No. 2—10—0647
Order filed May 27, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RANDY MUCHA,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09—MR—836
	)	
BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF OAK BROOK; THE VILLAGE OF OAK BROOK, a municipality; and CHIEF THOMAS SHEAHAN, in his official and individual capacity,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: (1) Board's finding that plaintiff committed perjury is not against the manifest weight of the evidence; (2) Board's termination of plaintiff's employment was appropriate given the seriousness of the offense at issue and plaintiff's prior disciplinary history; (3) trial court properly dismissed defamation *per se* count as it was reasonably capable of an innocent construction; and (4) plaintiff's invasion-of-privacy count was not properly before appellate court where trial court dismissed count but granted plaintiff leave to amend same and plaintiff filed an amended invasion-of-privacy count, but withdrew amended count before trial court ruled on its sufficiency.

I. INTRODUCTION

In April 1987, plaintiff, Randy Mucha, was hired as a police officer for the Village of Oak Brook, Illinois (Village). On August 16, 2007, the Village's Board of Fire and Police Commissioners (Board) terminated plaintiff's employment after finding that he had committed perjury. Subsequently, plaintiff filed in the circuit court of Du Page County a three-count complaint against the Board, the Village, and Thomas Sheahan, the Village's chief of police. Count I of the complaint sought judicial review of the Board's decision pursuant to the Administrative Review Law (735 ILCS 5/3–101 *et seq.* (West 2008)). Count II, a claim for defamation *per se* directed against the Village and Sheahan, alleged that Sheahan had intentionally misled a local newspaper to publish an article that plaintiff had child pornography on his personal computer and that the Du Page County state's attorney's office was considering charges against plaintiff. Count III, a claim for invasion of privacy directed against Sheahan, alleged that Sheahan obtained "unauthorized control over personal and sensitive information and images contained on [plaintiff's] home computer," to wit, nude photographs of plaintiff's ex-wife.

The Village and Sheahan filed two motions to dismiss counts II and III of plaintiff's complaint. One motion was premised on section 2—615 of the Code of Civil Procedure (Code) (735 ILCS 5/2—615 (West 2008)) and the other motion was premised on section 2—619(a)(9) of the Code (735 ILCS 5/2—619(a)(9) (West 2008)). On January 26, 2010, the trial court granted in part the Village's and Sheahan's section 2—615 motion and dismissed with prejudice count II of plaintiff's complaint. The court found that the newspaper article in question was "reasonably capable of an innocent construction." In that same order, the court struck count III of plaintiff's complaint and granted plaintiff leave to file an amended invasion-of-privacy count. After the trial

court denied plaintiff's motion to reconsider the dismissal of count II, plaintiff filed his first-amended complaint, which included a new invasion-of-privacy count. Thereafter, the trial court entered an order affirming the Board's factual findings and its decision to terminate plaintiff's employment. In connection with that order, plaintiff's amended count III was withdrawn. Plaintiff then filed a notice of appeal.

On appeal, plaintiff raises three issues. First, plaintiff argues that the Board's decision should be reversed because: (1) its finding that plaintiff committed perjury is against the manifest weight of the evidence and (2) there was no cause for discharge based upon the evidence contained in the administrative record. Second, plaintiff insists that Sheahan's statements to the press are not capable of an innocent construction and that the trial court therefore erred in dismissing with prejudice his claim for defamation *per se*. Third, plaintiff argues that count III should not have been dismissed because he alleged sufficient facts to state a cause of action for the tort of intrusion into the seclusion of another. Because the facts pertaining to each issue are fairly discrete, we discuss them separately in conjunction with our analysis of each issue, beginning with plaintiff's complaint for administrative review.

II. ANALYSIS

A. Count I–Complaint for Administrative Review

In April 2005, a Village resident filed a federal civil rights lawsuit against the Village, plaintiff, and the Village prosecutor. See *Gaik v. Mullins*, No. 05 C 2335 (N.D. Ill., July 30, 2009). On May 15, 2006, plaintiff was deposed in connection with the *Gaik* litigation. Prior to the commencement of his examination, plaintiff was sworn to testify the whole truth concerning the matters about which he was to be questioned. During the course of the deposition, Gaik's attorney

showed plaintiff an e-mail that was sent on January 14, 2005, at 7:13 p.m., from an individual named "Linda Lucinda." The following exchange then occurred between Gaik's attorney and plaintiff:

"Q. Have you ever seen this e-mail before?

A. I saw it once in the discovery materials or, possibly, Mr. Gaik's flowchart. I don't recall. But yes, I've seen it before.

Q. Okay. And do you have any understanding as to who Linda Lucinda is?

A. I do not.

Q. And have you heard anyone discuss the identity of Linda Lucinda during the course of your service at Oak Brook?

A. No.

Q. And have you made any effort to discover the identity of Linda Lucinda?

A. No.

* * *

Q. All right. And is there a possibility that Linda Lucinda is [fellow police officer] George Peterson?

A. I don't know."

Subsequently, plaintiff sought to amend the deposition testimony he gave in the *Gaik* litigation. To that end, plaintiff signed the "signature page" of a pleading entitled "Amended Deposition Testimony of Randy Mucha." Attached to this pleading was the following certification, which plaintiff also signed:

"Randy Mucha, being first duly sworn, on oath, deposes and states that he has read the foregoing Amended Deposition Testimony by him subscribed, that he knows the contents thereof, and that same are true in substance and in fact."

The certification was subscribed and sworn before a notary public on August 10, 2006.

Plaintiff's amended deposition testimony recanted a number of plaintiff's prior deposition answers and substituted for them the following answer: "I assert my Fifth Amendment privilege against self-incrimination." Plaintiff's responses to questions about "Linda Lucinda" were also amended as follows. Plaintiff's answer to whether he saw the e-mail from Linda Lucinda was changed to read, "Yes, I've seen it before." Plaintiff's denial of having any knowledge as to the identity of Linda Lucinda was amended to read, "Yes. I am Linda Lucinda." Plaintiff also amended his answer whether there was a possibility that Peterson was "Linda Lucinda" to simply read, "No."

In August 2006, plaintiff was brought before the Board on various charges. These charges stemmed from several matters, including a letter plaintiff wrote to the Board expressing his desire to be promoted to lieutenant, which, Sheahan contended, violated the chain of command. A hearing on these charges was held on April 23, 2007 (Hearing I). During Hearing I, plaintiff was asked about the "Linda Lucinda" matter. Plaintiff stated that he could not recall being asked at the *Gaik* deposition about an e-mail from a sender using the name "Linda Lucinda," claiming "[i]t was a long time ago." The questioning at Hearing I then turned to the amended deposition testimony filed by plaintiff. Plaintiff was asked the following questions, and he provided the following responses:

"Q. Do you recall your attorney filing amended deposition testimony for you in that federal lawsuit?

A. Yes, sir.

Q. And do you recall that you amended your answer [to state that] you are Linda Lucinda?

A. I don't recall that, sir.

Q. You don't recall whether you are Linda Lucinda?

A. No, I don't."

When plaintiff was shown the amended deposition testimony at Hearing I, he remarked that he had "never seen this," although he acknowledged that his attorney "may have faxed [him] the signature page to sign." Plaintiff later stated that the information in the amended deposition testimony resulted from discussions between himself and his attorney. Thereafter, plaintiff was again asked if he used the identity "Linda Lucinda" to write e-mails. Plaintiff responded, "I don't recall. Sir, I've never seen this in–I don't recall whether or not I ever purported to be Linda Lucinda." The following colloquy then ensued:

"Q. So you're saying that this was filed by your attorneys to amend your answers and that it was incorrect?

A. I don't know if it's correct or not, sir.

Q. So you won't admit that you are, in fact, Linda Lucinda?

A. I don't admit it and I don't deny it.

Q. What does that mean, Sergeant, you don't admit it, you don't deny it?

A. I don't recall if I ever used that name.

Q. So what you're saying then is you're telling us that the amended deposition testimony filed on your behalf and what you signed *** where it says the aforeging [*sic*]

amended deposition testimony has been answered by and signed by Randy Mucha and you signed it–that is your signature, is it not?

A. Yes, sir, that is my signature.

Q. And you're saying that you didn't read it before you signed it?

A. That's correct.

Q. Okay. So you're saying then that your attorneys filed an amendment on your behalf that is not accurate?

A. I don't know if it's accurate or not, sir.

Q. You don't know whether you're Linda Lucinda?

A. No, I don't.

Q. Is that what you're telling us?

A. Yes.

Q. Thank you. So your testimony today is that you do not know at this time whether or not you ever used the name Linda Lucinda as an e-mail address, is that correct?

A. That is correct.

Q. Would it help you if I said that Linda Lucinda is from a web site name of LindaLucinda@Excite.com and that you used to use that to send out e-mails?

A. Sir, no, it does not."

Following Hearing I, the Board found that plaintiff had violated various department rules, including those involving insubordination, conduct unbecoming an officer, untruthfulness, release of confidential information related to an internal investigation, and violation of the chain of command. The Board suspended plaintiff without pay for 30 days.

On June 21, 2007, Sheahan filed the "Statement of Charges" at issue in this appeal. The statement consisted of a single charge alleging violations of the following police department rules: Rule 7.2 (integrity), Rule 7.9 (truthfulness), Rule 15.1 (standard of conduct), Rule 18.10 (conduct unbecoming), and Rule 18.39 (disrepute). Among other things, the statement charged that plaintiff was untruthful in his testimony about the "Linda Lucinda" matter at Hearing I and that plaintiff's deposition testimony in the *Gaik* litigation, where he denied any knowledge of "Linda Lucinda," was untruthful based upon his later-amended deposition testimony. With respect to the amended deposition testimony, Sheahan charged that either plaintiff's testimony that he had never seen the amended deposition testimony was untruthful in light of his attestation, or that plaintiff was untruthful when he swore in the amended deposition testimony that he had reviewed that testimony prior to signing the answers. Sheahan sought termination of plaintiff's employment.

A hearing on the June 21, 2007, statement of charges, commenced on July 11, 2007 (Hearing II). At that time, the Board and the parties discussed various procedural and scheduling matters. Among other things, the Board granted a motion to bifurcate the hearing into a guilt-innocence phase and an aggravation-mitigation phase. The matter was then continued until July 23, 2007, to hear testimony.

At the first phase of Hearing II, plaintiff testified as an adverse witness. Initially, plaintiff agreed that it is "absolutely essential" that a police officer be truthful and that the failure of a police officer to testify truthfully under oath during a trial or at an administrative hearing could constitute grounds for the officer's immediate dismissal. Plaintiff also acknowledged that if a police officer does not tell the truth, his ability to testify as a witness in criminal cases is jeopardized because the officer would be subject to impeachment by the defense.

As to his original deposition testimony in the *Gaik* litigation, plaintiff testified at Hearing II that he "believe[d he] was being truthful" at the time he answered the questions posed to him. Plaintiff explained that although he had used a "Linda Lucinda" e-mail address, at the time of his original deposition testimony he "could not recall that." He later discovered that he "erred in that testimony" and "brought it immediately to the attention of [his] attorney so that he could make the correct reparations." With respect to the amended deposition testimony, plaintiff stated that he did not know "what [his] attorney put." He stated that although 14 pages of documents were filed with respect to his amended deposition testimony, he only received the signature page and the certification page, both of which he signed. Plaintiff further testified that he did not tell his attorney to change the answers to his testimony. Rather, he "told [the attorney] what the facts were and left it up to him to do the right thing." Plaintiff denied that his attorney fabricated responses to the amended deposition testimony. However, he stated that he never read them and that his attorney "filed answers well before [he] ever signed" the amended deposition testimony. Ultimately, plaintiff admitted that the certification in his amended deposition was "inaccurate" because he had not read the amended deposition testimony at the time he signed the document.

Plaintiff then returned to the original deposition testimony. He once again stated that at the time he testified, he did not recall being "Linda Lucinda." He stated that when his recollection was refreshed, he approached his attorney and "asked how to fix the answers from a seven and a half hour deposition where [he] was shown thousands of documents how to correct a couple [he] later learned were not accurate." Plaintiff once again acknowledged that in the amended deposition testimony that he used the "Linda Lucinda" e-mail name, but stated that he did not know why his attorney selected "Yes. I am Linda Lucinda" as an answer to that particular change.

Turning to Hearing I, plaintiff admitted that he testified at that proceeding that he could not recall whether he was "Linda Lucinda" even though Hearing I took place only eight months after plaintiff provided his amended deposition testimony. Nevertheless, plaintiff denied that his testimony at Hearing I was false, explaining that it was "a true statement at the time." He stated that after Hearing I, he went home and reviewed some documents to refresh his memory and determine whether he had ever used the name "Linda Lucinda." Plaintiff further explained that "over the year [he] had forgotten" that he used the name "Linda Lucinda" and that is why he could not definitively testify at Hearing I whether he had used that name.

Upon questioning by his own attorney, plaintiff testified that he contacted the lawyer representing him in the *Gaik* litigation and discussed amending his original deposition testimony. He reiterated that his deposition testimony was 7½ hours long and involved numerous documents and e-mails. Although he "answered truthfully to the best of [his] knowledge at [the] time [of the original deposition]," plaintiff began to think about his answers and the name "Linda Lucinda" "rang a bell." As a result, plaintiff did some research and discovered that he had used an e-mail account with the name "Linda Lucinda." After refreshing his recollection, plaintiff told counsel that he did recall using the name "Linda Lucinda," and he asked how to correct his original deposition testimony. Plaintiff testified that he was never asked to review the amended answers prior to July 21, 2006, which, according to the proof of service, was the date the amended deposition testimony was sent to the attorneys of record in the *Gaik* litigation. Plaintiff stated that he received only two pages of the amended deposition testimony, those that required his signature, which were faxed to him on August 10, 2006. Plaintiff testified that he did not see a complete copy of his amended deposition testimony until the June 21, 2007, statement of charges was filed against him. Plaintiff

testified that he decided to come forward with the fact that his original deposition testimony was inaccurate "[b]ecause of the vast importance placed on truthfulness, especially in [his] occupation." Plaintiff testified that the answers provided in the amended deposition are accurate.

Sheahan also testified at Hearing II. Sheahan stated that it is important to the discipline and efficiency of a police department that all members be truthful at all times. As a result, a charge of untruthfulness against an officer is "a very serious charge." Sheahan testified that after Hearing I in April 2007, plaintiff was found guilty of various charges. Sheahan testified that in his view, plaintiff had lied at Hearing I, which is why he filed the statement of charges at issue. Sheahan reiterated that it is "important for all police officers to be truthful, to be truthful especially under oath, and to be truthful in court, in reports, and in their everyday life."

Following Sheahan's testimony, the parties presented closing arguments. The Board then went into closed session. When the Board returned, it announced that it had found plaintiff guilty of violating police department rules 7.2, 7.9, 15.1, 18.10, and 18.39. Immediately thereafter, phase two of the hearing commenced. In support of his request that plaintiff's employment be terminated, Sheahan presented plaintiff's prior disciplinary history in evidence. That document indicated that during the course of his career with the Village police department, plaintiff had received two written reprimands, two one-day suspensions without pay, one eight-day suspension, one five-day suspension without pay, one three-day suspension without pay, and one 30-day suspension without pay. Sheahan noted that the 30-day suspension resulted, in part, after the Board found that plaintiff had lied in the letter at issue in that case. In mitigation, plaintiff's attorney presented plaintiff's entire personnel file, which was admitted into evidence. Counsel argued that plaintiff had 20 years of excellent performance evaluations and that the only discipline he has received regarding

untruthfulness came after Hearing I. Thereafter, the Board again went into closed session. After reconvening, the Board announced that the appropriate sanction for plaintiff's conduct was termination of his employment as a police officer for the Village.

On August 16, 2007, the Board reduced its findings and decision to writing. The written ruling states in pertinent part as follows:

> "A. The Board finds that [plaintiff] committed perjury during the May 15, 2006 deposition and at the April 23, 2007 hearing before this Board. This finding is predicated on the testimony and exhibits introduced at the hearing including, but not limited to, the following:
>
> 1. During the May 15, 2006 deposition [plaintiff] testified under oath that he had no knowledge about the identity of 'Linda Lucinda.'
>
> 2. On August 10, 2006, [plaintiff] executed a sworn statement *** amending his deposition testimony and averring that Linda Lucinda was an email address he had used.
>
> 3. [Plaintiff's] testimony in response to the Statement of Charges was not credible. [Plaintiff] failed to offer any credible explanation for his denial at his depostion that he knew the identity of Linda Lucinda, a moniker that he himself had used as an email address and/or identity. Additionally, [plaintiff's] testimony surrounding his execution of the amendment to his deposition also lacked any credibility whatsoever. [Plaintiff] did not sufficiently explain his claim that he only later recalled that Linda Lucinda was one of his email addresses. Despite this sworn amendment to his federal

> deposition testimony admitting his use of the moniker Linda Lucinda, at the April 23, 2007 hearing before this Board, [plaintiff] again testified that he did not remember using Linda Lucinda as one of his email addresses. At the present hearing, [plaintiff] offered no credible explanation for his claimed lapse of memory. [Plaintiff's] testimony at this hearing was clearly perjured.
>
> B. As a result of the Board's findings with respect to the May 15, 2006 and April 23, 2007 perjury allegations the Board finds that [plaintiff] violated Rules 7.2, 7.9, 15.1, 18.10, and 18.39 of the Rules and Regulations of the Oak Brook Police Department.
>
> C. In considering the appropriate discipline for the above-referenced violations, the Board has considered [plaintiff's] prior discipline, including suspensions. Additionally, the Board has considered the seriousness of the present charges and violations, especially as they relate to police work. Accordingly, based on these considerations and findings, the Board finds termination of employment to be appropriate discipline."

Thereafter, plaintiff filed a complaint for administrative review with the trial court. As noted above, the trial court affirmed the Board's findings and decision. This appeal followed.

On appeal, plaintiff contends that the Board's finding that he committed perjury is against the manifest weight of the evidence. Alternatively, plaintiff asserts that Sheahan failed to prove that there is "cause" for discharge based upon the evidence contained in the administrative record.

In reviewing an administrative agency's decision to discharge a public employee, we invoke a two-step process. *Walsh v. Board of Fire & Police Commissioners of the Village of Orland Park*, 96 Ill. 2d 101, 105 (1983). First, we must determine whether the administrative agency's findings

of fact are contrary to the manifest weight of the evidence. *Valio v. Board of Fire & Police Commissioners of the Village of Itasca*, 311 Ill. App. 3d 321, 328 (2000). Second, we must determine if the findings of fact provide a sufficient basis for the administrative agency's conclusion that there is cause for discharge. *Valio*, 311 Ill. App. 3d at 328-29. We now turn to the former inquiry.

1. The Board's Finding that Plaintiff Committed Perjury

It is not the function of this court to resolve factual inconsistencies or reweigh the evidence. *Sindermann v. Civil Service Comm'n of the Village of Gurnee*, 275 Ill. App. 3d 917, 927 (1995). A court of review considers the administrative agency's findings of fact to be *prima facie* true and correct. 735 ILCS 5/3–110 (West 2006); *Launius v. Board of Fire & Police Commissioners of the City of Des Plaines*, 151 Ill. 2d 419, 427 (1992); *Valio*, 311 Ill. App. 3d at 329; *Sindermann*, 275 Ill. App. 3d at 926-27. We must sustain the administrative agency's findings if the record contains any competent evidence to support the findings. *Valio*, 311 Ill. App. 3d at 330. In this regard, the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence are matters particularly within the province of the administrative agency. *Valio*, 311 Ill. App. 3d at 329. As such, the administrative agency's factual findings will not be disturbed on appeal unless they are against the manifest weight of the evidence. *Valio*, 311 Ill. App. 3d at 329. A finding of fact is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Sindermann*, 275 Ill. App. 3d at 922; *Kupkowski v. Board of Fire & Police Commissioners of the Village of Downers Grove*, 71 Ill. App. 3d 316, 323 (1979).

In this case, the Board found that plaintiff committed perjury during the May 15, 2006, deposition in the *Gaik* litigation and at Hearing I on April 23, 2007. For the reasons set forth below, we cannot conclude that the Board's finding is against the manifest weight of the evidence.

Although the Board's decision does not define "perjury," we note that the term generally denotes "[t]he act or an instance of a person's deliberately making material false or misleading statements while under oath." Black's Law Dictionary 1160 (7th ed. 1999); see also *Parks v. Neuf*, 218 Ill. App. 3d 427, 429 (1991); *People v. Lovitz*, 127 Ill. App. 3d 390, 395 (1984). The evidence of record shows that during the May 15, 2006, deposition, plaintiff was asked several questions regarding "Linda Lucinda," including whether he had any understanding as to who "Linda Lucinda" is, whether he had heard anyone discuss the identity of "Linda Lucinda" during the course of his tenure with the Oak Brook police department, and whether he made any effort to discover the identity of "Linda Lucinda." In responding under oath to these inquiries, plaintiff did not waver or indicate that he was unable to remember. Instead, he denied unequivocally that he had any knowledge of the identity of "Linda Lucinda." Yet, less then three months later, plaintiff sought to amend his deposition testimony. To that end, plaintiff certified that he had read the proposed amended deposition testimony and that the contents of his amended testimony "are true in substance and in fact." The amended deposition testimony was not a mere correction of typographical errors. Rather, it consisted of plaintiff's sworn acknowledgment that he had, in fact, used the fictitious name "Linda Lucinda" in correspondence. At Hearing II, plaintiff attributed the change in his deposition testimony to a memory lapse. He explained that after he was originally deposed he began to think about his answers and the name "Linda Lucinda rang a bell." Plaintiff further explained that after conducting some research he discovered that he had in fact used an e-mail account with the name

"Linda Lucinda." Plaintiff also related that despite signing the signature and certification pages of the amended testimony, he never read his amended testimony until the July 21, 2007, statement of charges were filed against him. The Board did not find plaintiff's explanations credible. As noted above, issues of credibility are particularly within the province of the Board. *Valio*, 311 Ill. App. 3d at 329. Indeed, given the unequivocal nature of plaintiff's testimony at the original deposition, the Board could have reasonably believed that filing the amended deposition testimony demonstrated a conscious desire to correct an intentionally wrongful statement, rather than to rectify an innocent memory lapse. Accordingly, we determine that a conclusion opposite to the Board's finding that plaintiff committed perjury at the May 15, 2006, is not clearly apparent.

Similarly, we determine that a conclusion opposite to the Board's finding that plaintiff committed perjury at Hearing I on April 23, 2007, is not clearly apparent. At Hearing I, plaintiff was asked about his amended deposition testimony. He stated that he was unable to recall that he had amended his original deposition testimony to state that he is "Linda Lucinda." Plaintiff further testified at Hearing I that he was unable to recall whether he is "Linda Lucinda." This testimony was presented despite the fact that just eight months earlier, plaintiff had sworn in his amended deposition testimony that he had used the name "Linda Lucinda" in correspondence. Plaintiff explained at Hearing II that despite doing some research after providing his original deposition testimony and discovering his connection to "Linda Lucinda," he again forgot that he had used the name "Linda Lucinda." Again, the Board did not find plaintiff's explanation credible, as was within its province. See *Valio*, 311 Ill. App. 3d at 329. Moreover, the Board could have reasonably found that plaintiff deliberately gave false or misleading testimony regarding the "Linda Lucinda" matter at Hearing I. Indeed, to believe plaintiff's explanation at Hearing II regarding his Hearing I denial

that he was "Linda Lucinda," the Board would have had to believe the following propositions. First, plaintiff completely forgot his creation of the "Linda Lucinda" identity when he provided his original deposition in the *Gaik* litigation in May 2006. Second, by August 2006, plaintiff had remembered using the fictitious name "Linda Lucinda" and thought it significant enough to correct the deposition testimony. Third, by the time of Hearing I, just eight months later, plaintiff again forgot about using the "Linda Lucinda" matter.

Plaintiff suggests that Sheahan "circumvented the administrative review process" by bringing allegations of misconduct in the June 21, 2007 statement of charges for which Sheahan was aware prior to Hearing I. Plaintiff points out that during Hearing I, Sheahan's attorney questioned him about his May 15, 2006, deposition testimony and his amendment thereto. Plaintiff insists that the fact that Sheahan knew about the May 15, 2006, deposition testimony and subsequent amendment at the time of Hearing I "mandated Sheahan to bring charges against [plaintiff] in the first set of disciplinary charges if Sheahan truly believed that [plaintiff] committed perjury." According to plaintiff, by waiting to bring allegations of misconduct of which Sheahan was aware prior to Hearing I, Sheahan must not have considered plaintiff to have violated any police department rule or regulation. However, plaintiff cites no authority for the proposition that the July 21, 2007, statement of charges was untimely or that Sheahan somehow waived his right to file charges against him in the "Linda Lucinda" matter. In fact, our research has found authority to the contrary. See *Sindermann*, 275 Ill. App. 3d at 926 ("[A] police department's failure to take timely disciplinary action does not bar the imposition of sanctions against a police officer"). Accordingly, we reject this assertion.

Next, plaintiff argues that we should not consider his statements from Hearing I about the May 15, 2006, deposition, because they were elicited in violation of his rights under the Uniform

Peace Officers' Disciplinary Act (Disciplinary Act) (50 ILCS 725/1 *et seq*. (West 2006)). According to plaintiff, instead of opening a formal investigation of the alleged misconduct on May 15, 2006, Sheahan interrogated him, under oath, before the Board at Hearing I, without providing him with prior notice of the allegations of misconduct or giving him the opportunity to meet with his civil attorney or union representative. Plaintiff insists that Sheahan's questioning of him during Hearing I "was nothing short of a formal interrogation which should have comported with the [Disciplinary Act]." We disagree. As we recently stated in *Sherwood v. City of Aurora*, 388 Ill. App. 3d 754, 759 (2009), the Disciplinary Act provides "a series of procedural protections to police officers *when they are interrogated as part of formal investigations* into officer misconduct." (Emphasis added.) However, plaintiff does not cite, and we do not find, any language in the Disciplinary Act requiring that an officer be interrogated prior to seeking the officer's termination. In fact, Sheahan testified at Hearing II that if the facts of the situation are known, there is no need for a formal interrogation. As such, we reject this argument.

2. Cause for Discharge

We next consider whether the Board's factual findings are sufficient to support its conclusion that "cause" exists for plaintiff's discharge. *Valio*, 311 Ill. App. 3d at 330. The term "cause" has been defined as " 'some substantial shortcoming which renders [the employee's] continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as good cause for his not longer occupying the place.' " *Walsh*, 96 Ill. 2d at 105, quoting *Fantozzi v. Board of Fire & Police Commissioners of the Village of Villa Park*, 27 Ill. 2d 357, 360 (1963). The Board, not the reviewing court, is in the best position to determine the effect of a police officer's conduct on the department.

Valio, 311 Ill. App. 3d at 330. As such, a reviewing court affords the administrative agency's determination of "cause" considerable deference. *Valio*, 311 Ill. App. 3d at 330-31. A reviewing court may not decide whether a less stringent punishment is appropriate and may not reverse the Board's decision unless it is arbitrary and unreasonable or unrelated to the needs of service. *Walsh*, 96 Ill. 2d at 105; *Valio*, 311 Ill. App. 3d at 331. The violation of one police department rule or regulation may constitute sufficient grounds for dismissal. *Thanasouras v. Police Board of the City of Chicago*, 33 Ill. App. 3d 1012, 1014 (1975).

Following Hearing II, the Board found that plaintiff had violated rules involving integrity, truthfulness, standard of conduct, conduct unbecoming, and disrepute arising out of his testimony about the "Linda Lucinda" matter. The Board then concluded that plaintiff's prior disciplinary history and the seriousness of the charges and violations at issue warranted termination of plaintiff's employment. It was undisputed that a charge of untruthfulness against a police officer is a very serious charge. Plaintiff himself acknowledged that it is "absolutely essential" that a police officer be truthful. He stated that by not telling the truth, an officer's ability to testify as a witness in a criminal case is jeopardized because the officer opens himself up to impeachment by the defense. Plaintiff even acknowledges that discharge could be an appropriate discipline for an officer's failure to testify truthfully under oath during a trial or at an administrative hearing. For his part, Sheahan testified that it is important to the discipline and efficiency of a police department that all members be truthful in all aspects of their lives, both private and professional. With respect to plaintiff's prior discipline, the evidence shows that during the course of his career with the Village police department, plaintiff had received two written reprimands, two one-day suspensions without pay, one eight-day suspension, one five-day suspension without pay, one three-day suspension without

pay, and one 30-day suspension without pay. The 30-day suspension resulted after Hearing I, where plaintiff was found to have violated various rules of the Village police department, including insubordination, conduct unbecoming an officer, untruthfulness, violation of the chain of command, and release of confidential information related to an internal investigation and disciplinary action. Given the seriousness of the charge at issue and plaintiff's extensive disciplinary history, we cannot say that the Board's decision to terminate plaintiff's employment is arbitrary, unreasonable, or unrelated to the needs of service.

Despite plaintiff's acknowledgment at Hearing II that the failure of a police officer to testify truthfully under oath during a trial or at an administrative hearing could constitute grounds for the officer's immediate dismissal, he insists that discharge was too harsh of a remedy in this case. He asserts that even if his testimony regarding the "Linda Lucinda" matter was untruthful, it was unrelated to his service as a police officer. We disagree. It is true that in determining whether discharge is an appropriate sanction for untruthfulness, Illinois courts have considered whether a lie relates to " 'personal business while on duty' " or whether the lie relates to " 'an officer's duty to the public.' " *Christenson v. Board of Fire & Police Commissioners of the City of Oak Forest*, 83 Ill. App. 3d 472, 477-78 (1980), quoting *Kupkowski*, 71 Ill. App. 3d at 324-25. Falsehoods pertaining to the latter category have been held to justify dismissal. See *Christenson*, 83 Ill. App. 3d at 477-78, quoting *Kupkowski*, 71 Ill. App. 3d at 324-25. Here, we find that plaintiff's misconduct related to his duty to the public. In particular, we note that plaintiff's deposition testimony involved a federal civil rights suit arising out of plaintiff's activities as a police officer for the Village. See *Gaik v. Mullins*, No. 05 C 2335 (N.D. Ill., July 30, 2009). Likewise, plaintiff's testimony at Hearing I involved questioning under oath by his employer about activities conducted as a police officer which

were relevant to the *Gaik* litigation. Indeed, plaintiff himself admitted that it is "absolutely essential" that a police officer be truthful and that the failure of a police officer to testify truthfully under oath during a trial or at an administrative hearing could constitute grounds for the officer's immediate dismissal. Therefore, we conclude that the Board had sufficient reason to terminate plaintiff's employment with the Village.

B. Count II–Defamation *Per Se*

Count II of plaintiff's complaint is directed against the Village and Sheahan. Count II sought recovery based upon a theory of defamation *per se* arising out of statements made by Sheahan in an article published in *The Doings* newspaper. As noted above, the trial court dismissed count II with prejudice upon the Village's and Sheahan's section 2—615 motion (735 ILCS 5/2—615 (West 2008)). The court found that the article in question was reasonably capable of an innocent construction. On appeal, plaintiff insists that the trial court erred in granting the motion to dismiss because Sheahan's statements "could in no way be considered 'innocent' under the innocent construction rule."

We review a motion to dismiss under section 2—615 *de novo*. *Solaia Technology, LLC v. Specialty Publishing Company*, 221 Ill. 2d 558, 579 (2006). A section 2—615 motion to dismiss challenges the legal sufficiency of the complaint. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). On review of an order granting a section 2—615 motion to dismiss, the relevant inquiry is whether the allegations of the complaint, when construed in the light most favorable to plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Green*, 234 Ill. 2d at 491. As such, our analysis is limited to those facts and allegations contained within the complaint and any attachments thereto. *Seith v. Chicago Sun-Times, Inc.*, 371 Ill. App. 3d 124, 133 (2007). A cause

of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that would entitle the plaintiff to recover. *Gardner v. Senior Living Systems, Inc.*, 314 Ill. App. 3d 114, 117 (2000).

"A statement is defamatory if it tends to harm a person's reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person." *Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006). To state a cause of action for defamation, a plaintiff must present facts that a defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. *Green*, 234 Ill. 2d at 491. Whether a statement is actionable is a question of law, and each case must be decided on its own facts and circumstances. *Gardner*, 314 Ill. App. 3d at 118.

Illinois courts recognize two types of defamation actions: defamation *per se* and defamation *per quod*. *Tuite*, 224 Ill. 2d at 501; *Stratman v. Brent*, 291 Ill. App. 3d 123, 134 (1997). As recounted below, count II of plaintiff's complaint alleges that Sheahan's statements were defamatory *per se*. A statement is actionable *per se* when the defamatory character of the statement is apparent on its face, *i.e.*, when the words used are so obviously and materially harmful to the plaintiff that injury to his or her reputation may be presumed. *Chicago City Day School v. Wade*, 297 Ill. App. 3d 465, 469 (1998). Unlike an action for defamation *per quod*, in an action for defamation *per se*, the plaintiff need not plead or prove actual damages to his or her reputation to recover. *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 68 (2010). Illinois recognizes five categories of statements that are defamatory *per se*: (1) statements imputing the commission of a crime; (2) statements imputing infection with a loathsome communicable disease; (3) statements imputing that an inability to perform or a lack of integrity in the discharge of one's employment

duties; (4) statements imputing that a person lacks ability or otherwise prejudicing a person in his or her trade, profession, or business; and (5) statements imputing adultery or fornication. *Green*, 234 Ill. 2d at 491-92.

However, even if a statement falls into one or more of these categories, it will not be deemed defamatory *per se* if it is reasonably capable of an innocent construction. *Green*, 234 Ill. App. 3d at 499; *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 849 (2010). In *Green,* our supreme court explained the innocent-construction rule as follows:

> "Under the 'innocent-construction rule,' a court must consider the statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning. [Citation.] Indeed, this court has emphasized that the context of the statement is critical in determining its meaning, as a given statement may convey entirely different meanings when presented in different contexts. [Citation.] If the statement may reasonably be innocently interpreted, it cannot be actionable *per se.* [Citation.] Stated differently, 'a statement "reasonably" capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions * * *.' [Citation.] At the same time, when the defendant clearly intended and unmistakably conveyed a defamatory meaning, a court should not strain to see an inoffensive gloss on the statement. [Citation.]" (Emphasis in original.) *Green*, 234 Ill. 2d at 499-500, quoting *Mittelman v. Witous,* 135 Ill. 2d 220, 232 (1989), *abrogated on other grounds* by *Kuwik v. Starmark Star Marketing & Administration, Inc.,* 156 Ill. 2d 16 (1993).

The applicability of the innocent construction rule is a question of law subject to *de novo* review. *Seith*, 371 Ill. App. 3d at 135. With these principles in mind, we consider plaintiff's arguments.

Count II of plaintiff's complaint alleged that on or about May 10, 2007, Sheahan publicly discussed plaintiff with a reporter for *The Doings* newspaper. Sheahan's statements were incorporated into a newspaper article titled "Police sergeant investigated by DuPage County grand jury." A copy of the article was attached to plaintiff's complaint. Because the article is short, and because the innocent construction rule requires a writing to be read as a whole (*Tuite*, 224 Ill. 2d at 512), we reproduce the article in its entirety here, italicizing the portion of the article that plaintiff alleges is defamatory:

> "[A] DuPage County grand jury is investigating an Oak Brook police officer who has been sued twice for allegedly harassing residents—with the village paying one couple $2 million to settle the case, court records show.
>
> The investigation came to light last week when the officer, Randy Mucha, asked a federal judge to put a protective order on a hard drive from his personal computer that was subpoenaed as part of one of the lawsuits against Mucha.
>
> Attorneys for the couple said they couldn't produce the hard drive. It had already been turned over to the grand jury, which had subpoenaed it.
>
> *Oak Brook Police Chief Thomas Sheahan said allegations involving child pornography were brought to light after Oak Brook resident Terrence O'Malley filed suit against Mucha. In the suit, O'Malley alleges that Mucha used O'Malley's online identity to purchase pornography. One of the computer files cited was a 16-year-old-girl in sexual poses, Sheahan said.*

'During the course of an investigation this came to light.' Sheahan said. 'I contacted the DuPage County State's Attorney's office and turned over the investigation to them.'

Mucha was recently suspended for 30 days without pay by the Oak Brook Police and Fire Commission. Sheahan wanted him fired.

In addition to the lawsuit filed by O'Malley, Mucha still faces a misdemeanor charge for allegedly running an illegal background check on a resident.

Mucha said he is unaware of any reason he would be under investigation.

'I have no idea,' Mucha said. 'I'm not at all worried. There's nothing at all there.'

He also said he has not been called before the grand jury.

A spokesperson for the DuPage County State's Attorney's office could not be reached."

Plaintiff alleged in his complaint that Sheahan's statements that there were " 'allegations involving child pornography' which were brought to light" and that " '[o]ne of the computer files cited in the case was a 16-year-old girl in sexual poses' " were "absolutely false." Plaintiff further asserted that Sheahan did not turn over any investigation involving child pornography to the Du Page County state's attorney's office. Plaintiff added that the state's attorney's investigation, "if any, of [his] computer revealed that it did not contain child pornography. No charges were ever brought against [plaintiff] for child pornography or any other criminal offense relating to his computer."

According to plaintiff, Sheahan "intentionally mislead *The Doings*' reporter to publish an article which inferred that 'child pornography' was found on [his] computer hard drive and the DuPage County State's Attorney's Office was considering child pornography charges against [him]."

Plaintiff alleged that Sheahan's statements were defamatory *per se* because they imputed the commission of a criminal offense, an inability to perform or want of integrity in the discharge of duties of office or employment, and a lack of ability in his trade, profession, or business. Plaintiff also asserted that the statements Sheahan made to the press were done with malice to continue his campaign to destroy plaintiff's career and were either false or made in reckless disregard for the truth.

Given the context of the article, and giving Sheahan's statements their natural and obvious meaning, we agree with the trial court that the statements are reasonably capable of an innocent construction. The article provides that "Sheahan said that *allegations* involving child pornography were brought to light after Oak Brook resident Terrence O'Malley filed suit against [plainitff]" (emphasis added) and that Sheahan "contacted the DuPage County State's Attorney's office and turned over the investigation to them." Sheahan's statements can be reasonably construed to mean that Sheahan was turning over to the appropriate authorities a third party's claim that plaintiff was involved in potentially criminal misconduct. These comments can be reasonably read to mean only that Sheahan was referring to the allegations in O'Malley's lawsuit, not that Sheahan himself was accusing plaintiff of possessing child pornography. Nowhere in the article does Sheahan state that he himself was accusing plaintiff of child pornography. Moreover, although plaintiff did not attach a copy of the O'Malley lawsuit to his complaint, there is no indication that Sheahan was vouching for the validity of any allegations that O'Malley made in his complaint. Rather, Sheahan related that there were serious charges brought to light by a third party in a publicly-filed federal lawsuit that needed to be investigated.

Further, the word "this" in the context of Sheahan's statement "[d]uring the course of investigation *this* came to light," (emphasis added) can be reasonably construed to refer only to the allegations being made by O'Malley in his lawsuit. Sheahan was merely saying that when "this" allegation of child pornography came to light, Sheahan turned the investigation over to the Du Page County state's attorney's office for investigation. Plaintiff argues that even assuming Sheahan's use of the word "this" referred to the O'Malley lawsuit, his complaint makes clear that O'Malley did not allege that plaintiff possessed child pornography. We disagree. While plaintiff's complaint states that O'Malley "admitted in court proceedings that he has no personal knowledge of any pornographic material on Mucha's computer and had never viewed or received any pornographic file which resided on Mucha's computer," the complaint does not deny that the O'Malley *lawsuit* contained the allegations referenced by Sheahan. Significantly, there is no allegation that O'Malley did not file a law suit against plaintiff alleging that plaintiff used O'Malley's online identity to purchase pornography or that the lawsuit referred to a computer file involving a 16-year-old girl in sexual poses. The fact that O'Malley may have later admitted that he lacked a basis for these allegations does not mean that the allegations were not made in the first instance.

Plaintiff further insists that the statements that "allegations of child pornography were brought to light" and that one of the computer files cited involved "a 16-year-old-girl in sexual poses" are not ambiguous or subject to different meanings. However, as we discussed above, the article can be reasonably interpreted that it was O'Malley, not Sheahan, who accused plaintiff of possessing child pornography. As noted earlier, Sheahan stated that *allegations* involving child pornography were brought to light after O'Malley filed a lawsuit. Sheahan then qualified what he meant by child pornography. He stated that O'Malley's allegations concerned a 16-year-old girl in

sexual poses. Any reasonable reader would have concluded that "child pornography" meant that the allegations of pornography identified in O'Malley's complaint were that the girl was under the age of 18 and therefore a minor.

Further, given the context of the article, any reasonable reader would have concluded that based upon the allegations contained in O'Malley's complaint, Sheahan's statements concerning his decision to turn over his investigation were not defamatory *per se*. Sheahan never indicated that the Du Page County state's attorney's office was considering child pornography charges against plaintiff. Sheahan stated that when O'Malley's allegations "came to light," he contacted the Du Page County state's attorney's office and turned over the investigation to it. A reasonable reader would conclude that Sheahan was turning his investigation over to the Du Page County state's attorney's office for the grand jury to make any determination about O'Malley's allegations. Sheahan never made any accusation of plaintiff having committed a crime or that criminal charges were being brought against plaintiff. Therefore, we conclude that the trial court properly determined that Sheahan's statements were not defamatory *per se* and it properly dismissed count II with prejudice.

III. Count III–Invasion of Privacy

Finally, plaintiff argues that count III of his complaint, which was styled as an invasion-of-privacy claim, alleged sufficient facts to state a cause of action for the tort of intrusion into the seclusion of another. Defendants respond that plaintiff waived any argument with respect to count III because he withdrew it as a tactical matter at the time the trial court entered judgment in defendants' favor on the administrative review claim.

A brief review of the procedural history of this case is helpful to our discussion. On May 22, 2009, plaintiff filed his original complaint, consisting of three counts. Count II was dismissed with

prejudice on January 26, 2010. On that same date, the trial court struck count III of the complaint and granted plaintiff leave to amend count III. On May 20, 2010, plaintiff filed his first amended complaint, which included a new count III, also styled as an invasion-of-privacy claim. Four days later that trial court entered the following order:

> "(1) For the reasons set forth in the Court's oral ruling of this date, the decision of the [Board] is affirmed, and final judgment rendered for defendants on Pltf's Count I Complaint for Administrative Review. (2) Pltf's amended Count III is withdrawn. (3) As the Court has previously dismissed Count II with prejudice, this suit is dismissed in its entirety. This is a final order."[1]

On June 18, 2010, plaintiff filed a notice of appeal. In his notice of appeal, plaintiff stated that he was appealing from the trial court's May 24, 2010, order, which, among other things, "dismissed [his] lawsuit in its entirety as the Circuit Court previously dismissed Counts II and III of [plaintiff's] Complaint at Law."

We conclude that neither plaintiff's amended count III nor his original count III is properly before this court. The trial court never ruled upon the sufficiency of the amended count III because plaintiff withdrew it. In his reply brief, plaintiff acknowledges that to obtain a final and appealable order, he withdrew his first amended complaint, including the amended count III. In doing so, however, he claims that he stood on his original count III. See *Cole v. Hoogendoorn*, *Talbot, Davids, Godfrey & Milligan*, 325 Ill. App. 3d 1152, 1156 (2001). Plaintiff concedes that he did not inform the trial court of his intention to stand on his original count III, but asserts that there was no

[1] A transcript of the May 24, 2010, hearing has not been included in the record on appeal.

legal requirement that he so inform the trial court. See *Miller v. Suburban Medical Center, Inc.*, 184 Ill. App. 3d 545, 548 (1989). Plaintiff's argument is unpersuasive.

As a general rule, an order striking or dismissing a complaint is not final and appealable unless the language of the order also indicates that the litigation is terminated and that the plaintiff will not be allowed to plead over. *Fligelman v. City of Chicago*, 264 Ill. App. 3d 1035, 1038 (1994); *March v. Miller-Jesser, Inc.*, 202 Ill. App. 3d 148, 159 (1990); *Miller*, 184 Ill. App. 3d at 547; *Ben Kozloff, Inc. v. Leaky*, 149 Ill. App. 3d 504, 506 (1986). Even where the plaintiff elects to stand on his complaint, an order striking or dismissing the complaint is not considered final and appealable until an order dismissing the suit is entered. *Cole*, 325 Ill. App. 3d at 1153-54; *Miller*, 184 Ill. App. 3d at 547; *Ben Kozloff, Inc.*, 149 Ill. App. 3d at 507.

Here, plaintiff claims that he elected to stand on his original count III. However, plaintiff's course of action reveals otherwise. After the trial court struck count III of plaintiff's original complaint, he filed a first amended complaint, including a new count III. In *Boatmen's National Bank v. Direct Lines, Inc.*, 167 Ill. 2d 88, 99-100 (1995), the supreme court stated that "a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." Thus, by filing an amended count III, plaintiff waived any objection to the trial court's ruling on the original count III. See *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274 (2007) ("Here, by filing an amended complaint, plaintiff was precluded from appealing the order on her original complaint"). Plaintiff cites no authority for the proposition that his decision to later withdraw the amended count III so that he could obtain a final and appealable order somehow revived the original count III.

In sum, count III of plaintiff's original complaint was never dismissed with prejudice, so there was never any final, appealable order entered as to that count. Further, by filing an amended

complaint with a new count III, claimant abandoned count III of his original complaint. Moreover, the trial court never ruled upon the sufficiency of the amended count III, because plaintiff withdrew the amended count before the court could do so. Accordingly, we are left with nothing to review with respect to plaintiff's invasion-of-privacy claim.

III. CONCLUSION

For the reasons set forth above, we affirm the judgment of the circuit court of Du Page County.

Affirmed.