THIRD DIVISION
March 21, 2018

No. 1-17-0924

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID IZSAK, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION; and BRYAN SCHNEIDER, in His Official Capacity as Secretary of the Illinois Department of Financial and Professional Regulation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 11811 Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court of Cook County affirming the decision of the Secretary of the Illinois Department of Financial and Professional Regulation to revoke the license of plaintiff real estate broker and impose a fine; plaintiff was not denied due process in the administrative proceeding, the agency's decision is not against the manifest weight of the evidence, and no abuse of discretion occurred in disciplining plaintiff.

¶ 2 Plaintiff, David Izsak, filed a complaint for administrative review of the decision of defendant Bryan Schneider, in his official capacity as Secretary of the Illinois Department of Financial and Professional Regulation, to revoke plaintiff's real estate broker's license and fine plaintiff $25,000 as discipline for violating the Real Estate License Act of 2000. The circuit court of Cook County affirmed the Secretary's decision. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In March 2012, defendant Illinois Department of Financial and Professional Regulation, Division of Professional Regulation (Department), filed a complaint against plaintiff, David Izsak, a licensed real estate salesperson, to discipline plaintiff pursuant to sections 20-20(a)(10) and 20-20(a)(21) of the Real Estate License Act of 2000 (Act) (225 ILCS 454/20-20(a)(10), 20-20(a)(21) (West 2012)). The complaint alleged plaintiff, in 2004, purchased real estate located in Cook County and began to take out a series of mortgages on the property. The complaint further alleged that "[t]o secure said mortgages, [plaintiff] filed mortgage releases with the Cook County Recorder of Deeds that have been identified by the lending banks as fraudulent releases."

¶ 5 The Department's complaint against plaintiff is in four counts. The complaint alleged plaintiff entered mortgage agreements with four different banks and in each case a mortgage agreement was recorded with the Cook County Recorder of Deeds (Recorder), and within a year of the mortgage being recorded, plaintiff allegedly "recorded with the Cook County Recorder of Deeds a fraudulent mortgage lien release document." Count I was based on a 2006 revolving credit mortgage with Washington Mutual Bank; Count II was based on a 2007 closed-end mortgage agreement with Chase Bank; Count III was based on a 2008 mortgage agreement with ING Bank; and Count IV was based on a 2010 open-end mortgage agreement with Fifth Third Bank. The complaint alleged plaintiff engaged in a fraudulent act by filing falsified documents

with the Recorder and "engaged in dishonorable, unethical, and unprofessional conduct that defrauds and harms the public."

¶ 6 On July 3, 2012, the Department served plaintiff with documents and a list of 43 witnesses the Department may call to testify. The list of witnesses included only their names. On August 7, 2012, plaintiff filed a motion to compel discovery. Plaintiff's motion to compel describes the Department's document production as "three hundred thirty-one (331) pages of random, uncategorized documents" and states "[n]o investigative reports are contained among [them]." The motion also complains the Department failed to provide addresses for any of its 43 witnesses or copies of any potentially exculpatory evidence. Plaintiff sought an order compelling the Department to produce copies of "any and all investigative reports prepared by the investigators of the Department" and copies of "any exculpatory evidence in the Department's possession." On October 10, 2012, plaintiff filed another motion to compel which stated that after plaintiff filed his initial motion to compel, the administrative law judge (ALJ) continued the matter for a status date to allow the parties' attorneys "to meet to review the Department's discovery and clarify the issues related to the discovery set forth in [plaintiff's] Motion to Compel Discovery." Plaintiff stated the attorneys did not meet because the attorney assigned to the case for the Department changed, and plaintiff's attorney went on hiatus and another attorney from his firm was now handling his case. The motion asked, in light of the fact the parties' attorneys did not meet, for a continuance to the next status date to allow the attorneys to review pending discovery issues and for an order compelling the Department to tender the discovery requested in the August 7, 2012 motion to compel.

¶ 7 On October 16, 2012, the ALJ continued the matter to December 4, 2012 for status. The ALJ continued the matter seven more times, ultimately to June 10, 2014. On June 10, 2014, the

ALJ ordered the Department to tender discovery by July 15, 2014 and that the Department's discovery would close on that date unless otherwise ordered. On July 15, 2014, the Department served plaintiff with documents and an amended list of witnesses. The July 15, 2014 discovery identified only three witnesses: (1) plaintiff, (2) Department Investigator Robert Wasniak, and (3) Joseph Burnett, a fraud investigator for BMO Harris Bank. The discovery listed 45 documents from the Recorder's office tendered digitally and twelve additional documents the Department had tendered previously.

¶ 8 On August 18, 2014, plaintiff filed a motion to dismiss the complaint or, in the alternative, to bar the Department from entering into evidence the discovery tendered to plaintiff on July 3, 2012 and July 15, 2014. Plaintiff's motion stated, in part, the documents tendered to plaintiff did not include any investigative reports "despite the fact that Robert Wasniak, a Department investigator, is listed as a potential witness for the Department." The motion to dismiss alleged the Department failed to provide addresses for its (original) 43 potential witnesses with the July 15, 2014 discovery, or copies of potentially exculpatory evidence, "which may be contained in various investigative reports prepared by the Department's investigator [or] by the Illinois Mortgage Fraud Task Force." The motion stated that after numerous requests, plaintiff's attorney met with the Department's then-current attorney "which was not fruitful." The documents tendered on July 15, 2014 included "238 pages of random documents pertaining to 45 releases allegedly filed by [plaintiff] with the [Recorder] between June 28, 1995 and September 27, 2013." Plaintiff argued many of those releases were beyond the five-year statute of limitations and "none of the documents tendered by the Department on July 15, 2014 relate to the four mortgage lien release documents that form the basis of the Department's *** Complaint." Therefore, plaintiff argued, the documents are irrelevant and

must be barred. Plaintiff asked, in part, for an order dismissing the complaint or, alternatively, for an order directing the Department to tender any investigative reports and exculpatory evidence, and an order barring Department Investigator Wasniak from testifying unless his investigative reports are tendered to plaintiff.

¶ 9 Plaintiff's motion to dismiss proceeded to a hearing before the ALJ. The parties discussed discovery at the hearing. The Department stated it had narrowed the initial list of 43 witnesses to three. Plaintiff's counsel responded the first time she learned that the witness list had been narrowed was when she read the Department's response to her motion to dismiss the complaint. The attorney for the Department stated he had told plaintiff's counsel the Department intended to call only three witnesses at the parties' discovery meeting. The ALJ asked the Department whether the investigator's report had been turned over to plaintiff. The Department responded the Department's rules provide that reports have to be turned over only if they purport to be a memorandum of an interview with the party, which never occurred, or if they contained exculpatory information, which they did not. Plaintiff's counsel responded it was her understanding this case came to the Department from the Illinois Mortgage Task Force and she had to presume there was information in the report from the task force. The Department's attorney stated that if the ALJ wanted to review the report *in camera* he would see it contains "none of the requirements of the administrative rules for tendering them." Counsel for the Department stated there was only one investigator's report and described it as eight pages long containing: (1) four pages of attachments that had not been turned over to plaintiff; (2) a one-page printout from the Department's internal licensing system; (3) three pages of printouts from the Treasurer's office; (4) a one-page list of the documents tendered in the initial discovery response; and (5) a two-page report.

¶ 10 Plaintiff's attorney stated she was only seeking the investigator's report which she believed could contain exculpatory information that would be helpful in preparing plaintiff's defense. Co-counsel for the Department stated plaintiff's attorney never gave a basis for her belief the report contains exculpatory information or stated what in the report she believes is exculpatory. Plaintiff's attorney stated that attorneys for the Department previously assigned to this case informed her that this case came from the Mortgage Task Force and it was her belief the task force's report may contain exculpatory information. The Department's attorney responded the task force does not put out reports and there was no such document in this case. Plaintiff's attorney also argued that under the Department's rules the report had to be turned over if the investigator was going to testify. The Department's attorney responded the rule states the report is to be turned over after the investigator's direct examination and before cross-examination, and the Department is not required to turn over the report before that testimony. The ALJ agreed that was his understanding of the rule. Plaintiff's counsel argued the Department was making a unilateral determination that nothing in the report was exculpatory but she may disagree. The ALJ asked if plaintiff's counsel could articulate anything "that would suggest that there is something exculpatory in the document." Plaintiff's counsel responded:

> "[M]y client's position is that the allegations that are being made by the Department are untrue. That the documentation does not support the Department's case. I'm assuming that Mr. Wasniak [(the investigator)] will testify otherwise, and I think that his credibility will be an issue in our case as to the nature of his investigation, who he received the documentation from, the conversations that he might have had, the information that he obtained through conversations with those other people."

¶ 11 The Department responded none of plaintiff's counsel's beliefs "have anything to do within the report." Counsel reiterated that the Department "has no problem with an *in camera* look at this document." The ALJ stated if the investigator testified the Department would be obligated to turn over the report but "any assertion that document contains exculpatory evidence is non-sufficient to justify production or some other information that it contains." The ALJ asked if plaintiff would have an objection to an *in camera* review of the report and what would plaintiff's counsel be looking for if she had the report. Plaintiff's counsel responded she would be looking for how and from whom the investigator gathered information and what kind of information he received, perhaps verbally, other than the documents produced in discovery that "would call into question his investigative report, the credibility of that investigative report and the credibility of the documents that have been provided to us in discovery."

¶ 12 The ALJ denied plaintiff's motion to dismiss the complaint. The ALJ found the investigator's report "is a report that they may withhold until such time as their witness who authored the report is testifying. The ALJ found he had "not heard anything to indicate that [the report] is exculpatory. A general request for documents claiming essentially they are exculpatory, without some sort of initial information to suggest otherwise. I don't think it merits an *in camera* inspection at this time." The ALJ granted plaintiff 21 days to tender his discovery to the Department.

¶ 13 Plaintiff filed a motion to reconsider arguing the report may contain exculpatory evidence because plaintiff has reason to believe the report will affect the investigator's credibility by showing bias and because plaintiff believes the report tends to support his defense. Plaintiff also argued he is not required to prove the exculpatory nature of the document, only that it could be potentially exculpatory; moreover, plaintiff cannot be required to so prove because the report is

not in his possession. Finally, plaintiff argued turning over the report was consistent with the goals of discovery because doing so would "be especially helpful to ascertaining the truth prior to hearing when the Department has otherwise provided no guidance of the evidence it intends to present from the hundreds of other documents provided in no logical order." Plaintiff further argued that to prove the Department brought this case in error based on the investigator's report he "must be able to show that the investigator who recommended the prosecution was in error" which "can only be done through inspection of the reports created by the said investigator." Plaintiff declined to state "the specific errors suspected to be contained in this document" because it would reveal his defense strategy and noted the Department refused to tender the report for the same reason—that the report might reveal its strategy. Therefore, plaintiff argued, fundamental fairness required both parties have access to the report. Plaintiff argued he reasonably believes the investigator made crucial errors based on the nature of the Department's complaint.

¶ 14 The ALJ denied plaintiff's motion to reconsider. The ALJ found plaintiff made no arguments specific to the report at issue beyond its existence, and "the mere existence of the *** report does not indicate that the report tends in any way to support [plaintiff's] position" or that "the report tended in any way to contain error to *** to call the credibility of [the investigator] into question." The ALJ found plaintiff's arguments the report "constituted exculpatory evidence *** are based on speculation."

¶ 15 On February 25, 2015, plaintiff filed a second motion to dismiss the complaint. Plaintiff's February 2015 motion to dismiss argued the complaint failed to sate facts which would form a proper basis for discipline under the Act. Plaintiff argued the conduct alleged would not constitute a substantial misrepresentation and is not advertising of any sort and,

therefore, does not fall within section 20-20(a)(10) of the Act. Plaintiff also argued the alleged conduct, even if found to be "dishonorable, unethical, or unprofessional" without proof of his knowledge and intent, would not affect the public at large and therefore does not fall within section 20-20(a)(21) of the Act. Plaintiff further argued the complaint should be dismissed because "none of the conduct by [plaintiff] alleged by the [Department] involved [plaintiff's] use of his real estate license, his role as a real estate agent, or in any way harmed any persons or entities that [plaintiff] represented as a real estate agent, or in any other capacity, or harmed the 'public.' " The motion further argued the complaint does not allege plaintiff had any role in the creation of the allegedly fraudulent mortgage releases or that he knew the releases were fraudulent; the complaint only alleges that he recorded the releases. Plaintiff noted the Department did not allege that he misused his license, that his license played any role in the alleged conduct, or that the alleged conduct involved or affected any of plaintiff's actual or potential clients. The Department responded as follows:

> "Whether the misrepresentations allegedly made by [plaintiff] are significant enough to be considered 'substantial' by this court, or if the alleged fraud perpetrated on a number of publicly insured financial institutions can deceive, defraud, or harm the public is a judgment that should be made by the ALJ following the completion of a formal evidentiary hearing."

¶ 16 The matter proceeded to a formal evidentiary hearing. Prior to commencing the hearing, the parties addressed plaintiff's motion *in limine* to bar Burnett's testimony on the grounds he lacked knowledge of any matters alleged in the complaint, and plaintiff's motion to dismiss the complaint. The Department responded Burnett was there to testify as to "what the actual facts are" so that the Department could prove plaintiff made a misrepresentation. Plaintiff's counsel

pointed out the complaint does not allege plaintiff made any misstatements, only that he recorded allegedly fraudulent releases. The ALJ denied plaintiff's motion *in limine* to bar Burnett's testimony. The ALJ reasoned the Department's rules do not allow depositions, so what Burnett would testify to was unknown; but plaintiff could object during the course of his testimony if Burnett lacked knowledge relevant to the proceedings. The ALJ also denied the motion to dismiss.

¶ 17 When the hearing commenced, the parties first addressed the Department's documentary evidence. The ALJ admitted or conditionally admitted into evidence several documents pertaining to mortgages on plaintiff's property, alleged releases of those mortgages, and notices of fraudulent releases. Burnett was the Department's first witness. Burnett testified he is employed as a fraud investigator for BMO Harris Bank. In his employment Burnett investigated a case involving plaintiff. Burnett testified the bank received two checks with insufficient funds to pay off plaintiff's home equity line of credit on his home. Upon further investigation, Burnett discovered that a release of the bank's lien on plaintiff's home had been filed. That release bore signatures of persons purported to be BMO Harris employees who were never employed by the bank. Burnett testified BMO Harris never attempted to release its lien. Burnett talked to plaintiff by telephone regarding the bad checks. He attempted to contact plaintiff regarding the lien release but could not reach him. Plaintiff never refused to speak to Burnett about the release.

¶ 18 The Department called plaintiff as an adverse witness. Plaintiff testified he has refinanced his home several times and has taken out several loans. Counsel for the Department showed plaintiff several mortgage documents bearing plaintiff's address. Plaintiff testified the signature on those documents looked like his signature, but he could not be certain it was his

signature, and plaintiff testified he could not specifically recall taking out those mortgages. He also could not say whether he paid any of them off without examining his records. The Department's attorney attempted to ask plaintiff about a 2006 mortgage with Washington Mutual Bank, a 2007 mortgage with Chase Bank, a 2008 mortgage with ING Bank, and a 2009 mortgage with Fifth Third Bank. In each instance plaintiff testified the signature on the mortgage looked like his but plaintiff could not remember the document. Plaintiff guessed he had taken out ten mortgages on his property. He did not know which had been paid or refinanced and could not recall the last time he made a payment on any mortgage. Plaintiff testified he has not caused releases from any of the mortgages to be filed with the Recorder. He did not request any releases to be filed. Plaintiff became aware fraudulent releases had been filed when this case came up. Plaintiff did not recall whether or not he contacted the banks when he learned of the releases. Plaintiff could not remember if he was aware of any releases of prior mortgages when he signed the mortgages with Washington Mutual, Chase, ING, or Fifth Third Bank. On cross-examination plaintiff identified and testified to documents indicating the Chase mortgage had been paid off. Plaintiff also testified that he received what he believed to be a satisfaction of the mortgage to ING's successor, Capital One. Plaintiff also testified he received documentation the ING mortgage was satisfied, but the ALJ did not admit that documentation into evidence. Plaintiff testified he has not recorded any mortgage releases and has never created a mortgage release. Plaintiff received $270,000 from one refinancing of his home.

¶ 19 The Department rested its case without calling any further witnesses. Plaintiff also rested without calling any additional witnesses, and the parties gave closing arguments. The ALJ issued a Report and Recommendation (report) to the Department's Real Estate Administration and Disciplinary Board (Board). The ALJ made the following material findings of fact:

- Plaintiff entered a mortgage on his property with Chase Bank in October 2007 and a Release of the Chase mortgage was recorded in May 2008.
- Plaintiff entered a mortgage on his property with Washington Mutual Bank in October 2006 and a Satisfaction of that mortgage was recorded in September 2007.
- Plaintiff entered a mortgage on his property with ING Bank in March 2008 and a Satisfaction of that mortgage was recorded in March 2009.
- In June 2010 ING recorded a notice of fraudulent release regarding the September 2007 Satisfaction.
- Plaintiff entered a mortgage on his property with Fifth Third Bank in December 2009 and a Release of that mortgage was recorded in June 2010.
- In August 2010 Fifth Third Bank recorded a notice of fraudulent release.

¶ 20 The ALJ's report summarized Burnett's testimony and found Burnett to be a credible witness. The ALJ found plaintiff "lacked credibility and consistency." The ALJ noted plaintiff "claimed he could not recognize the four mortgages at issue in the amended complaint." The ALJ found plaintiff's "disinterest in his own case is at odds with human nature." The ALJ found plaintiff contradicted himself, was evasive, and "uncomfortable during testimony." The ALJ also found plaintiff "claimed unconvincingly that he could not understand questions that should have been within the comprehension of one with his experience." The ALJ concluded he was "not inclined to accept [plaintiff's] representations of ING and Chase payouts derived from [plaintiff's] exhibits." The ALJ stated the Department alleged plaintiff recorded fraudulent mortgage lien release documents and found the Department presented evidence that "the ING and Fifth Third releases were not only fraudulent, but that the lenders in the ING and Fifth Third

mortgages subsequently signed and had recorded notices of fraudulent release." Two additional notices of fraudulent releases were filed by Bank of America and Harris Bank.

¶ 21 The ALJ noted the Department "presented no testimonial evidence that [plaintiff] participated in the filing of the fraudulent releases." The ALJ found "multiple fraudulent releases have been issued on [plaintiff's] mortgages *** to the benefit of [plaintiff]." The ALJ also considered "as highly probative [plaintiff's] indifference to those very notices of fraudulent release, despite the fact that the releases affected [plaintiff's] personal home and his economic benefits from refinancing." The ALJ stated plaintiff "testified unconvincingly that he could not remember if he did something in response to those notices of fraudulent release." The ALJ concluded plaintiff's "evasive, contradictory and resistant testimony in general, considered with the aforesaid circumstances, reflects his participation in the use of fraudulent releases." The ALJ also noted that "the fraudulent releases were part of [the] real estate business, and observers, including the general public, would perceive [plaintiff's] conduct as related to his profession." The ALJ found the Department established by clear and convincing evidence plaintiff participated in the filing of fraudulent releases in violation of section 20-20(a)(10) and 20-20(a)(21) of the Act as alleged in counts III and IV of the complaint.

¶ 22 The ALJ found no factors in mitigation applied and the following factors in aggravation applied: (1) the seriousness of the offense; (2) the presence of multiple offenses; (3) the impact of the offenses on any injured party; and (4) the motive for the offenses. The ALJ recommended to the Board that plaintiff's license be indefinitely suspended for a minimum of three years and that plaintiff be fined $5,000.

¶ 23 The Board issued its written findings of fact, conclusions of law, and recommendation to the Secretary of the Department. The Board adopted the findings of fact in the ALJ's report.

The Board adopted the ALJ's conclusions of law in part; specifically, in pertinent part, the Board accepted that the Department met its burden by proving plaintiff violated sections 20-20(a)(10) and 20-20(a)(21) of the Act by clear and convincing evidence. The Board rejected the ALJ's discipline recommendation and recommended the Secretary revoke plaintiff's license and fine plaintiff $25,000. Plaintiff filed a motion for rehearing.

¶ 24 The Secretary issued a written order. The Secretary's order begins by stating as follows:

> "The matter has its roots in [plaintiff's] fraudulent acts of filing falsified documents with the Cook County Recorder of Deeds. The Department's Complaint alleged that [plaintiff,] in the course of taking out a series of mortgages on a property he owned, secured those mortgages with fraudulent releases, using the confusion caused by those releases to continually obtain new mortgages from various financial institutions. [Plaintiff's] acts or omissions in this regard violated 68 Ill. Adm. Code § 1450.900 and 225 ILCS 454/20-20(a)(10) and (21). Accordingly, the Department undertook to discipline him for behaviors that constituted dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public."

¶ 25 In the order, the Secretary gave deference to the ALJ's decision to admit documents recorded with the Recorder of Deeds over plaintiff's hearsay objections. The Secretary found the ALJ's report makes plain that in many instances plaintiff lacked memory, but plaintiff did not deny "having taken out the mortgages underlying his fraudulent filings of releases and other documents." The Secretary also stated plaintiff's testimony, "observed by the ALJ, lacked credibility and consistency, and was unconvincing, contradictory and resistant." The Secretary also noted that the ALJ found plaintiff's "indifference to the notices of fraudulent releases"

highly probative. The Secretary found that "[a]s the trier of fact, the ALJ was justified by clear and convincing evidence in arriving at his conclusion that [plaintiff] participated in filing the fraudulent releases." The Secretary found plaintiff did not raise any substantive issues and his arguments had no merit. The Secretary found the Department proved by clear and convincing evidence that plaintiff violated sections 20-20(a)(10) and 20-20(a)(21) of the Act and is subject to discipline. The Secretary denied plaintiff's motion for rehearing and adopted the Board's Recommendation. The Secretary ordered plaintiff's license revoked and fined plaintiff $25,000.

¶ 26 Plaintiff filed a complaint for administrative review in the circuit court of Cook County. The trial court entered a written order affirming the final administrative decision. Plaintiff filed a motion to reconsider, which was denied. This appeal followed.

¶ 27 ANALYSIS

¶ 28 Plaintiff raises three arguments on appeal: (1) defendants violated his right to due process by (a) admitting materially prejudicial hearsay and (b) refusing to turn over evidence which would have assisted plaintiff's defense; (2) the Secretary's decision is against the manifest weight of the evidence because (a) the Department failed to produce expert testimony that the alleged conduct is related to plaintiff's profession and (b) there is no evidence plaintiff participated in the filing of fraudulent releases; and (3) the Secretary abused his discretion in sanctioning plaintiff because the sanction (a) was arbitrarily increased from the recommendation of the ALJ; (b) is overly harsh in light of mitigating circumstances; and (c) is unrelated to the purpose of the Act. The hearing and determination of a review of any final administrative decision extends to all questions of law and fact presented by the entire record before the court, and the findings and conclusions of the administrative agency on questions of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2016). In an appeal from a final

decision of an administrative agency "this court reviews the final decision of the administrative agency, and not that of the circuit court. [Citation.] As such, our review is limited to the Secretary's order and the hearing officer's findings of fact and conclusions of law to the extent they were adopted by the Secretary." *All American Title Agency, LLC v. Department of Financial & Professional Regulation*, 2013 IL App (1st) 113400, ¶ 25. "The standard of review to apply on review of an administrative agency decision depends on whether the question presented is one of fact, one of law, or a mixed question of fact and law. [Citation.]" *Id.* ¶ 26. "[T]his court reviews factual questions under the manifest weight of the evidence standard, [and] questions of law *de novo*." *Danigeles v. Illinois Department of Financial & Professional Regulation*, 2015 IL App (1st) 142622, ¶ 69. A decision is against the manifest weight of the evidence when the opposite conclusion is clearly evident. *Id.* ¶ 77. Mixed questions of law and fact are reviewed under the clearly erroneous standard of review. *All American Title Agency, LLC*, 2013 IL App (1st) 113400, ¶ 26. "A decision will be deemed clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.*

¶ 29 1(a). Due Process--Hearsay

¶ 30 We first address plaintiff's argument the ALJ violated his right to due process by admitting materially prejudicial hearsay. Plaintiff argues the notices of fraudulent release were out-of-court statements by third parties used to prove the truth of the matters asserted therein: that the previously filed releases of the ING and Fifth Third liens were fraudulent. Defendants respond that to any extent the ALJ relied on the statements in the notices for the truth of the assertion that the lien releases were fraudulent, such reliance was appropriate under Rule 1110.220(b) because (a) the notices bear significant circumstantial guarantees of trustworthiness in that "they were each sworn to by bank employees and filed with the Cook County Recorder of

Deeds; and (b) plaintiff's cross-examination of Burnett, consisting of only two questions, demonstrates the probative value of the statements in the notices outweighs any prejudice resulting from plaintiff's inability to cross-examine the declarants.

¶ 31 The notice of fraudulent release filed by ING was the Department's exhibit HH, and the notice of fraudulent release filed by Fifth Third was the Department's exhibit KK. At the hearing, the following exchange occurred regarding exhibit HH.

> "HEARING OFFICER: Mr. Kaberon [plaintiff's attorney], is there any objection to the admission of Department's Exhibit double H?
>
> MR. KABERON: The same objection[1], but also that the document is hearsay.
>
> HEARING OFFICER: With regard to the hearsay issue, are you going to be able to demonstrate the—are you going to be able to overcome the hearsay objection with regard to Department's Exhibit double H?
>
> MR. BERNARD [the Department's attorney]: My understanding is that this document by being recorded with the Cook County Recorder of deeds with a notarized signature of an officer of that company, it is not—it doesn't say that this—it has a legal effect. There is no hearsay. It doesn't matter what it actually says. It is the effect on the property.
>
> HEARING OFFICER: You are not offering it for the proof of the statement made by the signer of this document?

---

[1] Plaintiff's counsel made a standing objection to the relevance of several of the Department's exhibits.

MR. BERNARD: I am offering it as it legally wipes out the previous release.

HEARING OFFICER: Over the objection of the [plaintiff,] I am going to admit Department's Exhibit—actually, I am going to reserve ruling on Department's Exhibit double H for a moment. We will move on."

After admitting the release of the Fifth Third lien (the Department's exhibit II) into evidence without objection, and a *lis pendens* filed by ING regarding plaintiff's property, the hearing officer admitted the Department's exhibit HH into evidence over plaintiff's objection without returning to the hearsay question.[2]

¶ 32 "Generally, procedural due process protections preclude the admission of hearsay evidence in an administrative proceeding. [Citation.]" (Internal quotation marks omitted.) *Kimble v. Illinois State Board of Education*, 2014 IL App (1st) 123436, ¶ 79. "Additionally, the strict rules of evidence that apply in a judicial proceeding are not applicable to proceedings

---

[2] The record suggests the ALJ admitted ING's notice based on a relevance determination. When the attorney for the Department explained the reason for admitting the *lis pendens* the following exchange occurred:

"MR. BERNARD: Again, this ties in with the other documents regarding the ING mortgage, particularly the notice of fraudulent release showing the further action by ING as a result of that fraudulent release.

HEARING OFFICER: Which exhibit is that?

MR. BERNARD: The original complaint or the original mortgage [with ING] is Exhibit DD. The satisfaction is—the purported satisfaction is Exhibit FF and the notice of fraudulent release is Exhibit HH.

HEARING OFFICER: Okay. With regard to Department's Exhibit HH, I am going to admit, over objection Department's Exhibit HH into evidence. Is there any objection to admitting Department's Exhibit JJ into evidence, counsel for the [plaintiff]?

MR. KABERON: Same objection, Your Honor. (See fn. 1.)

HEARING OFFICER: Over that objection I am going to admit Department's Exhibit JJ into evidence."

before an administrative agency." *Id.* Pursuant to section 1110.220 of Title 68 of the Illinois Administrative Code governing practice in administrative hearings for the Department, "[i]n addition to any other exceptions to the hearsay rule which exists in Illinois, a statement may be admitted if it has circumstantial guarantees of trustworthiness, and if the probative value of the statement outweighs any prejudice resulting from an inability to cross-examine the declarant." 68 Ill. Admin. Code § 1110.220(b). "Generally, a document offered for the truth of the matter asserted is inadmissible as hearsay. [Citation.]" *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 13. "Unless it falls within a recognized exception to the rule, hearsay is not admissible. [Citation.] An out-of-court statement offered to prove its effect on a listener's mind or to show why he subsequently acted as he did is not hearsay and is admissible. [Citation.]" (Internal quotation marks omitted.) *Fakes v. Eloy*, 2014 IL App (4th) 121100, ¶ 124. "Whether a party's due process rights were violated during the administrative hearing is a question of law that we review *de novo*." *Kimble*, 2014 IL App (1st) 123436, ¶ 76. The ALJ did not expressly rule on whether the notices were hearsay because they were being offered for the truth of the matter asserted or on the question of whether the notices fell within a recognized exception to the rule against hearsay. For that reason as well, we must review plaintiff's arguments *de novo*. See *Chamberlain v. Civil Service Comm'n of Village of Gurnee*, 2014 IL App (2d) 121251, ¶ 43 ("Although we generally review evidentiary rulings for an abuse of discretion [citation], here the Commission did not rule on whether the statements of which plaintiff complains were hearsay. Therefore, we cannot logically give deference to a ruling that the Commission did not make.").

¶ 33 Although we review the decision of the agency and not that of the trial court, we do note that on this issue the trial court relied, in part, on Illinois Rule of Evidence 803(15) (eff. Apr. 26,

2012), which identifies the following as an exception to the rule against hearsay regardless of whether the declarant is available to testify: "Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document." Ill. R. Evid. 803(15) (eff. Apr. 26, 2012). The notices of fraudulent release were documents affecting an interest in property. For example, the ING notice reads, in part, as follows: "At no time since the execution of a certain Mortgage by David Izsak granting a security interest to ING Bank, FSB dated March 31, 2008, and recorded April 21, 2008, as document number 0811255004 has said Mortgage been satisfied. A balance still remains." The Fifth Third notice states, in part: "Fifth Third did not knowingly, or willingly, agree or authorize any type of Release of Mortgage to be filed on the above stated loan agreement." The purpose of the notices was to protect the bank's security interests in plaintiff's property. The statements that the "purported Satisfaction dated February 13, 2009 *** was neither prepared nor executed by ING Bank, FSB" and was "not authorized by ING Bank" was relevant to the purpose of the notice of fraudulent release; as was the statement in the Fifth Third release that "Said Release of Mortgage is fraudulent as such that it was not executed by me in my place of employment." Furthermore, the documents were signed (the Fifth Third notice is notarized) and recorded with the Recorder of Deeds, providing additional indicia of reliability. Finally, we acknowledge plaintiff's argument that the Fifth Third notice "appears to attest to actions and omissions of third parties for which the signor could have no first-hand knowledge." The affiant of the Fifth Third notice states, in part, as follows: "That through deliberate and knowing action, borrower caused, or assisted in causing, a fraudulent Release of Mortgage

presuming to release the above loan agreement." We note neither the ALJ nor the Secretary relied on this particular statement in the notice to find plaintiff participated in its filing. Accordingly, we hold the document was admissible under Rule 803(15). See Michael H. Graham, Winning Evidence Arguments § 803.15 (2018). Generally this court may affirm an order admitting or excluding evidence on any ground that appears in the record. *Carroll v. Preston Trucking Co.*, 349 Ill. App. 3d 562, 566 (2004) (citing *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 1005 (2003)). We find no error in the admission or use of the notices of fraudulent release.

¶ 34 1(b). Due Process--Failure to Turn Over Evidence

¶ 35 Next, we address plaintiff's argument his right to due process was violated because the ALJ allowed the Department to refuse to turn over evidence which would have assisted plaintiff's defense.

> "Generally, in all cases involving professional licenses, this court has held that an agency is required to disclose evidence in its possession which might be helpful to an accused. [Citations.] The Rules of Practice in Administrative Hearings were amended to include the requirement that the Department disclose any exculpatory information in the Department's possession. Exculpatory evidence is defined as any evidence which tends to support the registrant's position or to call into question the credibility of a Department witness. 68 Ill. Adm. Code 110.130(d)(1) (1985)." *Smith v. Department of Registration & Education of State of Illinois*, 170 Ill. App. 3d 40, 45 (1988).

¶ 36 Plaintiff argues the Department violated its rules and this court's prior holdings when it failed to provide contact information for all of the witnesses on its original witness list and when it failed to turn over the investigator's report. Plaintiff asserts the refusal to provide contact

information for the witnesses on the original witness list prejudiced his defense because he could not contact them to prepare his defense. Plaintiff also asserts that refusing to turn over the investigator's report based on the Department's rule limiting when the Department is required to do so was an abuse of discretion. Despite the fact the Department amended its witness list to remove everyone except plaintiff, the investigator (who was not called to testify), and Burnett (whose contact information plaintiff had), plaintiff argues the failure to provide the contact information for the originally listed witnesses prevented him from questioning the sources of the Department's information, which in turn was used against him when the ALJ found plaintiff was disinterested in his case. Plaintiff also argues that had he been given the investigative report he might have been able to contact and subpoena witnesses to support a finding that the releases, if valid, were recorded erroneously rather than fraudulently, or he could have cross-examined those witnesses on that possibility to cast doubt on their assertions.

¶ 37 In support of his argument plaintiff relies on *Montgomery v. Department of Registration and Education*, 146 Ill. App. 3d 222 (1986). In that case, the Department filed a complaint against the plaintiff regarding certain of her actions as a licensed nurse. *Montgomery*, 146 Ill. App. 3d at 223. The plaintiff made discovery requests but the Department challenged those requests as outside the scope of its discovery rules. *Id.* Based on a rule, the Department agreed only to produce a list of witnesses it intended to call at the hearing but denied the plaintiff's request for certain statements and "any other information in the control or possession of the Department which might be helpful to [the] plaintiff." *Id.* at 224. The hearing officer agreed with the Department and ruled that discovery was limited to that provided for in the Department rules. *Id.* The *Montgomery* court began by noting that in administrative proceedings there exists a basic obligation to disclose exculpatory information and that this court had previously held that

in cases involving professional licenses, "an agency is required to disclose evidence in its possession 'which *might* be helpful to an accused.' [Citations.]" (Emphasis in original.) *Id.* at 225. In *Montgomery*, the court found the information the plaintiff requested "could have been helpful to [the] plaintiff to support her position." *Id.* at 226. The court held that "[i]n the face of the decisions listed above requiring agencies to disclose evidence in their possession 'which might be helpful to an accused' we find that the refusal by [the] defendant to provide the matter requested in the instant case solely on the basis of the Department's own rules without regard to whether it would have been helpful to [the] plaintiff was abuse of discretion and we conclude that a new hearing should be conducted after discovery is provided." *Id.*

¶ 38 The Department's Rule 1110.130 reads, in pertinent part, as follows:

> "b) Upon written request served on the opposing party, any party shall be entitled to:
>
> 1) The name and address of any witness who may be called to testify;
>
> 2) Copies of any document which may be offered as evidence; and
>
> 3) A description of any other evidence which may be offered.
>
> * * *
>
> d) Whether or not a request is made, during discovery a registrant shall be entitled to:
>
> 1) Any exculpatory evidence in the Department's possession. Exculpatory evidence is any evidence which tends to support the registrant's position or to call into question the credibility of a Department witness; and

> 2) Copies of any investigative report which purports to be a memorandum of interview of the registrant.
>
> e) The registrant shall be entitled to the above whether or not the investigator is called to testify and whether or not the investigator uses his reports to refresh his recollection prior to or during testimony.
>
> * * *
>
> g) The investigative file of a Department investigator is not subject to discovery except as stated in paragraph (d) above relating to exculpatory evidence and memoranda of interviews of a registrant. However, after the direct examination of a Department witness but prior to the cross-examination of that witness, the registrant shall be entitled to all investigative reports relating to that witness. Investigative reports relating to the witness shall be those which purport to be memoranda of interviews of the witness or which contain information about the witness." 68 Ill. Admin. Code § 1110.130.

¶ 39 Initially, we note the investigator did not testify, and plaintiff does not claim the report is a memorandum of an interview of plaintiff or of Burnett. Therefore, the Department did not violate Rule 1110.130(g) with regard to the investigator's report. The Department argues it provided a narrowed witness list and contact information for the only two witnesses who "may be called to testify" (the investigator and Burnett), therefore it complied with Rule 1110.130(b)(1). Plaintiff replied regardless of the limited witness list, the Department was required to provide the contact information for all of the witnesses on its original witness list "when the individuals were first named." Plaintiff cites no authority for that proposition. Administrative regulations "have the force and effect of law, and must be construed under the

same standards which govern the construction of statutes. [Citation.]" (Internal quotation marks omitted.) *People ex rel. Department of Labor v. MCC Home Health Care, Inc.*, 339 Ill. App. 3d 10, 21 (2003). "When the plain language of the statute is clear and unambiguous, the legislative intent that is discernible from this language must prevail, and no resort to other tools of statutory construction is necessary. [Citation.]" *Land v. Board of Education of City of Chicago*, 202 Ill. 2d 414, 421-22 (2002). Here, the plain language of Rule 1110.130(b)(1) is clear and unambiguous. The Rule requires the Department to provide the name and address of any witness who may be called to testify. There was no possibility the 43 witnesses listed on the Department's disclosure "may be called to testify" at the formal hearing. We find the Department was not required to provide the contact information at issue under the Rules.

¶ 40 Plaintiff also argued "his ability to subpoena witness testimony in support of his defense is clearly independent of whether those individuals were being brought as the Department's witnesses." To the extent plaintiff argues the Department was obligated to provide contact information for the originally listed witnesses under the Department's duty to turn over any exculpatory information in the Department's possession, we disagree. Plaintiff argues speaking to those witnesses "might be helpful" to his defense because he could "question the sources of the Department's information" and "challenge the underlying basis for the Department's investigation."

¶ 41 The question, for purposes of plaintiff's due process challenge based on the failure to provide the witnesses' contact information, is whether the failure to do so rendered the proceedings fundamentally unfair. See *Lyon v. Department of Children and Family Services*, 335 Ill. App. 3d 376, 385 (2002) ("we find no basis in the record for holding that the proceedings were fundamentally unfair, at least with respect to discovery").

> "Where an administrative proceeding gives the petitioner a fair opportunity to be heard, including the opportunity to cross-examine witnesses and present evidence, generally this is considered sufficient to insure due process and a fair, impartial hearing. [Citation.] The reviewing court's function is to insure that the administrative agency conducted a fair hearing, allowed only the introduction of competent evidence, and reached an objective, rational decision. [Citation.] Reviewing courts may not interfere with the discretionary authority vested in an administrative body unless that authority is exercised in an arbitrary or capricious manner." *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 48 (2000).

"Due process also requires that all parties have an opportunity to cross-examine witnesses and offer rebuttal evidence." *Dombrowski v. City of Chicago*, 363 Ill. App. 3d 420, 426 (2005).

¶ 42 Plaintiff has presented no basis for finding the proceedings fundamentally unfair because he was not able to contact the original list of witnesses. Plaintiff's inability to contact the witnesses did not contribute to the ALJ's finding plaintiff was indifferent to the notices of fraudulent release. The Department asked if he contacted the police or the banks when he learned of the notices. Plaintiff did not need the Department to give him information on how to contact his own bank. Plaintiff was not deprived of the fundamental elements of a fair hearing. Plaintiff has not demonstrated that he was deprived of an opportunity to offer rebuttal evidence by not having contact information for the Department's original list of 43 witnesses. The individuals who prepared the two notices of fraudulent release were listed on the Department's original witness list; however, the documents themselves provided a means for contacting those individuals. The ING notice listed the preparer's name and title with the bank as well as the name and address of the law firm that prepared the notice. The Fifth Third notice gave a name

and address for the affiant. We find the Department did not violate plaintiff's due process rights by failing to provide contact information for the original list of witnesses.

¶ 43 Similarly, plaintiff's argument the Department violated his right to due process by failing to turn over the investigator's report must fail. First, plaintiff has cited no authority to support finding that the Department must turn over evidence a licensee only thinks might contain exculpatory material.[3] Second, *Montgomery* does not stand for the proposition that it was *necessarily* an abuse of discretion to refuse to turn over the investigative report based on the Department's rules. Rather, the court was able to determine in *Montgomery* that the information sought could have been helpful to the plaintiff to support her position. *Id.* Admittedly, in this case, the ALJ declined to conduct an *in camera* inspection of the investigator's report, so we have no basis from which to determine if it contained anything which tends to support plaintiff's position or to call into question the credibility of a witness. However, the *Montgomery* court also noted that this court had previously held that even where such disclosure is required, an agency does not abuse its discretion in denying a request for discovery "where: (1) the request was not

---

[3] In the criminal law context, "the prosecution has a duty to provide certain exculpatory material to the defense even absent a specific request. (*United States v. Agurs*, 427 U.S. 97 (1976)). Under *Agurs*, the prosecution's duty to disclose absent request extends only to evidence 'so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce' [citation] and which 'creates a reasonable doubt that did not otherwise exist' [citation]. Stated in another way, the undisclosed evidence will be considered material only if its 'suppression undermines confidence in the outcome of the trial' [citation], and if there is a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different' [citation]." *People v. Harris*, 129 Ill. 2d 123, 152 (1989).

Although we do not hold today that plaintiff had to meet this standard to show a violation of the Department's duty to turn over exculpatory material in its possession, we do note plaintiff has failed to articulate what he even thinks the report contains, beyond a vague assertion of something that will cast doubt on the investigator's credibility. We question the usefulness of such information to plaintiff, given that the evidence against him was primarily documentary.

diligently made; (2) plaintiff was not prejudiced by its denial; and (3) plaintiff was not handicapped in the preparation of his defense." *Montgomery*, 146 Ill. App. 3d at 225. See also *Lyon*, 335 Ill. App. 3d at 385 ("Even if we considered the allegedly untimely discovery not as a constitutional violation but as a possible violation of departmental rules, Lyon would still have to show actual prejudice from the violation."). In this case, although plaintiff's request was timely, we find that despite the refusal of the Department to turn over the report, for the reasons stated above, we find plaintiff was not prejudiced by the denial and he was not handicapped in the preparation of his defense. Accordingly, we hold plaintiff's right to due process was not violated by the failure to turn over the investigator's report.

¶ 44 2(a). Manifest Weight of the Evidence--Expert Testimony

¶ 45 Next, we address plaintiff's argument the decision is against the manifest weight of the evidence because the Department failed to adduce expert testimony to establish the alleged conduct is related to the practice of the real estate profession. Plaintiff states the Department's examples of what constitutes "unprofessional conduct" each involve activities involved in the practice of the profession. Plaintiff argues because the conduct alleged in this case is not one of the examples given, "it is incumbent on the Department to prove how conduct which would be wholly independent of the profession implicates professional conduct in any way." Plaintiff begins from the premise that "no licensed activities are implicated" in the refinancing of his own home, and argues that to find the alleged conduct was related to the profession, the ALJ and the Secretary relied on their own expertise, depriving plaintiff of the opportunity to cross-examine that conclusion. Plaintiff argues that because there is no expert testimony linking the conduct alleged and real estate broker activities, the finding plaintiff engaged in "unprofessional" conduct is against the manifest weight of the evidence. Although the issue presented by plaintiff is

couched in terms of whether the finding is against the manifest weight of the evidence, we are actually presented with a question of law—whether expert opinion testimony is required to determine whether plaintiff's conduct violated the Act. See *Noble v. Earle M. Jorgensen Co.*, 2013 IL App (5th) 120248, ¶ 27 ("Expert testimony is not required in instances in which the trial court has determined that a layperson can readily appraise the relationship between the injuries without expert assistance." (citing *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 59 (2000))).

¶ 46 Defendants respond neither the Act nor the Department's rules require that the "dishonorable, unethical or professional" conduct that is prohibited occur in the course of engaging in the real estate profession, as evidenced by the use of the disjunctive "or" in the statute. Thus, defendants argue, "even if mortgage fraud does not constitute unprofessional conduct *** it nevertheless constitutes dishonorable or unethical conduct sufficient to constitute a violation." Defendants further respond expert testimony is only required where, without it, the agency would have to substitute its own special knowledge to make determinations involving technical concepts. In this case, however, no special knowledge was necessary to determine that the conduct alleged constitutes "dishonorable, unethical or unprofessional conduct." Common sense combined with the illegality of the conduct is sufficient to make that determination.

¶ 47 As support for finding a requirement expert testimony is needed to support a decision that certain conduct violated the standards of the profession, that is not limited to only highly technical concepts, plaintiff cites *Smith v. Department of Registration and Education*, 412 Ill. 332 (1952), and *Chase v. Department of Professional Regulation*, 242 Ill. App. 3d 279 (1993). In *Smith*, our supreme court wrote "[i]t is well settled in Illinois that an administrative tribunal cannot rely upon its own information for support of its findings." *Smith*, 412 Ill. at 347. There, the Department revoked the medical license of a doctor based on alleged violations of the

Medical Practice Act. *Id.* at 333. However, the record was "completely silent as to any expert testimony relating to the respondent's professional conduct." *Id.* at 346. The *Smith* court reversed with orders to remand the cause to the Department for another hearing. *Id.* at 349. The court found it "possesses neither medical learning nor powers of telepathy. We are, therefore, unable to medically evaluate the testimony in this record or to know what scientific appraisal of it was made by the medical committee." *Id.* at 349.

¶ 48 In *Chase*, the court found that "where an administrative agency makes factual determinations involving technical concepts unique to its expertise, expert testimony must be introduced into the record supporting the agency's position." *Chase*, 242 Ill. App. 3d at 285 (citing *Smith*, 412 Ill. at 332). In that case, the Department charged an architect with violating the Illinois Architecture Act. *Id.* at 280. The architect's expert testified that the conduct did not amount to a violation. *Id.* at 281-82. The Department provided no expert testimony. *Id.* After reviewing the authorities, including *Smith*, the court concluded the rule established by the cases was that "although an administrative agency may use its expertise to evaluate conflicting expert testimony introduced into the record, it cannot substitute that special knowledge for expert testimony in support of its position." *Id.* at 288. The court further explained:

> "The rationale for this rule is twofold. First, where the agency substitutes its own expertise *dehors* the record for expert testimony, the other party is patently deprived of its right to challenge that evidence through cross-examination. Second, reviewing courts, almost invariably non-experts in the particular field they have under consideration, have no reliable way of determining whether an agency's decision is against the manifest weight of the evidence since expert testimony supporting its conclusion is not in the record." *Id.*

The *Chase* court rejected the Department's argument that "based on the facts of this case, it did not need to introduce expert testimony into the record in order to establish that [the architect] contravened the [Illinois Architecture] Act." *Id.* at 288. The court found "[t]his case involves technical concepts, and it is impossible for us, as laymen vis-a-vis architecture, to determine from this record whether Chase violated the Act." *Id.*

¶ 49 We find expert testimony is not required in every case alleging professional misconduct. Under *Chase*, expert testimony is only required where "special knowledge" is required to resolve an issue. In this context, "special knowledge" means a technical matter or a matter that is beyond the understanding of laymen. Plaintiff has failed to demonstrate what special knowledge is required to determine the connection between the conduct alleged in the complaint and plaintiff's profession. The ALJ found plaintiff "participated in having false documents recorded by the Recorder of Deeds, interfering with a process essential to real estate transactions, and undermining the public's reliance on real estate brokers." We do not agree that a layman could not understand that determination without the aid of expert testimony. Not only is this a matter of common understanding, plaintiff's own testimony supports finding the essential nature of financing to real estate transactions. Plaintiff testified that in his professional capacity he has read approximately 100 mortgages.

¶ 50 Moreover, plaintiff has not cited clear authority for the proposition that the "substantial misrepresentation" or "dishonorable, unethical, or unprofessional conduct" prohibited by the Act must be related to the profession of a real estate broker to subject a licensee to discipline. We are not persuaded by plaintiff's argument different divisions of the Department regulate these different activities. First, that may simply be a matter of administrative convenience. Second, that fact would not establish the activities are wholly unrelated. Regardless, we make no

determination on that question because the answer would not change our holding. If such a connection between the conduct alleged and the profession is required before a violation of the Act may be found, in this case, expert testimony was not needed to establish it. We reject plaintiff's argument the Secretary's decision that he violated the Act is against the manifest weight of the evidence because it is not supported by expert testimony. Because the opposite conclusion is not clearly evident, the Department's decision is not against the manifest weight of the evidence. Further, because we do not have a definite and firm conviction an error was made when the Department concluded, without expert testimony, that plaintiff's actions violated the Act, the Department's finding is not clearly erroneous.

¶ 51 For those reasons, plaintiff's argument the Secretary abused his discretion in sanctioning plaintiff because the sanction is unrelated to the purpose of the Act (plaintiff's argument 3(c)) must fail. Plaintiff asserts the issue is "whether a licensee may be disciplined for conduct unrelated to the practice of real estate" and argues "refinancing and obtaining lines of credit are simply not part of the real estate profession and do not implicate broker activities." The ALJ made factual findings to the contrary, finding that plaintiff "participated in having false documents recorded by the Recorder of Deeds, interfering with a process essential to real estate transactions, and undermining the public's reliance on real estate brokers." The Board and the Secretary adopted those findings, and they are not against the manifest weight of the evidence. *Supra*, ¶ 49. Further, the Act contains a "good moral character" provision. See 225 ILCS 454/5-25 (West 2016). Although section 5-25 does not generally provide a basis for discipline for licensees, it does list actions the Department may consider in determining whether to grant a license, that do not necessarily involve the buying and selling of real estate. *Id.* Section 5-25 further provides that when "an applicant has made a false statement of material fact on his or her

application, the false statement may in itself be sufficient grounds to *revoke* or refuse to issue a license." (Emphasis added.) 225 ILCS 454/5-25 (West 2016). Additionally, one of the statutory requirements for licensure as a broker is to "[b]e of good moral character." 225 ILCS 454/5-27(a)(2) (West 2016). Based on all of the foregoing, we cannot say the Act is completely disinterested in the conduct of its licensees beyond facilitating sales contracts for real estate that might reflect poorly on the profession or undermine public trust in the profession. "Indeed, the predominant purpose of the State in licensing a trade or profession is the prevention of injury to the public by assuring that the occupation will be practiced with honesty and integrity, excluding from the profession those who are incompetent or unworthy." *Coles v. Department of Registration & Education*, 59 Ill. App. 3d 1046, 1048 (1978). Plaintiff's argument the discipline imposed in this case is unrelated to the purposes of the Act fails.

¶ 52 2(b). Manifest Weight of the Evidence--Filing Releases

¶ 53 Plaintiff argues the decision is against the manifest weight of the evidence because there is no evidence in the record which supports his involvement in the releases at issue, whether they were fraudulent or not.[4] Plaintiff asserts the ALJ erroneously relied on a faulty inference and an adverse credibility determination to arrive at the conclusion plaintiff participated in the filing of the allegedly fraudulent releases. Specifically, plaintiff argues the inference he participated in filing the releases is based on the erroneous assumption of fact that plaintiff was the only person to benefit from the releases which is not supported by facts in the record. Plaintiff asserts without citation to evidence in the record that every entity involved in the transaction stood to

[4] In this appeal plaintiff argued the evidence used to prove the releases related to counts III and IV were fraudulent, the notices of fraudulent release filed with the Recorder's office, was inadmissible hearsay.

benefit from the releases. Regarding the adverse credibility determination, plaintiff notes the Department called no witnesses from any of the banks involved or its own investigator. He asserts the only evidence regarding participation in the filing of the releases is his own testimony that he did not create, commission, or record the releases because the notices of fraudulent release themselves do not establish his participation and Burnett did not testify to plaintiff's involvement in any release (including the Harris release he investigated). Plaintiff argues the finding he filed the allegedly fraudulent releases or caused them to be filed rests exclusively on whether his defense was credible, effectively shifting the burden of proof to him to prove he did not file any fraudulent releases.

¶ 54 Defendants respond that proving plaintiff's violation with circumstantial evidence was appropriate and sufficient to satisfy the Department's burden of proof, and "ample circumstantial evidence exists to demonstrate" plaintiff's participation in the filing of the allegedly false releases at issue. Specifically, the Department argues that plaintiff's "indifference, in combination with the economic benefit received by [plaintiff] in refinancing with fewer encumbrances on his property (in the form of both lower rates and cash), sufficiently established his participation." As evidence of plaintiff's "indifference" to the notices of fraudulent release defendants point to the fact plaintiff did not call the police when he learned of the notices of fraudulent release and did not contact the banks.

¶ 55 The Department's burden was to establish "by clear and convincing evidence that the allegations of the Complaint are true." 68 Ill. Admin. Code. 1110.190(a). The Department alleged plaintiff violated the Act in that he made a "substantial misrepresentation" (225 ILCS 454/20-20(a)(10) (West 2012)) and/or engaged in "dishonorable, unethical, or unprofessional conduct" (225 ILCS 454/20-20(a)(21) (West 2012)) by recording with the Cook County

Recorder of Deeds fraudulent mortgage release documents. The ALJ conceded the only evidence of plaintiff's involvement in the filing of the allegedly fraudulent releases was circumstantial. Any fact may be proved by circumstantial evidence "provided that evidence meets the requisite tests of sufficiency." *Monahan v. Monahan*, 14 Ill. 2d 449, 453 (1958). See also *DeHart v. DeHart*, 2013 IL 114137, ¶ 45. "Courts have defined 'clear and convincing' evidence most often as the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question. Although stated in terms of reasonable doubt, courts consider clear and convincing evidence to be more than preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense. [Citation.]" *Bazydlo v. Volant*, 164 Ill. 2d 207, 213 (1995). See also *Wynn v. Illinois Department of Human Services*, 2017 IL App (1st) 160344, ¶ 73. This court has previously written as follows:

> "However, when the Committee has made its findings which were adopted by the Director of the Department and affirmed by the trial court, then this court cannot reverse unless it appears to us that the ruling is against the manifest weight of the evidence. As we understand it, we must balance this requirement of 'clear and convincing evidence' against the limitation on our own power to review. We have, therefore, first examined the record to determine whether in the first instance it could be said that the evidence presented by the defendants was clear and convincing." *Schyman v. Department of Registration & Education*, 9 Ill. App. 2d 504, 522 (1956), overruled in part on other grounds by *People v. Valentine*, 60 Ill. App. 2d 339 (1965).

In his case, having examined the record to determine, in the first instance, whether it can be said the evidence that plaintiff filed fraudulent lien releases was clear and convincing, we have determined that it was.

¶ 56 "Circumstantial evidence 'is the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. [Citation.]" (Emphases omitted.) *Private Bank v. Silver Cross Hospital & Medical Centers*, 2017 IL App (1st) 161863, ¶ 49. "Proof which relies upon mere conjecture or speculation, rather than reasonable inference, is insufficient. [Citation.]" *Jacobs v. Yellow Cab Affiliation, Inc.*, 2017 IL App (1st) 151107, ¶ 92. "Courts have always considered it within the province of the jury, or any other trier of facts, to make reasonable inferences from established facts, and such permissible inferences will not be discarded by a reviewing court because other inferences might have been drawn from such established facts, unless the inferences drawn are unreasonable. [Citation.]" *Olsen v. Pigott*, 39 Ill. App. 2d 191, 201 (1963). The ALJ relied on evidence of (1) multiple "fraudulent" releases on plaintiff's home; (2) a benefit to plaintiff; and (3) plaintiff's alleged indifference to the notices of fraudulent releases.[5] The record evidence establishes multiple lien releases were filed for various liens on plaintiff's property, that multiple lienholders filed notices that those releases were fraudulent, and that plaintiff received cash from at least one transaction involving a lienholder that filed a notice of fraudulent lien. The ALJ also relied on plaintiff's testimony he did not call the banks or the police when he learned of the notices of fraudulent release. The evidence established plaintiff entered a mortgage with ING Bank on March 21, 2008. On February 13, 2009, a release of the

[5] There is also evidence that two releases filed for plaintiff's property were filed not due to fraud but in error.

ING mortgage lien was executed. Then, on December 22, 2009, plaintiff executed a mortgage with Fifth Third Bank. Subsequently, on June 4, 2010, a release of the lien held by Fifth Third Bank was executed. Shortly thereafter, on June 11, 2010, ING executed its notice of fraudulent release, and on July 21, 2010, Fifth Third Bank's notice of fraudulent release followed.

¶ 57 Regardless of plaintiff's claim that he did not learn of the notices of fraudulent release of the ING and Fifth Third Bank liens until the Department filed a complaint against him, at the time plaintiff executed the mortgage with Fifth Third Bank on December 22, 2009, plaintiff would have known that he had not satisfied the ING mortgage. The documentary evidence establishes that plaintiff's claim of ignorance of the fraudulent lien releases is incredible, as was the rest of his testimony, as the ALJ found. The evidence also established plaintiff benefitted from the lien releases in that, at least with regard to the December 22, 2009 mortgage with Fifth Third Bank, plaintiff was able to refinance his home, which he testified he did to obtain better rates. The trier of fact could reasonably infer that plaintiff's acceptance of a benefit from a fraudulent lien release was probative of his involvement without resort to conjecture or speculation. Moreover, although we find nothing to suggest the filing of the notices of fraudulent release would have been a police matter, it is reasonable to infer from plaintiff's failure to even contact his bank after learning of the notices given, and his frequent refinancing and the benefits realized therefrom, that plaintiff was complicit in the filing of the fraudulent releases on which the notices were based. A reasonable trier of fact could infer from those facts that plaintiff participated in the filing of the fraudulent releases of the ING and Fifth Third liens. Because the findings were based on a reasonable inference, we will not discard the trier of fact's factual determinations.

¶ 58 Plaintiff relies on the decision in *United States v. Pickering*, 794 F. 3d 802 (7th Cir. 2015), for the proposition that an adverse credibility determination cannot constitute evidence of willful conduct. In *Pickering*, the defendant was mailed a summons to appear for federal jury duty as well as a follow-up letter but she failed to appear. *Pickering*, 794 F. 3d at 802. The trial judge asked the United States Department of Justice to institute criminal contempt proceedings. *Id.* The government filed a motion for a rule to show cause why the defendant should not be held in criminal contempt of court. *Id.* The trial court held a hearing on the motion at which the defendant testified she received the summons but had forgotten about it. *Id.* at 803. The defendant explained that when she received the summons she was in the middle of a "complicated pregnancy" that required close monitoring by medical personnel, and she was also caring for her mother who was undergoing a total knee replacement and receiving treatment for angiodema in Chicago (the defendant and her mother lived in Rockford). *Id.* The trial court found the defendant guilty beyond a reasonable doubt of willful criminal contempt of court. *Id.* On appeal, the Seventh Circuit pointed out that the trial judge "did not explain the basis of his conclusion beyond saying 'I think that she in essence just didn't want to be bothered with this summons.' " *Id.* The court of appeals found that "[o]bviously if she merely forgot the summons amidst the distractions of a complicated pregnancy and a seriously ill mother whom she was ferrying from Rockford to Chicago and back—89 miles each way—she was not guilty of willful disobedience of the summons." *Id.* The court found no evidence of the defendant's willfulness had been presented. Instead, the court found, the trial court had shifted the burden of proof to the defendant to convince him she had not willfully disobeyed the summons. *Id.* The court also noted that the defendant could have applied for a hardship excuse from having to appear for jury

duty, thus she must have forgotten the summons because "she would have been likely *** to invoke the excuse rather than risk getting into trouble." *Id.* at 804. Nonetheless, the court held,

> "[t]he point is not that she must have forgotten the summons—who knows? It is that proof beyond a reasonable doubt that she did not forget it is woefully lacking. The only solid evidence in the case is that she didn't appear for jury duty on July 18. That cannot be proof of willfulness—certainly not in the face of the uncontradicted evidence of the pressures she was under, her previous compliance with jury summonses, the availability of a hardship excuse, and the *de facto* refusal of the government to prosecute her. All the government did was carry out the judge's order to initiate a criminal proceeding—it made no effort to demonstrate that she was guilty of a crime." *Id.*

Defendant's only response to plaintiff's argument based on *Pickering* is to assert "citation to criminal cases *** involving the 'beyond a reasonable doubt' standard of proof, are inapposite." Plaintiff acknowledged that "[w]hile *Pickering* applied the 'proof beyond a reasonable standard' of a criminal case, the standard here, 'clear and convincing,' is not far behind."

¶ 59 We find the decision in *Pickering* inapposite. The findings of fact in this case are not based solely on an adverse credibility determination. The ALJ did not have to rely on the credibility of plaintiff's testimony to find plaintiff's testimony he was unaware of the fraudulent liens incredible. Plaintiff secured a mortgage ten months after one of the fraudulent releases at issue was filed, at which time it would have been impossible for plaintiff to not learn that records indicated his prior mortgage had been satisfied. In this case, unlike in *Pickering*, there is more than just evidence that the fraudulent releases were filed. There is evidence plaintiff knew about the fraudulent releases, there is evidence plaintiff benefitted from the fraudulent releases, and

there is evidence plaintiff did nothing in the face of learning of these fraudulent filings despite the threat to his personal finances. "Under Illinois law, a witness' testimony is inherently improbable if it is 'contrary of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony.' [Citations.]" *Bucktown Partners v. Johnson*, 119 Ill. App. 3d 346, 354 (1983). In this case, the facts demonstrate the falsity of plaintiff's testimony, not the ALJ's credibility determination, and the findings of fact are based on reasonable inferences from the circumstantial evidence. The decision concerning plaintiff's participation in filing the releases is not against the manifest weight of the evidence.

¶ 60 3(a). Sanctions--Arbitrarily Increased

¶ 61 Next, we address plaintiff's argument the Secretary abused his discretion in sanctioning plaintiff because the sanction was arbitrarily increased from the recommendation of the ALJ. Plaintiff cites *Sender v. Department of Professional Regulation*, 262 Ill. App. 3d 918 (1994), for the proposition that an agency's penalty is arbitrary "if it is harsher than that recommended by the hearing officer without explanation." In *Sender*, a hearing officer recommended that a pharmacist be disciplined by suspending his license for a minimum of 30 months. *Sender*, 262 Ill. App. 3d at 920. When the board received the hearing officer's recommendation, the board adopted the findings of fact and conclusions of law, but recommended to the director that the pharmacist's license be suspended for a minimum of five years and that he be fined $2,000. *Id.* at 920-21. The director of the Department adopted the board's recommendation, and the circuit court affirmed the decision of the director. *Id.* at 921. On appeal, the court affirmed the findings the pharmacist violated the relevant provisions of the Pharmacy Practice Act. *Id.* at 923. The pharmacist argued the discipline was an abuse of discretion. *Id.* at 922. The court noted the

department "doubled this sanction and added a monetary fine without explanation. The Department did not dispute the hearing officer's findings, nor did it make additional findings of fact to support its increase in the penalty imposed." *Id.* at 923. Further, the pharmacist had admitted the cause of the violation and in mitigation testified as to the steps he had taken to correct it. See *id.* Moreover, the pharmacist had been in practice for over 32 years, and had never been disciplined. *Id.* The court found "the penalty imposed is overly harsh and arbitrary." *Id.* The court reversed the fine and suspension and remanded for reconsideration and review of the recommendations of the hearing officer. *Id.*

¶ 62 This court reviews "the Director's disciplinary decision for an abuse of discretion. [Citation.] An abuse of discretion occurs only when the decision was either: (1) overly harsh in view of the mitigating circumstances or (2) unrelated to the purpose of the statute. [Citations.]" (Internal quotation marks omitted.) *Kafin v. Division of Professional Regulation of Department of Financial & Professional Regulation*, 2012 IL App (1st) 111875, ¶ 42. Whether a sanction is "overly harsh in view of the mitigating circumstances" "must be viewed in light of the abuse-of-discretion standard of review. Under that standard, an agency's decision will not be disturbed unless it is arbitrary or capricious, or unless no reasonable person would agree with the [agency's] position. [Citation.]" (Internal quotation marks omitted.) *Sonntag v. Stewart*, 2015 IL App (2d) 140445, ¶ 22. See also *Sender*, 262 Ill. App. 3d at 922 (agency abuses its discretion "when it acts arbitrarily and capriciously or when it imposes an overly harsh sanction in view of mitigating circumstances"). "The arbitrary and capricious standard is one of rationality, and the reviewing court will not substitute its own reasoning in the absence of a clear error of judgment on the part of the agency." *1212 Restaurant Group, LLC v. Alexander*, 2011 IL App (1st) 100797, ¶ 59. "Agency action is arbitrary and capricious when the agency contravenes the

legislature's intent, fails to consider a crucial aspect of the problem, or offers an implausible explanation contrary to agency expertise." *Wade v. Illinois Commerce Comm'n*, 2017 IL App (1st) 171230, ¶ 26.

¶ 63 The *Sender* court did not hold that an agency abuses its discretion whenever the sanction imposed deviates from the recommendation of the hearing officer without an explanation. A reading of *Sender* makes clear that court's holding was based on the particular facts of that case, which are readily distinguishable from this case. Here, plaintiff admitted nothing (giving highly incredible and evasive answers during his testimony), took no actions upon learning of the notices of fraudulent release, and, although plaintiff has also never been disciplined before, he has fewer years of service than the pharmacist in *Sender*. We reject plaintiff's argument the *Sender* decision contains dual holdings. There is nothing in the language of the decision to suggest the court's general observation that no explanation was given for increasing the discipline was an independent basis of the court's decision. Plaintiff's argument the sanction in this case is arbitrary under *Sender*, simply because the Director increased the sanction without explanation, fails.

¶ 64 "[O]ur review is limited to the Secretary's order and the hearing officer's findings of fact and conclusions of law to the extent they were adopted by the Secretary." *All American Title Agency, LLC*, 2013 IL App (1st) 113400, ¶ 25. Plaintiff has not demonstrated the Secretary's sanction is arbitrary. The Board adopted the ALJ's findings of fact and conclusions of law. The Board's disciplinary recommendation was based on the findings of fact and conclusions of law. ("The [Board] after making the above Findings of Fact and Conclusions of Law *** recommends that the Real Estate Broker License held by [plaintiff] be REVOKED and that he be fined twenty five thousand ($25,000) dollars.") The Secretary adopted the Board's

recommendation. Accordingly, we reject plaintiff's argument the agency issued a sanction "for which no explanation is given." The ALJ's factual findings with regard to discipline were as follows:

> "As reflected in *** the testimony and the evidence at the formal hearing, [plaintiff] was involved in his refinancing efforts of his personal property to high degree, and he engaged in substantial misrepresentation and dishonorable, unethical or unprofessional conduct related to that refinancing project. His actions demonstrated an indifference to the harm that would be done to the public were the recording of real estate transactions to become discredited. The ALJ is concerned that [plaintiff's] testimony at the formal hearing demonstrated the same indifference. [Plaintiff] will better merit the trust of the people of Illinois if he is given time to consider that a real estate broker who engages in fraud is unworthy to act as a broker, and is also a serious threat to the public welfare."

The purpose of the Act is, in part, to regulate the real estate business for the protection of the public. 225 ILCS 454/1-5 (West 2016). The basis for the discipline imposed is the protection of the public; plaintiff has pointed to no "aspect of the problem" that has not been considered; and the factual explanation for the discipline—including several factors in aggravation[6]—is not

---

[6] The ALJ found the following factors in aggravation apply in this case:

- The seriousness of the offense.
- The presence of multiple offenses.
- The impact of the offenses on any injured party.
- The motive for the offense.

See 20 ILCS 2105/2105-130 (West 2016).

implausible. We find the Secretary's order disciplining plaintiff was not arbitrary or capricious; accordingly, we find no abuse of discretion.

¶ 65 3(b). Sanctions--Overly Harsh

¶ 66 Finally, we address plaintiff's argument the Secretary abused his discretion in sanctioning plaintiff because the sanction is overly harsh in light of mitigating circumstances. Plaintiff argues defendants erroneously found no mitigating factors apply where he has "met the only factor which would be applicable to this case: a lack of prior disciplinary action." The Department's Rules provide as follows:

> "When making a determination of the appropriate disciplinary sanction to be imposed, the Department shall consider, but is not limited to, the following factors in aggravation and mitigation:
>
> a) Factors in Aggravation
>
> 1) The seriousness of the offenses;
>
> 2) The presence of multiple offenses;
>
> 3) Prior disciplinary history, including actions taken by other agencies in this State or by other states or jurisdictions, hospitals, healthcare facilities, residency programs, employers, insurance providers, or any of the armed forces of the United States or any state;
>
> 4) The impact of the offenses on any injured party;
>
> 5) The vulnerability of any injured party when considering such elements as, but not limited to, the injured party's age, disability or mental illness;
>
> 6) The motive for the offense;
>
> 7) The lack of contrition for the offenses;

8) Financial gain as a result of committing the offenses; and

9) The lack of cooperation with the Department or other investigative authorities.

b) Factors in Mitigation

1) The lack of prior disciplinary action by the Department or by other agencies in this State or by other states or jurisdictions, hospitals, healthcare facilities, residency programs, employers, insurance providers, or any of the armed forces of the United States or any state;

2) Contrition for the offenses;

3) Cooperation with the Department or other investigative authorities;

4) Restitution to injured parties;

5) Self-reporting of the misconduct; and

6) Any voluntary remedial actions taken." 68 Ill. Admin. Code § 1130.200.

¶ 67 Section 2105-130 of the Act states, in pertinent part, as follows: "When making a determination of the appropriate disciplinary sanction to be imposed, the Department shall consider only evidence contained in the record. The Department shall consider any aggravating or mitigating factors contained *in the record* when determining the appropriate disciplinary sanction to be imposed." (Emphasis added.) 20 ILCS 2105/2105-130 (West 2016). The Department argued plaintiff failed to raise the factor in mitigation in proceedings before the Department; therefore no abuse of discretion occurred in failing to consider it because that information is not in the record. In reply, plaintiff argued the Department is the keeper of its own records, and "the existence of a prior disciplinary record would be an aggravating factor."

Therefore, "the first exhibit introduced in any Department hearing are those records that support that aggravating factor."

¶ 68 We construe plaintiff's argument to surmise that if the Department is not presented with such record, it knows there is no disciplinary record. Plaintiff's position is highly speculative. Regardless, plaintiff has not pointed this court to anywhere this evidence in mitigation is "contained in the record." 20 ILCS 2105/2105-130(c) (West 2016). "Where the language is clear and unambiguous, a court may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16. The language of the statute is clear. The Department is only *required* to consider a lack of prior disciplinary action contained in the record. 20 ILCS 2105/2105-130(c) (West 2016). The mitigating factor to which plaintiff claims entitlement is not in the record; therefore, plaintiff cannot show an abuse of discretion occurred in failing to consider it. See also *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis").

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 71 Affirmed.