2012 IL App (2d) 110862-U
No. 2-11-0862
Order filed May 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHAEL RETTIG, Plaintiff-Appellee, v. NORTHERN ILLINOIS UNIVERSITY, Defendant-Appellant (The State Universities Civil Service Merit Board and its Members, Joanne E. Maitland, James D. Montgomery, Kristi Delaurentis, Donald W. "Bill" Griffin, Richard L. Tolliver, Barbara Vella, Robert D. Webb, Grace G. Dawson, Karen Hasara, Lawrence Oliver II, John Simmons, and Lewis T. "Tom" Morelock, Defendants).	)	Appeal from the Circuit Court of De Kalb County. Nos. 09-MR-120 10-MR-179 Honorable Kurt P. Klein, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Hudson concurred in the judgment.

ORDER

Held: This court lacks jurisdiction to review the trial court's June 21, 2010 order in case No. 09-MR-120, and that portion of the appeal is dismissed. In case No. 10-MR-179, the Merit Board's decision finding just cause for the plaintiff's discharge was not error.

¶ 1 The defendant, Northern Illinois University (NIU), appeals from the circuit court's orders, in case Nos. 09-MR-120 and 10-MR-179, reversing two decisions of the defendant University Civil Service Merit Board (the Merit Board). Specifically, on June 21, 2010, in the former case, the trial court reversed the Merit Board's decision finding that the plaintiff, Michael Rettig, was not entitled to a discharge hearing pursuant to section 36*o* of the State Universities Civil Service Act (the Act) (110 ILCS 70/36*o* (West 2008)). On July 28, 2011, in the latter case, the trial court reversed the Merit Board's decision discharging the plaintiff from his position as a police officer with NIU. We lack jurisdiction to review the Merit Board's first decision but we affirm the Merit Board's latter decision.

¶ 2 In April 2002, the plaintiff began working as a police officer in the department of public safety at NIU. In September 2006, the plaintiff was assigned by NIU to the North Central Narcotics Task Force (Task Force), which is operated by the Illinois State Police. Chief Donald Grady was the chief of police for NIU's police department. Three lieutenants reported to Chief Grady. Sergeants supervised the patrol officers, such as the plaintiff, and reported to the lieutenants. The plaintiff's supervisor was Sergeant Larry Ellington, who was supervised by Lieutenant Darren Mitchell. The plaintiff's supervisor on the Task Force was Master Sergeant Terry Murphy of the Illinois State Police.

¶ 3 In July 2007, the plaintiff participated in an undercover operation for the Task Force. During the operation, the plaintiff mishandled his gun, causing it to discharge. Another undercover police officer was injured as a result. In May 2008, NIU filed written charges to discharge the plaintiff, on the ground that he had been criminally reckless, violated NIU rules concerning use of force, and then provided false information about the shooting. The plaintiff was suspended without pay pending discharge. The plaintiff requested a discharge hearing before the Merit Board of the State

Universities Civil Service System, pursuant to the Act (110 ILCS 70/36*o* (West 2008)) and related rules (80 Ill. Admin. Code 250.110 (2011)).

¶ 4 Prior to the discharge hearing, the parties reached a settlement, set forth in a written "Last Chance/Return to Work Agreement" (Last Chance Agreement). In the Last Chance Agreement, the plaintiff essentially admitted to the charges against him. As consideration for NIU withdrawing the charges and giving the plaintiff "one last opportunity to correct [his] behavior and performance issues," the plaintiff agreed that "in the event that [he] *** commit[ed] major infractions of NIU Police Department general orders within twenty-four (24) months from the date of entering into [the] Agreement as determined by the Chief of Police in consultation with counsel in University Legal Services, *** [he] [would] voluntarily resign unconditionally and irrevocably from employment at [NIU] ***." The plaintiff returned to work on September 4, 2008, the same day the Last Chance Agreement was signed.

¶ 5 In late June or early July 2008, as a way to control costs due to budget constraints, Chief Grady ordered that no one could work beyond normally scheduled hours absent prior approval from a supervisor. In September 2008, the plaintiff attended a remedial firearms training course, which required extra hours that Chief Grady had approved. In October 2008, the maximum hours per day that an NIU police officer could work was reduced from eight and one-half hours per day to seven and one-half hours per day.

¶ 6 On November 17 through 21, 2008, the plaintiff attended a Task Force training in undercover officer survival. The plaintiff's timesheet for that period reflected that he had worked more than seven and one-half hours each day for the first four days of the training. After investigating the matter, Sergeant Ellington learned that the plaintiff had not received advance approval for the extra hours.

¶ 7 On December 3, 2008, Sergeant Ellington requested that the plaintiff be disciplined for violating the standing order not to exceed seven and one-half hours of work per day. Sergeant Ellington indicated that his investigation revealed that the plaintiff was well aware of the restriction. Sergeant Ellington found that the plaintiff had violated the department's code of ethics and its rules and regulations by engaging in disobedient and insubordinate conduct. Finally, Sergeant Ellington noted that the failure to address the plaintiff's conduct was "likely to result in similar behavior by other members of the department and the degradation of the department's ability to function." He further noted that such disobedience was "in the least disrespectful and at worst life threatening." The request for discipline was then reviewed by Sergeant Ellington's supervisor, Lieutenant Mitchell.

¶ 8 On December 9, 2008, Lieutenant Mitchell found that the facts detailed in Sergeant Ellington's request for discipline represented a sufficient basis for "significant disciplinary action." He further noted that "[i]t would not be unreasonable to consider termination in this circumstance due to [the plaintiff's] blatant disobedience." On December 12, 2008, the plaintiff was sent a letter indicating that he had five days "to request a departmental hearing to show cause as to why the recommended disciplinary action should not be taken." The plaintiff's request was to be sent to Chief Grady with a list of any witnesses or representatives the plaintiff wished to have present.

¶ 9 On May 5, 2009, Chief Grady issued a letter. The letter indicated that, after receiving Sergeant Ellington's and Lieutenant Mitchell's recommendations for discipline, Chief Grady conducted his own investigation. Chief Grady noted that the plaintiff never requested a hearing or offered any explanation or evidence in mitigation. Chief Grady noted that the plaintiff had worked overtime on four different days without acquiring prior approval. Chief Grady found that there was no evidence that the plaintiff was ever given a reason to believe that the training he attended, at

which he incurred the overtime, was mandatory. Chief Grady concluded that the plaintiff's willful and insubordinate behavior had violated several departmental rules, regulations and policies. Pursuant to the Last Chance Agreement, Chief Grady demanded the plaintiff's resignation. In the alternative, Chief Grady indicated that the plaintiff would be "administratively dropped from employment for position abandonment reasons as a permitted term of the [Last Chance] Agreement." After the plaintiff refused to resign, an employee separation form was issued for the plaintiff's "administrative removal for position abandonment."

¶ 10 On May 11, 2009, the plaintiff filed a written request with the Merit Board for a discharge hearing pursuant to section 36*o* of the Act (110 ILCS 70/36*o* (West 2008)) because he had been "constructively discharged." In response, the Merit Board noted that it had received a copy of the Last Chance Agreement and that NIU believed that the agreement authorized the plaintiff's discharge without a discharge hearing. The Merit Board noted that although no written disciplinary charges had been filed, it had the authority to determine whether the plaintiff's discharge was in compliance with the Act and the Illinois Administrative Code (80 Ill. Admin. Code 250.110 (2011)). The Merit Board ordered the parties to file position statements. In its statement, NIU argued that the plaintiff had waived his statutory right to a discharge hearing under the Last Chance Agreement. The plaintiff argued that a hearing was warranted to determine whether Chief Grady's conclusion that the plaintiff had committed a "major infraction" under the Last Chance Agreement was arbitrary and capricious.

¶ 11 On June 9, 2009, the executive director of the State Universities Civil Service System issued a decision. The executive director found that the plaintiff had freely and voluntarily relinquished his statutory right to a discharge hearing because the Last Chance Agreement "clearly" stated that the chief of police would determine whether the plaintiff committed a "major infraction." Accordingly, the executive director concluded that he could not grant the plaintiff any relief. Thereafter, the

plaintiff requested that the Merit Board review the executive director's determination. On August 19, 2009, the Merit Board adopted and affirmed the executive director's decision.

¶ 12 On September 16, 2009, the plaintiff filed a complaint, case No. 09-MR-120, naming as defendants the Merit Board and its members, the Executive Director of the State Universities Civil Service System and three other individual employees of NIU: Kenneth Davidson, the general counsel, Steve Cunningham, the vice-president for human resources, and Chief Grady. In his complaint, the plaintiff alleged that the Merit Board's decision was subject to judicial review under the Administrative Review Law (Review Law) (735 ILCS 5/3-103 (West 2008)), and should be reversed and the matter remanded for a discharge hearing. In a supporting brief, the plaintiff argued that the Merit Board's decision, that he had relinquished his statutory right to a discharge hearing, was legally erroneous because he was entitled to dispute his discharge pursuant to section 36*o* of the Act (110 ILCS 70/36*o* (West 2008)). The plaintiff further argued that the Merit Board's decision was against the manifest weight of the evidence because the plaintiff's overtime violations were not "major infractions" as intended by the parties when they signed the Last Chance Agreement. In response, the Merit Board argued that the plaintiff freely entered into the Last Chance Agreement, which specifically stated that Chief Grady, in consultation with NIU counsel, would be the sole arbiter of whether he had committed a "major infraction." Accordingly, the Merit Board contended that the plaintiff was not entitled to a discharge hearing.

¶ 13 On June 21, 2010, a hearing was held on the plaintiff's complaint. The plaintiff argued that Chief Grady acted in bad faith in determining that the plaintiff's overtime violations were a major infraction. The plaintiff argued that the violation was at most a minor infraction and that he was therefore entitled to a discharge hearing before termination of his employment. The plaintiff argued that NIU was aware of the training and that it would have been impractical for the plaintiff to get up

and leave during the training after seven and one-half hours. The plaintiff acknowledged that, in some situations, time abuse could be considered a major infraction. However, submitting a timesheet for hours of time that were actually worked was not such a situation.

¶ 14 The Merit Board argued that, through the Last Chance Agreement, the plaintiff waived his right to a discharge hearing. The Merit Board noted that it was undisputed that the plaintiff submitted a timesheet with unapproved extra hours. Chief Grady determined that unapproved overtime was a major infraction because it was a form of insubordination. Under the Last Chance Agreement, Chief Grady was the sole arbiter of whether a "major infraction" occurred. The Merit Board noted that there was no evidence in the record that the plaintiff had a good faith belief that the training he attended was mandatory. It further noted that the plaintiff knew of the overtime policy and had ample time to request permission to incur overtime to attend the training.

¶ 15 Following argument, the trial court rendered its decision. The trial court noted that last chance agreements are generally valid and enforceable. Nonetheless, the trial court found that, under the circumstances in the present case, the overtime issue could not be considered a "major infraction." The trial court noted that the plaintiff applied for pay for time worked and the department could have simply not approved payment for the extra time. Accordingly, the trial court remanded the matter to the Merit Board for a discharge hearing. NIU did not appeal the trial court's decision.

¶ 16 On August 12, 2010, NIU filed, with the Merit Board, written disciplinary charges against the plaintiff for disobedience, insubordination, and unethical conduct for working beyond his regularly scheduled hours to attend Task Force training on November 17-20, 2008, without having sought prior approval. NIU stated that the training was not mandatory and that, even if it was mandatory, there was no reason the plaintiff could not have sought advance approval as ordered.

NIU further noted that at the time the plaintiff engaged in the aforementioned conduct, he was working under a Last Chance Agreement, which was the result of a previous incident where the plaintiff failed to follow lawful orders. NIU alleged that the plaintiff's conduct violated the Last Chance Agreement, and that he was therefore required to resign pursuant to the agreement. NIU explained that this was why written charges were not originally prepared. However, written charges were now being prepared pursuant to the trial court's June 21, 2010 order.

¶ 17 A discharge hearing was held before a hearing officer on September 20, 2010. At the hearing, Chief Grady testified that the plaintiff was a patrol officer at the time of his separation. The plaintiff's chain of command was Sergeant Ellington, Lieutenant Mitchell, and then Chief Grady. The purpose of the overtime order, which had been given in June 2008, was to reduce the amount of overtime due to budgetary constraints. At the time the plaintiff violated the overtime order, the plaintiff had been assigned to the Task Force. The plaintiff's supervisor on the Task Force was Master Sergeant Murphy of the Illinois State Police. Members assigned to the Task Force have the same obligation to follow the rules and regulations of the member's home agency. The November 2008 Task Force training that the plaintiff attended was not mandatory. Chief Grady knew that the plaintiff was aware of the overtime policy at that time because he had issued the order several times and Sergeant Ellington had reported that everyone in his group and Master Sergeant Murphy had been advised of the order. In addition, the plaintiff had requested permission to work overtime on a previous occasion and the request was denied. Other officers that violated the overtime order were disciplined. In violating the overtime order, the plaintiff violated the code of ethics which specifically required officers to obey all lawfully issued orders of a supervisor.

¶ 18 Sergeant Ellington testified that when he became aware of the overtime order at issue, he informed his officers. He informed the plaintiff of the order around October 10, 2008, because the

actual reduction in hours to seven and one-half per day occurred on Monday, October 13, 2008. He also knew that the plaintiff was aware of the order, because the plaintiff had called and requested approval for extra hours on a previous occasion. When the plaintiff turned in his timesheet with the excess hours at issue, he asked the plaintiff whether he had received prior approval. The plaintiff responded that the training was mandatory. However, Sergeant Ellington did not order the plaintiff to attend the training and he was not aware of anyone approving the training. Sergeant Ellington then spoke with Lieutenant Mitchell to find out if the training had been approved. Lieutenant Mitchell indicated that he had not given approval for extra hours for the training. Sergeant Ellington then contacted Master Sergeant Murphy, the supervisor of the Task Force, who indicated that the training course was not mandatory. Sergeant Ellington testified that the plaintiff's failure to get approval to work extra hours was a violation of department rules.

¶ 19 Master Sergeant Murphy testified that officers on the Task Force are expected to follow the rules of his or her home agency with respect to hours of work. One of the NIU officers on the Task Force informed him about there was a very limited overtime budget for NIU officers and that authorization was required for overtime. His understanding, with respect to the November training at issue, was that Task Force members were expected to attend, but it was not mandatory. Master Sergeant Murphy did not attend. When he saw the plaintiff's timesheet in early December, he asked the plaintiff if NIU would be okay with the extra hours for the training. The plaintiff said there were provisions in his contract that allowed him to get overtime for training. Finally, Master Sergeant Murphy testified that if there was a conflict relative to attendance at training between the Task Force and a home agency, the home agency would prevail since it was providing the compensation for the members.

¶ 20 Officer Rachael Muszynski testified that in November 2008, she was a police officer for NIU and was assigned to the Task Force. As a Task Force member, she reported to Master Sergeant Murphy. Master Sergeant Joseph Perez was in charge of the Task Force. She believed the November 2008 training was mandatory based on an e-mail from Master Sergeant Perez that was forwarded to her by Master Sergeant Murphy. Master Sergeant Perez's e-mail indicated that he expected everyone to attend. Officer Muszynki testified that she was aware of the overtime policy. However, she recorded the overtime for the training on her timesheet because she believed her contract required that she be paid. She received a seven-day suspension because she did not seek prior approval to incur overtime for the training. She filed a grievance and the matter was still pending.

¶ 21 The plaintiff testified that after the shooting incident, he returned to work on September 4, 2008. He was assigned to the Task Force. His immediate supervisor at NIU was Sergeant Ellington. On the Task Force, he reported to Master Sergeant Murphy. During a squad meeting, Master Sergeant Murphy had indicated that the November training was mandatory. The plaintiff attended firearms training in September 2008. He incurred overtime for the September training. At that time, he was aware of the standing overtime order. He was not disciplined for the overtime in September. When he attended the November training, he therefore had the same assumption that he could put in for overtime. In his opinion, he had not committed a major infraction under the Last Chance Agreement.

¶ 22 On cross-examination, the plaintiff acknowledged that, while assigned to the Task Force, he was still obligated to follow the rule and procedures of the NIU department of public safety. He further testified that no one at NIU ordered him to attend the training. Moreover, after the first day

of the November training went an hour past his regularly scheduled hours, he did not contact his supervisors to obtain approval for the extra hours.

¶ 23 On October 15, 2010, the hearing officer rendered his decision. The hearing officer determined that the plaintiff did not disobey any laws or regulations, and was not insubordinate, because the verbal overtime order at issue was not written and was vague in how it should be applied. The hearing officer found that the November training at issue "was a mandatory in-service training that ran slightly long on four of the five days." The hearing officer determined that, because the overtime order was vague, the plaintiff had no guidance when the training ran unexpectedly long. The hearing officer noted that if the violation of the overtime order were as serious as NIU contended, there was no reasonable explanation for a six month delay between the alleged violation and the disciplinary action against the plaintiff.

¶ 24 On November 4, 2010, NIU filed, with the Merit Board, an objection to the hearing officer's findings. NIU argued that the hearing officer incorrectly determined whether there was "just cause" to discharge the plaintiff rather than determining whether the plaintiff's discharge violated the Last Chance Agreement. NIU further argued that even if the "just cause" standard was appropriate, the hearing officer relied on evidence not presented and omitted evidence that was presented. Specifically, NIU argued that there was no evidence that the overtime order needed to be in writing and no evidence that it was vague in how it should be applied. NIU noted that the plaintiff admitted that he was aware of the order and knew that he needed permission to work beyond his regular hours.

¶ 25 NIU further argued that the finding that the training was mandatory was not supported by the evidence. NIU noted that the evidence clearly established the chain of command and that the only people who could have made the training mandatory were Chief Grady, Lieutenant Mitchell, or Sergeant Ellington. NIU further argued that even if the training was mandatory, the evidence clearly

showed that the plaintiff had to seek permission to work extra hours to attend the training. NIU argued that the hearing officer erred in attaching any significance to the delay between the incident and the disciplinary action. Chief Grady had testified that he conducted his own investigation and consulted with legal counsel before initiating the discipline. NIU argues that this demonstrates the serious nature of the incident and the careful consideration given before imposing discipline. NIU urged the Merit Board to reject the hearing officer's findings and find that NIU complied with its obligations under the Last Chance Agreement.

¶ 26 On November 17, 2010, the Merit Board issued its final administrative decision "based solely on the matters contained in the Hearing Record," which included the evidence at the hearing and NIU's written objection to the hearing officer's findings. The Merit Board determined that NIU had sustained its burden of proof on the charges against the plaintiff, which constituted "just cause" for his discharge. The Merit Board ordered that the plaintiff be separated from employment as of the date of its decision. The Merit Board noted that it adopted the hearing officer's findings only to the extent that they were consistent with its own decision.

¶ 27 On December 2, 2010, the plaintiff filed a complaint, seeking review of the Merit Board's decision, case No. 10-MR-179. On January 26, 2011, the plaintiff filed an amended complaint. On July 28, 2011, a hearing was held. At the hearing, the plaintiff argued that the members of the Merit Board were not present at the discharge hearing; only the hearing officer was present. The plaintiff argued that the Merit board erred in rejecting the hearing officer's findings. NIU argued that the Merit Board was the ultimate finder of fact and that what the Merit Board found was not against the manifest weight of the evidence. Following argument, the trial court found "that the hearing officer conducted a very thorough, reasonable hearing and reached very reasonable conclusions." The trial court therefore found that the Merit Board's decision was against the manifest weight of the

evidence, reversed the Merit Board's decision, and ordered that the officer be reinstated with full back pay and benefits.

¶ 28 On August 10, 2011, NIU moved to consolidate case No. 09-MR-120 with case No. 10-MR-179. On August 15, 2011, the trial court granted the motion to consolidate and stayed enforcement of its July 28, 2011, order, pending appeal. On August 30, 2011, NIU filed a notice of appeal from the circuit court's orders of June 21, 2010, and July 28, 2011.

¶ 29 On appeal, NIU argues that the trial court erred in reversing both decisions of the Merit Board. The Act provides that final decisions of the Merit Board are subject to judicial review pursuant to the Administrative Review Law (Review Law) (735 ILCS 5/3-103 (West 2008)). 110 ILCS 70/36*o* (West 2008). Under the Review Law, we review the decision of the administrative agency, not the determination of the circuit court. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 272 (2009). Our review extends to all questions of law and fact presented in the administrative record. 735 ILCS 5/3-110 (West 2008). An administrative agency's factual findings will not be upset unless they are against the manifest weight of the evidence. *Exelon Corp.*, 234 Ill. 2d at 272. However, an agency's rulings on matters of law are reviewed *de novo*. *Id.*

¶ 30 At the outset we note that a reviewing court has a duty to consider *sua sponte* its jurisdiction over the issues raised by the parties. *Cole v. Retirement Board of Policemen's Annuity and Benefit Fund of the City of Chicago*, 396 Ill. App. 3d 357, 366 (2009). On August 19, 2009, the Merit Board rendered its first decision, finding that Chief Grady, under the Last Chance Agreement, was the sole arbiter of whether the plaintiff had committed a "major infraction." Accordingly, the Merit Board denied the plaintiff's request for a discharge hearing. Thereafter, the plaintiff filed a timely complaint for judicial review in the circuit court. See 735 ILCS 5/3-103 (West 2008) (review of an administrative decision shall be commenced by filing complaint within 35 days of the date the

affected party was served with the decision). On June 21, 2010, following a hearing, the trial court reversed the Merit Board's determination. The trial court found that the plaintiff's violation of the overtime order was not a major infraction and remanded the matter for a discharge hearing.

¶ 31 Now, as its first issue raised on appeal, NIU argues that the trial court should not have reversed the Merit Board's August 2009 determination. However, the trial court's June 21, 2010, judgment was a final order. An order is final if it "terminates the litigation between the parties on the merits or disposes of the rights of the parties either on the entire controversy or on a separate *** part of it." *Bennett v. Chicago Title & Trust Co.*, 404 Ill. App. 3d 1088, 1094 (2010). The trial court found that the violation of the overtime order at issue was not a major infraction under the Last Chance Agreement, and remanded the matter to the Merit Board for a discharge hearing. This was a final order because it essentially terminated the litigation as to whether the violation at issue was a "major infraction" within the meaning of the Last Chance Agreement. Moreover, the trial court's docket shows that after the June 21 order, no further action was taken in the case (until the August 2011 motion to consolidate) and the case was closed. The trial court's June 21, 2010, judgment was therefore reviewable by appeal as in other civil cases. 735 ILCS 5/3-112 (West 2008).

¶ 32 In civil cases, a notice of appeal must be filed within 30 days after the entry of the judgment appealed from. Ill. S. Ct. R. 303 (eff. May 30, 2008). In the present case, NIU did not appeal within 30 days from the trial court's June 21, 2010, judgment. Rather, it filed written disciplinary charges against the plaintiff and proceeded on the issue of whether the violation of the overtime order was just cause for the plaintiff's discharge. As NIU did not file a timely appeal from the trial court's June 2010 judgment, we lack jurisdiction to review that order or the August 2009 order of the Merit Board. *Pritza v. Village of Lansing*, 405 Ill. App. 3d 634, 641 (2010) (reviewing court has no subject matter jurisdiction over untimely notice of appeal).

¶ 33 NIU's second contention on appeal is that the trial court erred in reversing the Merit Board's November 17, 2010, determination that the plaintiff's violation of the overtime order was just cause for the plaintiff's discharge. Review of an administrative agency's decision regarding discharge requires a two-step analysis. *Krocka v. Police Board of City of Chicago*, 327 Ill. App. 3d 36, 46 (2001). First, the court must determine whether the agency's findings are "contrary to the manifest weight of the evidence." *Sangirardi v. Village of Stickney*, 342 Ill. App. 3d 1, 17 (2003). Second, the court must determine whether the findings of fact "provide a sufficient basis for the agency's conclusion that cause for discharge does or does not exist." *Id.* "[T]he agency's decision as to cause will not be reversed unless it is arbitrary, unreasonable, or unrelated to the requirements of service." *Krocka*, 327 Ill. App. 3d at 46.

¶ 34 NIU argues that the Merit Board's decision was not against the manifest weight of the evidence. Generally, an administrative agency's findings and conclusions on questions of fact are considered *prima facie* true and correct (*Exelon Corp.*, 234 Ill. 2d at 272 (citing 735 ILCS 5/3-110 (West 1994)) and are against the manifest weight of the evidence only if the opposite conclusion is clearly evident (*City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill.2d 191, 205 (1998)). "Only if, after reviewing the evidence in a light most favorable to the Board, we determine that no rational trier of fact could have reached the conclusion reached by the Board are we able to overturn a decision under this standard." *Krocka*, 327 Ill. App. 3d at 46 (quoting *Chief Judge of Circuit Court v. American Federation of State, County and Municipal Employees, Council 31, AFL-CIO*, 153 Ill. 2d 508, 514 (1992)). While the Board is required to consider the findings of the hearing officer, it is not bound to accept them. *Highland Park Convalescent Center, Inc. v. Illinois Health Facilities Planning Board*, 217 Ill. App. 3d 1088, 1092 (1991). "Rather, the agency must make its own decision based upon the evidence in the record. [Citation.] The rule applies even when

findings of fact depend on the credibility of witnesses, and it is the hearing officer who observes the witnesses." *Id.*

¶ 35 In the present case, the Merit Board found that the plaintiff had violated NIU's code of ethics and its rules and regulations by disobeying the standing order requiring overtime to be approved in advance. We cannot say that this determination was against the manifest weight of the evidence. Chief Grady testified that he gave the order that officers needed to seek approval prior to working beyond one's regularly scheduled hours. Sergeant Ellington testified that he communicated the order to the plaintiff. Both Chief Grady and Sergeant Ellington testified that the plaintiff was aware of the order because he had, on one occasion after the order was given, requested permission to work overtime as required. Furthermore, although the plaintiff testified that Master Sergeant Murphy stated, during a squad meeting, that the November training was mandatory, Chief Grady, Sergeant Ellington and Master Sergeant Murphy all testified that the training was not mandatory. Moreover, even if the training was mandatory, Chief Grady and Master Sergeant Murphy both testified that NIU officers on the Task Force were required to follow the rules and regulations of NIU's department of public safety. The plaintiff testified that he was aware of the overtime order and he knew that while on the Task Force he was obligated to follow NIU's rules. Nonetheless, the plaintiff did not seek prior approval to work beyond his regularly scheduled hours to attend the training. Even if the plaintiff was not aware that the training would extend beyond his regularly scheduled hours, the plaintiff acknowledged that after the November training went beyond his regularly scheduled hours on the first day, he did not seek approval for the extra hours he incurred on the next three days. Given these facts, the Merit Board's conclusion that the plaintiff violated the overtime order, and thereby violated NIU's rules against insubordination and disobedience, was not against the manifest weight of the evidence.

¶ 36 The next question we must address is whether the plaintiff's disobedience and insubordination constituted just cause for his termination. The Merit Board's finding that the plaintiff's disobedience provided cause for discharge is not subject to manifest weight of the evidence review. *Kappel v. Police Board of the City of Chicago*, 220 Ill. App. 3d 580, 589 (1991). Rather, the Merit Board's determination will not be reversed unless it is arbitrary, unreasonable, or unrelated to the requirements of service. *Id.* Courts have defined "cause" as some substantial shortcoming that renders the employee's continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and that the law and sound public opinion recognize as good cause for his no longer holding the position. *Id.* (citing cases). The Merit Board has considerable latitude and discretion in determining what constitutes cause for discharge and its finding is entitled to substantial and considerable deference. *Id.* The Board is in the best position to determine the effect of an officer's conduct on the proper operation of the department and its decision will stand even if this court were to consider another sanction more appropriate. *Id.*

¶ 37 The plaintiff does not dispute that NIU's department of public safety code of ethics requires an officer to be "exemplary in obeying the law and regulations of [the] department." Furthermore, the department's rules and regulations state that a member may be subject to disciplinary action for insubordination and disobedience of a lawful order. Additionally, it is well established that disobedience to a proper order given by a superior officer is cause for discharge. *Sangirardi*, 342 Ill. App. 3d at 18; *Norman v. Board of Fire and Police Commissioners of the City of Zion*, 245 Ill. App. 3d 822, 830 (1993); *Nelmark v. Board of Fire and Police Commissioners of City of DeKalb*, 159 Ill. App. 3d 751, 759 (1987).

¶ 38 In *Norman*, this court noted that failing to obey a direct order would generally be detrimental to the discipline and effectiveness of the department. *Norman*, 245 Ill. App. 3d at 831. We further

noted that if there were "nothing more to [a] case than blatant or unfounded refusal to obey an order, it would be readily apparent *** that the Board's finding of cause was neither arbitrary nor unrelated to the requirements of the department." *Id.* In *Norman*, an officer failed to report for duty, on doctor's advice, despite a direct order to report. *Id.* at 828. This court held:

> "Plaintiff's own doctor, who had seen him and treated him for over a year, had told him not to return to his usual duties. Following his doctor's orders, however, possibly meant risking the loss of his job. On the other hand, the chief issued his order in reliance on Dr. Pawl's report—a report based on one five-minute examination and 30-minute maximum interview with plaintiff. Yet, following the chief's orders carried the possible risk of a permanent, disabling injury. Under these circumstances we think the Board's finding of cause to terminate plaintiff was arbitrary and unreasonable." *Id.* at 833.

¶ 39 In the present case, there are no extenuating circumstances to the plaintiff's failure to follow Chief Grady's order to seek prior approval to work past regularly scheduled hours. The plaintiff testified that Master Sergeant Murphy had stated during a squad meeting that the training was mandatory and Officer Muszynski testified that an e-mail indicated that everyone was expected to attend the training. However, even if the training was mandatory, that does not excuse the plaintiff's failure to seek prior approval for the extra hours as ordered. The plaintiff testified that he was aware that, as a member of the Task Force, he was still required to follow NIU's rules and regulations. Accordingly, we conclude that the Board's discharge of the plaintiff was neither arbitrary nor unrelated to the requirements of the department. *Id.* at 831. The plaintiff failed to follow the overtime order four days in a row, despite his testimony that he was aware of the order. Moreover, in the written charges for discharge, NIU noted that at the time the plaintiff engaged in the aforementioned conduct, he was working under a Last Chance Agreement, which was the result of

a previous incident where the plaintiff also failed to follow department rules and regulations. There is nothing prohibiting the Merit Board from considering the plaintiff's previous conduct when determining appropriate disciplinary action in the present case.

¶ 40 For the foregoing reasons, the appeal in case No. 09-MR-120 is dismissed for lack of jurisdiction. Additionally, in case No. 10-MR-179, we reverse the judgment of the trial court and affirm the decision and order of the Merit Board.

¶ 41 Dismissed in part and reversed in part.