before or after."

¶ 5 In March 2009, Welch left the Department and was replaced by John Chambers, whose office was also in Springfield. The following month, the Department created the position of "Bureau Manager," which ranked between Chambers and Little in the chain of command, and the new position was filled by Barbara Bruno, who took an office in the Des Plaines facility. Chambers testified in these proceedings that Little had a personal conflict with Bruno, told Chambers that "If he was going to report to anyone, it would be [Chambers]," and Chambers somewhat acquiesced to this arrangement.

¶ 6 Chambers also testified that Little was occasionally needed in the field with his agents, but was expected to spend most of his time in his office in Des Plaines. The division of time was approximately 80% at his desk in Des Plaines and 20% in the field. The time records that led to Little's dismissal are for the first half of 2010. In April 2009, Chambers approved Little's written request for a "9 day" alternative work schedule, in which, instead of working his established hours of 8:30 a.m. to 5:00 p.m, Little's schedule became 7:30 a.m. to 5:00 p.m. Monday through Friday, except the first Friday would be a day off and the second Wednesday would be a "short day" day ending at 3:30 p.m. In September 2010, Chambers approved Little's written request for a "9 day" alternative work schedule in which the first Monday would be Little's day off and the second Monday would be the "short day." Chambers testified that if Little

ever wanted to work extra hours that could be credited against his established schedule of 37.5 weekly hours, Little would have to telephone and then email Chambers for approval. For instance, in 2010, Little contacted Chambers when he needed to be out in the field with his agents in the evenings for "a few cigarette [tax stamp evasion] investigations" and "another case involving theft of merchandise from a railroad yard." However, even if Little was working these additional hours in the evenings, Chambers expected Little to adhere to his "9-day" work schedule.

¶ 7 In May 2009, the Department charged Little with "time abuse" for teaching at Triton College three times a week during his scheduled work hours and because his recorded time sheets conflicted with his key card access logs 83 times. Little was also charged with misuse of his State vehicle for using the car to drive to his secondary employment and with conduct unbecoming a State employee in September and October 2008, because he sent "racist and threatening emails" to his then-supervisor, Welch. A pre-disciplinary hearing was convened. For reasons that are not disclosed by the record, the parties agreed to a written reprimand which addressed only the vehicle misuse charge. Little contends the time abuse and unbecoming conduct charges were deliberately dropped, although he has no explanation for this resolution, and the Department attributes the single reprimand to a mistake. The written reprimand was signed by Little's manager, Bruno.

¶ 8 In November 2009, Chambers cautioned Little that there were "continued variations" between his approved schedule and time sheets. Chambers wrote in the email, "It's no big deal, I just request that the hours you work correspond with the schedule A-9011," which was a

reference to the Department form used to request and approve an alternative work schedule. Chambers testified in these proceedings that Little's attendance actually was "a big deal" but Chambers was trying to give Little the benefit of any doubt and a reminder that he needed to conform with his approved work schedule. Little wrote back that there was no reason to be concerned about the time he worked because he consistently exceeded the hours required of him. In this November 2009 email, Little also said he would continue to vary from his approved schedule and that he had no intention of informing anyone in the future when he left early due to having exceeded his minimum work hours, because he was sure everyone would agree it was unnecessary. Little added that, in his opinion, even raising the issue had been a waste of his time (a "needless use of time to answer questions that are non-questions"). Chambers had asked the administrative aide who was processing Little's time sheets to tell Chambers whenever she saw an anomaly on a time sheet, but Little told the timekeeper to contact him directly with any subsequent question about his time sheets instead of reporting her concerns to their superiors. Chambers and Bruno discussed disciplining Little but decided this would only provoke further animosity instead of compliance. Chambers did not respond to Little.

¶ 9 Meanwhile, the relationship between Little and his immediate supervisor, Bruno, was steadily deteriorating because he considered her unqualified for her position and she considered him to be disrespectful of her. In late 2009 and early 2010, a disagreement flared about Little's duties and whether he was being "supervised" by Bruno and Chambers or only "coordinat[ing]" his work with theirs. Bruno insisted that she had been hired to supervise Little and another regional supervisor. By January 2010, Bruno and Little, who were in the same facility in Des

Plaines, rarely had direct communication and relied on texting or emailing. In an email to Chambers and Bruno in March 2010, Little contended that by broaching the subject of the reporting structure, Chambers had opened "the proverbial 'Pandora's Box' " and "should prepare to address any fallout or potential litigation from your decision to open this matter." Continuing, Little contended that Chambers was misattributing the source of information about their reporting roles and changing the rules about Little's authority to "seek assistance or delegate." Little then posed three "rhetorical" questions which he said he did not expect to be answered at that time:

> "a) are you targeting my position or me to insure that there is someone more acceptable or more palatable to you and [Bruno] by seemingly invoking or directing arbitrary and capricious rules or statements towards me that seem to have no supporting foundation; b) are you targeting me and/or my position in an attempt to demonstrate that I am incapable of completing tasks that are both herculean in scope and have also never been asked of any [Bureau of Criminal Investigations] supervisor in the history of the Bureau (at least in my twenty plus years), thus rendering me ineffective; c) are you engaging in this behavior that effectively seems to attack, embarrass, or minimize my position or me because of my race?"

¶ 10 In March and April 2010, the situation worsened when Bruno reported Little for sending an email to his agents describing one of her emails as "maladroit" and Little filed seven complaints with the EEOC alleging that she was discriminating against him because of his race

and gender. While Little's EEOC complaints were pending, Bruno filed charges against him on April 30, 2010, with the Department's Office of Internal Affairs, contending he was disrespectful, bullying, unprofessional, and unable or unwilling to follow the chain of command.

¶ 11 The Department's Internal Investigations Division opened an investigation and determined that while many of Bruno's allegations could not be substantiated, Little had repeatedly violated his "9-day" work schedule. The acting chief investigator was alerted to this possibility when Bruno said during her interview that Little came and went from their Des Plaines office as he pleased and by the email Little sent to Chambers in November 2009 announcing that he would self-adjust his approved schedule and had no intention of informing anyone about his changes. This led the investigator to narrow his focus to the first half of 2010 and request copies of Little's time sheets and the records generated by the I-Pass transponder (the Illinois electronic toll road collection system) that was in his State-owned vehicle, his swipe-card access into the Des Plaines office, and his computer network logins and logouts. The investigator found numerous discrepancies between Little's time sheets and the electronic records and a lack of leave slips or corroboration of field activity in his subordinates' activity reports. The investigator determined that Little was often coming to work late or leaving early, so that he was working less hours than he was required under his approved schedule. Also, the I-Pass records indicated Little was again or was still using his State vehicle to get to Triton College in River Grove, Illinois, where he taught on Mondays and Wednesday at 5:30 p.m. And, when one of Little's female agents, Senica Evans, was interviewed by the acting chief investigator and another investigator, she told them Little came to her house in Calumet City, Illinois, several

times to discuss personal matters and used his State vehicle to get there. The I-Pass records confirmed Little was in the Calumet City area on seven instances in January, March, and April, generally late at night, and none of these trips were recorded in his vehicle log, which made the investigator question the veracity of the entire log.

¶ 12 As a result of this internal investigation, in July 2010, Little was charged with "time abuse," "falsification of time records," and "misuse of state vehicle and state property." The time abuse charge was because Little was disregarding his approved work schedule. The falsification of time records charge was an allegation of fraud because Little was recording arrival and departure times at the office which were inconsistent with his electronic records. The vehicle charge was based on Evans' statement that Little was making personal use of State resources.

¶ 13 Little was given the investigators' supporting documentation and an opportunity to respond at a pre-disciplinary hearing. He attributed the charges to discrimination and being singled out by Bruno and he said he had filed seven EEOC charges against her which were still outstanding. The acting chief investigator noted, however, that all of Little's EEOC charges had been closed as unfounded. Little then presented a written rebuttal to the charges, and as a result, the Department withdrew 13 of the claimed discrepancies and revised the charges, but maintained the time abuse and falsification allegations on 80 of them. The Department placed Little on 30-day suspension as of September 10, 2010, pending discharge, and it terminated his employment on October 15, 2010, for cause.

¶ 14 Little sought review by the Civil Service Commission and the matter was assigned

for hearing before an administrative law judge (ALJ). The ALJ received written arguments and exhibits and heard eight days of testimony in February, March, April, and May 2011. During the administrative hearing, Little again attributed the charges against him primarily to his poor relationship with Bruno and specifically because (1) in January 2010 he admittedly made some "highly inappropriate" and "extremely distasteful" remarks about her as a person in front of their subordinates and (2) in April 2010 he complained about her to the EEOC. He argued that instead of waiting 13 weeks after the inappropriate remarks to report him to the Internal Affairs Office, Bruno should have addressed the incident as a personnel matter and that she demonstrated her own failure as a supervisor when she reported him instead of giving him her own "remedial supervisory training" or other form of managerial assistance. He said the investigators' conclusion that many of her allegations could not be substantiated was an indication that her report was not credible and perhaps even false. He contended that he was "very self-sufficient" instead of insubordinate or disrespectful to a woman who was "incapable of understanding what we [tax investigators] did."

¶ 15 Little did not dispute the Department's electronic records, but contended there were other facts indicating the time abuse and records falsification charges were incorrect. He contended that his actual time entries were immaterial so long as his reported hours for the day exceeded his scheduled hours. He argued that what was actually clear from the time records being used against him was that he "went far beyond and above his work schedule" and complied with the bureau's policies. His policy argument was based on a statement in the bureau's employee handbook regarding "On-Duty Time" that said, "[d]ue to the nature of the duties [that]

sworn personnel are required to perform, irregular work hours may be necessary to complete assignments." He also pointed to the statement entitled "Obligation to Respond to A Call to Duty," which said personnel "may be subject to a call to duty, at any time, day or night, to meet the operational needs of the bureau." Little resided in Bolingbrook, Illinois and testified that when he stopped on the way to work in the morning to put gas in the State-issued vehicle, he would record that errand as the start of his work day rather than when he arrived at his office about 30 minutes later. Little testified this was an agency practice and that Welch specifically told him this was allowed. Welch denied this was an agency practice and he identified the email he sent to Little in 2008 telling him that all vehicle maintenance had to be done during work hours, not before or after. Krozel also testified that this was not an allowed time keeping practice.

¶ 16 Little testified that he recorded time on his time sheet if he ever worked at home with email or written reports, made or answered a telephone call that was either during his off-hours or his commute to Des Plaines, or was in the field at night to assist his agents. Little testified that he was typically on State business as soon as he left home every work day because his commute would be interrupted by a call or the need to stop for fuel. Little testified that his motivation for recording these tasks was to be compliant with the State Officials and Employees Ethics Act, 5 ILCS 430 (West 2010) (Ethics Act), rather than to be credited with the hours. Little said, however, that the agents reporting to him did not start their workday from the moment they made or received a cell phone call with Little, because they were not subject to the Ethics Act. And, contrary to Little's testimony, when the ALJ reviewed Little's time records, the ALJ found

that Little was taking credit for the time he purportedly worked at home against the hours he was required to be at the office for the day or the week. Little testified this was how he had been completing his time sheets for several years without complaint or question from the Department and that Chambers had regularly signed off on Little's time sheets. Little also informed the ALJ that Little had filed a Section 1983 federal civil rights lawsuit against the Department's chief of internal affairs, investigative personnel, and director of labor relations and that although he was not "at [t]his point, proffering evidence" that the charges against him were in retaliation, he was arguing the charges were not reasonable, specific, and unbiased. Welch and Chambers both denied that Little was allowed to work at home without supervisory approval. Chambers testified that there were only six or seven occasions between January and June 2010 when he had authorized Little to work outside the office and the acting chief investigator testified that these days had been eliminated from the pending charges. Chambers also testified that when he signed off on one of Little's time sheets, it would be one of several hundred administrative documents he signed at a time and that he was relying on Little to accurately submit his time. However, Chambers also said his signature on a time sheet indicated the information was " 'accurate and correct.' " In addition, Little recorded himself as being on official State business when he drove to a meeting at the EEOC to discuss filing charges against the Department, but the Department's witnesses denied that this time should be considered work time. According to Little, he justified every one of the 80 days at issue and his explanations consisted mostly of working at home; servicing the vehicle; assisting, conferring with, or "Maintain[ing] availability" to field agents; and being delayed by weather or a vehicle breakdown. Little contended the time sheets showed

he actually worked extra hours on 65 of the 80 days and had not requested "any compensation, remuneration, or other monetary or beneficial consideration for the time worked."

¶ 17 Little testified there were days he arrived at the office after his scheduled start time, but he entered his scheduled start time on the time sheet because he was " 'close enough.' " An example of this was January 5, 2010, when his swipe card was activated at the Des Plaines office at 7:44 a.m., but Little's time sheet entry was 7:39 a.m. Although Little testified that his standard for doing this was " 'twenty to thirty minutes,' " even his personal standard was contradicted by instances such as January 11, 2010, when Little recorded his start time as 7:30 a.m. and his swipe card indicated he arrived at 8:05 a.m. – a difference of 35 minutes. Both Welch and Chambers denied that " 'close enough' " was an allowed practice within the Department and Welch added that in his opinion, rounding up or down to the nearest tenth or quarter hour was acceptable. Through Welch and Krozel's testimony, the ALJ also had the emails exchanged in August and September 2008 when Welch reminded Little that he had no authority to use "flextime" and was expected to be in the Des Plaines office by his scheduled start time in order to supervise his staff, Little's response expressing confusion or disagreement about approval to alter his schedule in order to teach at Triton College, Krozel's response that there was no approval in place for flextime, and Welch's additional response, "You still do not have the authority to flex your own schedule." Welch testified that he found discrepancies in Little's subsequent time sheets but did not take disciplinary measures. Krozel testified that flextime and an alternative work schedule were two different things and that Little never received approval for flextime during his employment with the Department. Little brought up the possibility that there were days that his

time sheet entry did not coincide with his first swipe-card entry of the day because he had "tailgated" or followed closely behind an agent who used his or her swipe card to unlock the door.

¶ 18 The ALJ summarized that the time sheets indicated Little neither adhered to his alternative work schedule "with any consistency" or maintained any other pattern to his work hours. Some days his recorded start time was as early as 4:00 in the morning but on other days it was in the afternoon. Some days his recorded end time was as late as 3:00 in the morning and on other days it was before noon. Based on the testimony and exhibits, the ALJ concluded that there were 52 specific days when Little did not adhere to his approved work schedule or obtain approval to deviate from his scheduled work hours. There were also 64 specific instances when his actual time on State business did not match the entries on his time sheets, and the differences were as small as 11 minutes or as big as several hours.

¶ 19 The ALJ also concluded that although Chambers characterized his signature on Little's weekly time sheets as merely a ministerial act, Chambers' signature had to be construed as verification and/or approval, otherwise there was no reason for Chambers to sign the time sheets. Therefore, Chambers knew or should have known that Little was not working the hours on his alternative work schedule and Chambers' failure to take action constituted tacit approval of Little's conduct. The ALJ reached the same conclusion about management's failure to respond to Little's November 2009 email, which "puts [the Department] on notice not only that Little has a skewed understanding of his schedule requirements, but also [has a] mistaken view that his current timekeeping practices are in compliance with agency requirements." The Department's

written employment policies would typically have been sufficient notice to Little that his non-approved work hours were inappropriate and could lead to discipline up to and including his termination, however, the supervisors' failure to respond to Little's "defiant and borderline insubordinate e-mail response that he intends to continue this practice that the agency now finds objectionable" was tacit agreement to continue his erratic schedule. In other words, at some point, the failure of Little's supervisors to chastise or reprimand him as he continued this practice over such an extended period of time allowed him to conclude that his work schedule was acceptable. Thus, although Little clearly violated his alternative work schedule, the circumstances did not support a conclusion of time abuse.

¶ 20 The ALJ further found, however, Little offered no credible explanation to rebut the evidence that he falsified his time records by intentionally making inaccurate entries on his time sheets to make it appear he was on official State business when he was not. The electronic records, although not infallible, established "with acceptable accuracy" when Little arrived and departed from the Des Plaines office and the explanations he offered in his written rebuttal and oral testimony were insufficient to overcome the numerous discrepancies between his actual arrivals and departures and his time entries. Although Little contended Bruno set the falsification charge in motion due to their personality conflict, there was minimal evidence to that effect and Little, "despite being encouraged to do so by the [ALJ] did not call [Bruno] as a witness to explore this avenue." In addition, many of Little's explanations for why he credited himself with work time while outside the Des Plaines office "were not believable." The evidence indicated Little recorded work time while commuting to/from the Des Plaines facility, driving to

Bolingbrook to contest a parking ticket, driving to downtown Chicago to file a complaint against the Department ("this one being the most puzzling" to the ALJ), and taking work-related telephone calls and conducting administrative tasks at home. The ALJ reasoned that "a modicum of common sense" indicates that supervisory employees, for the most part, do not start getting paid until they arrive at the office and they do not count hours working at home. Also, the Department had a work-at-home policy which Little neither followed nor requested. Furthermore, the emails in 2008 regarding vehicle maintenance put Little on notice that fueling his vehicle while enroute to Des Plaines was not the legitimate start of his work day. Little insisted that the Department allowed his practices to occur, but the email records and testimony from Krozel, Welch, and Chambers consistently indicated that this was not true, and Little was left with nothing but his own testimony to counter this evidence. He also tried to attribute his unusual time keeping practices to a clause in the Ethics Act indicating he should document his work, however, Little did not segregate these off-hours on his time sheets as off-hours and he took credit for them when he contended he routinely put in more hours per day or week than was required of him. He also argued that when the Ethics Act indicated he should round his recorded time to the nearest quarter hour, it required him to record his 7:44 arrival on January 5, 2010, as 7:30 a.m., but this rationalization was not convincing to the ALJ, who determined the statute did not give employees a 15-minute grace period and that the nearest quarter hour to 7:44 was 7:45. The ALJ also rejected Little's personal 20-to-30 minute grace period as "close enough" and noted that the Department's witnesses denied such a practice existed.

¶ 21 Ultimately, the ALJ concluded that even accepting many of Little's excuses would

leave at least 28 unexplained instances when he entered times that did not comport with his actual arrivals to and departures from the Des Plaines facility. For example, there was the 14-minute discrepancy noted above on January 5, 2010, and the very next day, on January 6, 2010, Little recorded a 7:30 a.m. arrival and 5:30 p.m. departure, but the electronic records indicated a 9:41 a.m. arrival and 3:48 p.m. departure. Furthermore, "Even on a day like May 4, 2010, when he arrived on time at Des Plaines in accordance with his 7:30 a.m. starting time, Little 'fudged' his time sheet by almost half an hour by entering 7:00 a.m." The ALJ also noted that in 2008, Welsh made Little aware of his timekeeping shortcomings and that, by his own testimony, Little did not change his practices. The resulting lack of notice to Little to change his ways had been fatal to the time abuse charge, but not to the falsification charge, as there was no credible explanation ever for making false entries on the time sheets. The ALJ reasoned:

> "While many of [the 28 discrepancies noted above] are of minimal duration, the sheer number establish that he cannot be relied upon to honestly record his comings and goings. When this is combined with his questionable decisions to, essentially, wring every minute of the work day he could to count toward his scheduled hours, such conduct supports discharge ***. This is so despite his lengthy continuous service, good performance record and minimal discipline history."

¶ 22 The third and final charge concerned Little driving his State-issued vehicle to agent Evans' home for personal reasons on at least two occasions. The department's chief of staff, Krozel, testified that she had been with the department since 2003 and was "a principal policy

maker." She met Little in person for the first time in January 2008, in her Springfield office, when he was being considered for the supervisory position. Welch was also present. Little asked if he could take his State-issued vehicle about a quarter mile "off course" between the Des Plaines office and his home to get to his secondary employment, because it was impractical to go home, switch to his personal vehicle, and return to his other job. Krozel, however, responded with "a definite no" and gave the example of stopping at the dry cleaners on the way home from work, which would mean she would only park the car long enough to pick up her belongings, but "the public" would see her making personal use of a State vehicle, which would be "unacceptable." The acting chief investigator and an investigator testified that Evans told them during her first investigatory interview that Little came to her house in his State vehicle for purely personal reasons, but during these proceedings, Evans denied making that statement and both Evans and Little testified that he visited for legitimate business reasons but they would also discuss personal matters. The ALJ concluded that the evidence showed Little had indeed used the State car to visit Evans at her home, but there was credible and unrebutted testimony from both of them that the visits were work-related. Thus, the ALJ found that the misuse charge was unproven, but even if proven, it would have been insufficient reason to discharge Little.

¶ 23 After the ALJ concluded that the one charge that was proven warranted Little's discharge, the Commission itself rendered a final decision to that effect in August 2011. Little then sought review in the circuit court, where the parties spent slightly more than a year with briefing and arguments. In late 2012, the circuit court judge ruled in the Department's favor and Little sought further review in this appellate court. It took most of 2013 for the parties to

compile the record for our review and complete their appellate briefs. Thus, more than three years after Little's discharge, we begin our review. Little asks us to reverse the Commission's decision and order either reinstatement with full back pay or the imposition of a sanction less drastic than termination.

¶ 24 Our role is to review the administrative decision rather than the circuit court's decision. *Department of Corrections v. Welch*, 2013 IL App (4th) 120114, 990 N.E.2d 240. The Commission's decision to sustain Little's discharge is reviewed in a two-step process. *Department of Mental Health & Developmental Disabilities*, 85 Ill. 2d 547, 550, 426 N.E.2d 885, 887 (1981); *Illinois Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 718, 921 N.E.2d 367, 380 (2009).

¶ 25 Our first step is to determine if the agency's findings of fact are contrary to the manifest weight of the evidence adduced. *Department of Mental Health*, 85 Ill. 2d at 550, 426 N.E.2d at 887; *Porter*, 396 Ill. App. 3d at 718, 921 N.E.2d at 380. When reviewing factual findings, we do not reweigh the evidence or make independent judgments of credibility. *Porter*, 396 Ill. App. 3d at 722, 921 N.E.2d at 383. Pursuant to statute, we deem the findings and conclusions of the administrative agency on questions of fact to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2010); *Department of Mental Health*, 85 Ill. 2d at 550, 426 N.E.2d at 886. We will find the administrative agency's assessment of a fact to be against the manifest weight of the evidence only when " 'all reasonable and unbiased persons, acting with the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous and that the opposite conclusion is clearly evident.' " *Porter*, 396 Ill. App.

3d at 722, 921 N.E.2d at 383 (quoting *Sheehan v. Board of Fire & Police Commissioners*, 158 Ill. App. 3d 275, 287, 509 N.E.2d 467, 475-76 (1987)).

¶ 26 Little contends he was discharged for violating a time keeping policy that did not exist. He points to the lack of any time keeping instructions in the Department's employee handbook or any enabling statute and that he received no training about the entries on his time sheets. He contends he was supposed to record time when he was on "official State business" and that this is a very broad phrase that must include refueling his State-issued vehicle and working at home. The Department counters that Little has cited no authority suggesting that policies must be promulgated in writing to support a discharge, or evidence that anyone else was having difficulty with compliance. We agree with the Department.

¶ 27 We find that the Commission had a sufficient basis for finding that Little falsified his time sheets and that he did so intentionally. The manifest weight of the evidence plainly indicates that Little counted time against his work schedule that was not spent on official State business and misstated how much time he was spending in the office or field. The Department met its burden of proof on the first of these two points because it showed numerous instances when the start and stop times that Little recorded on his time sheets did not match up with the electronic data collected by internal investigation. See *Arroyo v. Chicago Transit Authority*, 394 Ill. App. 3d 822, 916 N.E.2d 34 (2009) (relying on similar evidence of written mileage reimbursement requests that did not coincide with card swipes as grounds for discharge). There were more than 50 discrepancies between his time sheets and his apparent arrivals or departures from his Des Plaines office.

¶ 28 Little argues that reliance on the Department's electronic data was inappropriate because the records were inherently incomplete. He contends not every Illinois road is on the I-Pass system and not every task of a sworn field agent is done on a networked computer, and thus, some of an agent's work is done "off the grid." This is the full extent of his argument, which is not enough. He fails to specify when and where he was working "off the grid" and it is not our role to guess at which dates and times Little is referring to, comb the evidence to find the necessary support, and then determine if the activities Little was purportedly engaging in "off the grid" were in compliance with Departmental policy. An appellant bears the burden of creating a cohesive legal argument and supporting it with pertinent authority. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855, 869 N.E.2d 964, 979 (2007). When an appellant fails to meet this standard, waiver results. *Express Valet*, 373 Ill. App. 3d at 855, 869 N.E.2d at 979. Little's argument is waived because it is not sufficiently developed by a discussion of any facts.

¶ 29 Furthermore, the "off the grid" argument most likely would be insufficient, because Little admitted that he regularly counted two categories of time that never should have been counted. First, Little testified that although commuting was not compensable and generally should not be credited toward his work schedule, he counted his entire commute whenever he got gas or answered a phone call from one of his agents at any time while on the way to work. Little even gave the example that if he left his house at 7:30 a.m., stopped for gas in Des Plaines at 8:15 a.m., and arrived at the office at 8:30 a.m., he would record 7:30 a.m. as his start time that day because he "had intended to get gas at some point [during the commute]" and "[s]o the minute I left my house to go take care of State business I'm on the clock." Illogically, however, if

Little had no intention when he started his commute to stop along the way for gas and did not stop for gas, then he recorded his arrival time at the office as the start of his work day, because, "You don't get paid for commuting time." Due to phone calls or gas stops, Little was able to count almost every morning commute in the six-month period at issue. Little's second inappropriate and repeated practice was that he admittedly allowed himself a 20-to-30 minute leeway in reporting his start and end times, because this was "close enough" or because "close counts." There was also the fact that Little recorded time for personal activity that was only remotely job-related, including when he disputed a parking ticket for parking a State vehicle at his house, "monitored" the personal welfare of field agent Evans on a Sunday evening, and prepared EEOC complaints against Bruno and traveled to Chicago to submit them.

¶ 30 Furthermore, recording hours on his time sheets created the impression for his Springfield supervisors that Little was working in the office in Des Plaines or in the field with the investigatory agents, and thus Little's time sheets misled or even deceived his supervisors about the time he was spending in the office or field. This is the case despite the email exchange in which Little announced he intended to continue deviating from his approved schedule and none of his supervisors responded, and this lack of response could be construed as a tacit agreement that Little could self-adjust his schedule. At no point in this email exchange did anyone mention "clocking in" at the start of the morning commute or while running personal errands and no one ever suggested it was a legitimate practice to misstate arrival or departure times by 20 minutes, 30 minutes, or even hours. Little admitted in these proceedings that he would "often" work at home during his scheduled office hours without notifying Chambers or

Bruno.

¶ 31 Thus, the undisputed evidence shows that Little took credit for time that was not office or field time and deceived the chain-of-command as to how much time he was spending in the office or field. Therefore, the Commission's finding that Little falsified his time sheets was not against the manifest weight of the evidence.

¶ 32 In addition, the manifest weight of the evidence further indicates that Little made the inaccurate entries on his time sheets intentionally. Although he contends there were no written instructions on the time sheet form and he was not trained on how to complete them, the record shows that he was advised on most of the practices that he engaged in to falsify his time records. For instance, in August 2008, when an issue was made of Little's failure to submit leave slips for absences from the office, Little contended that the need to service his State vehicle or be available for phone calls "outside the normal work hours of 8:30 a.m. to 5:00 p.m." gave him "some discretion" in managing his schedule. However, Welch responded by email that Little was required to be at the Des Plaines office at his approved start time of 8:30 a.m. in order to supervise his agents and both Welch and Krozel told Little he was not authorized to use "flextime." Furthermore, the Ethics Act, which Little characterized as his "guiding principle," unequivocally specified that time recorded on his time sheets should be rounded to the nearly quarter hour. See 5 ILCS 430/5-5(c) (West 2010) ("The policies shall require State employees to periodically submit time sheets documenting the time spent each day on official State business to the nearest quarter hour"). Also, Little testified that Welch told him to "set the right example" and Chambers testified that during a phone call he told Little that any time at home should not be

reflected on Little's time sheet. Accordingly, the clear weight of the credible evidence indicates Little knew it was inappropriate to misstate his start and stop times by 20 minutes or more.

¶ 33 Little contends that a combination of the Ethics Act and Krozel's directive to record all his hours required him to document hours outside the office. The record indicates, however, that even if Little needed to occasionally take work home from the office or respond to phone calls while at his residence, the time spent at home was in addition to the hours that Little, a salaried employee, was required to spend at the Des Plaines facility directly supervising his 16 agents. There is no way to reasonably infer from the statute or Krozel's email that Little was supposed to start clocking office or field time when he started his morning commute or was authorized to reduce his office or field hours by any hours worked at home. Such an inference is baseless. It is also contrary to the explicit direction from Welch that Little needed to be with his agents in order to supervise them and Little's testimony that Welch was "very concerned" that when the agents went unsupervised they became lax in their job performance and time recording. Furthermore, even if Little disagreed with directions or policy statements he received from Krozel, Welch, Chambers, and Bruno, he had no right to ignore their guidelines in favor of his own interpretation of State law or Departmental policy. See *Launius v. Board of Fire and Police Commissioners of the City of Des Plaines*, 151 Ill. 2d 419, 436, 603 N.E.2d 477, 485 (1992) (citing 16A E. McQuillan, Municipal Corporations § 45.66, at 397-98 (3d ed. 1992) ("an employee's good faith disagreement with the employer's opinion or judgment underlying a reasonable order does not justify the employee's refusal to follow the order")). Accord 30 C.J.S. Employer § 75 (2010) ("a refusal or neglect on the employee's part to obey a lawful and

[objectively] reasonable command, order, or rule of the employer which, in view of the circumstances of the case, amounts to insubordination, and is inconsistent with his or her duties to the employer, is a sufficient ground for discharge").

¶ 34 Little also takes issue with the ALJ's remark that Little tried to wring every possible minute of the work day he could to count toward his scheduled hours. Little insists that as a salaried employee who did not receive overtime pay, he had no incentive to be untruthful when completing his time sheets. However, we agree with the Department's response that this salaried employee benefitted in at least two ways when he falsified his time sheets because (1) when he took credit for his commute time he could leave home at the time he otherwise would have to arrive at the office and (2) when he took credit for time at home or running personal errands as if he were actually in the office or field, it was unclear to his supervisors how he was spending his time and they could not assess or criticize his work priorities or efficiency as the supervisor of the northern division.

¶ 35 Little also argues the ALJ improperly allowed the Department to merely create an inference of misconduct and then shift the burden to Little to rebut this presumption. We find this fleeting argument is waived because it is insufficiently developed and supported. *Express Valet*, 373 Ill. App. 3d at 855, 869 N.E.2d at 979.

¶ 36 For these reasons, we reject Little's contention that he was disciplined for failing "to follow procedures and guidelines which do no exist, other than in the imagination of persons who wish to criticize [his time keeping practices]." The manifest weight of evidence indicates Little was aware of proper time keeping practices and that his actual practices were unreasonable and

intentionally false.

¶ 37 The second step in our two-part analysis is to determine if the findings of fact provide a sufficient basis for the agency's conclusion that there was cause to discharge Little. *Department of Mental Health*, 85 Ill. 2d at 551, 426 N.E.2d at 887; *Porter*, 396 Ill. App. 3d 718, 921 N.E.2d at 380. The Commission's decision as to cause is entitled to considerable deference and will not be reversed unless it is arbitrary, unreasonable, or unrelated to the requirements of service. *Rodriguez v. Weis*, 408 Ill. App. 3d 663, 668, 946 N.E.2d 501, 505 (2011); *Department of Mental Health*, 85 Ill. 2d at 552, 426 N.E.2d at 887. The question is not whether this court would have imposed a different penalty, but rather whether there was a basis for the Commission's decision. *Welch*, 2013 IL App (4th) 120114, ¶39, 990 N.E.2d 240.

¶ 38 The Illinois Personnel Code provides that certain state employees shall not be discharged except for cause, upon written charges approved by the Director of Central Management Services. 20 ILCS 415/11 (2012) (Personnel Code). The Personnel Code does not define "cause," however, the Commission's regulations describe "Cause for discharge" as "some substantial shortcoming that in some way renders the employee's continuance in the position detrimental to the discipline and efficiency of the service and that law and sound public opinion recognize as good cause for the employee's removal from the position." 80 Ill. Admin. Code §1.170 (2010). Also, in order to determine the appropriate level of discipline, the Commission must consider the employee's performance record, including his disciplinary history, and his length of continuous service. 80 Ill. Admin. Code §1.170 (2010).

¶ 39 Little argues that discharge is too harsh a penalty because "lies" are generally not

considered grounds for discharge where they relate only to "internal administration" instead of the performance of public duties, especially where the employee has a long length of service. Little cites numerous cases about employee dishonesty and progressive discipline. Little contends discharge was unduly harsh, particularly after Chambers told Little the situation was "no big deal."

¶ 40 After considering the record in light of this argument and authority, we find that the record supports the decision to discharge Little. The evidence indicates this employee intentionally disregarded a time keeping policy that he did not wish to comply with and that he frequently falsified his time records by significant amounts of time. We agree with the Department that these are indications that Little could not be trusted to adhere to the Department's goals instead of his own. Little was in a supervisory position with little direct oversight and was responsible for guiding agents in the northern division. In this light, his misconduct was a "substantial shortcoming" that rendered his continued employment in the supervisory position to be "detrimental to the discipline and efficiency" of the Department (80 Ill. Admin. Code §1.170 (2010) and overcame the positive aspects of his long term of service to the State.

¶ 41 We find the authority Little relies upon to be unhelpful, for two reasons. First, there is no indication in the record that Little has previously argued that only some types of "lies" justify an employee's termination. In the underlying proceedings, Little contended the charges against him were false and retaliatory, he was apologetic and expressed remorse about any mistakes he may have made, and he contended "any sanction imposed *** [should] be less than

discharge." However, Little never conceded to being dishonest and, more importantly, he did not ask the ALJ or the Commission itself to consider whether some "lies" warrant discharge, but other "lies" warrant discipline, and to conclude that the charges against him fit into the second category of dishonest conduct. An appellant's role is to demonstrate errors in judgment or discretion in the underlying proceedings, not to craft new arguments, and our role is to review what has transpired. Little has forfeited this argument by not raising it before the ALJ or the Commission. *Porter*, 396 Ill. App. 3d at 720, 921 N.E.2d at 381 (finding the appellant forfeited the argument that the ALJ applied the wrong standard of proof by failing to raise the issue in the administrative proceedings) (citing *Smith v. Department of Professional Regulation*, 202 Ill. App. 3d 279, 286–87, 559 N.E.2d 884, 889 (1990) (same)).

¶ 42 Waiver aside, the authority is unhelpful for the additional reason that none of it concerns repeatedly misstating arrival and departure times at work, or comparable misconduct. Examples include *Noro v. Police Board, City of Chicago*, 47 Ill. App. 3d 872, 365 N.E.2d 419 (1977), in which a Chicago patrol officer was fired for attempting to deceive superior officers in an internal affairs investigation; *Mihalopoulos v. Board of Fire & Police Commissioners*, 60 Ill. App. 3d 590, 376 N.E.2d 1105 (1978), in which an East Moline police captain was fired for lying during an internal affairs investigation, being intoxicated while on duty, instructing a subordinate to falsify the police captain's time records, and performing personal errands while on duty; and *Kupkowski v. Board of Fire and Police Commissioners of the Village of Downers Grove*, 71 Ill. App. 3d 316, 389 N.E.2d 219 (1979), in which a Downers Grove police officer was discharged for falsely answering his immediate supervisor's question about the cause of damage to a squad

car, failing to promptly report that he had struck a private retaining wall with the squad car, failing to notify the real property owner, moving the vehicle from the scene without authorization (so that he could call in a mysterious electrical system failure rather than a collision), and lying to his superior officer about the performance of his duties. Little places particular emphasis on the fact that discharge from employment was deemed excessive in *Kreiser v. Police Board of Chicago*, 40 Ill. App. 3d 456, 352 N.E.2d 389 (1979), but that case involved a police officer's failure to license his private vehicle, driving the unlicensed vehicle, disregarding his superior officer's oral order, falsely stating to the superior officer that he had not driven the vehicle while it was unlicensed, and failing to follow the station's procedure of logging out of the station before going to testify in traffic court. We do not consider any of these circumstances analogous to the case before us. Precedent is helpful only when the factual circumstances are "sufficiently similar to the facts surrounding the discharge at issue to enable this reviewing court to perform a meaningful and informed comparison." *Rodriguez*, 408 Ill. App. 3d663, 946 N.E.2d at 505 (citing *Launius*, 151 Ill. 2d at 441-43, 603 N.E.2d 477). The mere fact that others have been " 'disciplined differently is not a basis for concluding that an agency's disciplinary decision is unreasonable.' " *Rodriguez*, 408 Ill. App. 3d663, 946 N.E.2d at 505 (quoting *Siwek v. Police Board of City of Chicago*, 374 Ill. App.3 d 735, 738, 872 N.E.2d 87 (2007)).

¶ 43 Little also places considerable emphasis on a federal trial judge's unpublished decision, but he does not explain why we should veer off to authority that is not binding in this jurisdiction. We strike Little's reference to and discussion of a nonprecedential case. *Wallis v. Country Mutual Insurance Co.,* 309 Ill. App. 3d 566, 572, 723 N.E.2d 376, 381 (2000).

¶ 44 The most analogous case is *Arroyo*, 394 Ill. App. 3d at 825, 916 N.E.2d at 38, in which two public transit system employees who were assigned to inspect and perform maintenance work at various rail and bus terminals came under internal investigation and were discharged for repeatedly leaving work early without permission, exaggerating their mileage reimbursement claims, changing work assignments without permission, and failing to be at assigned field locations. Like Little with his time sheets, the employees claimed they did not wilfully submit false mileage sheets (*Arroyo*, 394 Ill. App. 3d at 830, 916 N.E.2d at 42), but had instead never been properly instructed on how to fill in the forms, that their mileage sheets were never questioned or returned, and that they made a good faith interpretation of the limited guidance that was available (*Arroyo*, 394 Ill. App. 3d at 825-26, 916 N.E.2d at 38-39). Nonetheless, the sanction of termination was upheld by the courts, because the employees had intentionally committed misconduct that was significantly related to the performance of their work duties and undermined the integrity of their positions and the public transit system. *Arroyo*, 394 Ill. App. 3d at 31-33, 916 N.E.2d at 43-44. Little attempts to distinguish this case on grounds that the transit system employees were compensated for the false mileage sheets and that stealing is patently detrimental to an employer, and he contends his false time sheets did not affect his compensation. We consider this to be a minor distinction and reiterate our conclusion that Little benefitted from his false time entries.

¶ 45 In contrast, in *Bell v. Civil Service Commission*, 161 Ill. App. 3d 644, 651, 515 N.E.2d 248, 252 (1987), the court reversed a termination and remanded for reconsideration of the hearing officer's recommendation of a 30-day suspension, where an assistant supervisor-

investigator was charged with falsifying her time sheets, but the credible evidence showed her violations were technical and unintentional. The record showed that the agency had implemented a new system and form for time reporting, no directions were given, other employees had difficulty with properly completing the form, and there was no apparent motive for the employee to falsify. *Bell*, 161 Ill. App. 3d at 646-649, 515 N.E.2d at 249-51. Furthermore, the employee had never been informed of her mistake or given an opportunity to change prior to being discharged. *Bell*, 161 Ill. App. 3d at 661, 515 N.E.2d at 252. The court also concluded that the employees "confusion and misunderstanding of filling out a newly introduced time reporting form cannot be said to be detrimental to the discipline and efficiency of the [agency]." *Bell*, 161 Ill. App. 3d at 649, 515 N.E.2d at 251. None of these conditions are present in Little's case.

¶ 46 Moreover, it is unlikely that progressive discipline would have been effective, given that Little showed resistence to his supervisors' authority and disregarded their instructions. Furthermore, Little had a history of insubordination egregious enough that the Department fired him in 1994, but subsequently reduced the discipline to a 30-day unpaid suspension.

¶ 47 For these reasons, find that the Commission's determination that discharge was warranted was not arbitrary, unreasonable, or unrelated to the requirements of Little's service.

¶ 48 Accordingly, we affirm the agency's decision to terminate his employment for cause.

¶ 49 Affirmed.