

NOTICE

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2019 IL App (4th) 180574-U

NO. 4-18-0574

IN THE APPELLATE COURT

OF ILLINOIS

FILED

October 1, 2019

Carla Bender

4th District Appellate

Court, IL

FOURTH DISTRICT

PETER J. WAGNER,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
DEPARTMENT OF COMMERCE AND ECONOMIC)	No. 11L251
OPPORTUNITY, JILL MEHRBERG, and WARREN)	
RIBLEY,)	Honorable
Defendants-Appellees.)	John Madonia,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court’s decision that defendants would have given plaintiff a negative performance evaluation in the absence of his protected conduct was not against the manifest weight of the evidence.

¶ 2 In October 2011, plaintiff, Peter J. Wagner, filed a complaint against defendants, Department of Commerce and Economic Opportunity (DCEO), Jill Mehrberg, and Warren Ribley. Among other allegations, the complaint alleged defendants violated the State Officials and Employee Ethics Act (Ethics Act) (5 ILCS 430/15-10 to 15-20) (West 2010)) when they gave him a negative performance evaluation and ultimately terminated his employment at DCEO following his disclosure to the United States Department of Labor (DOL) that DCEO was not in compliance with DOL’s regulations. Following a bench trial on the Ethics Act claim, the trial court entered judgment in favor of defendants.

¶ 3 Wagner appeals, arguing the trial court erred by finding defendants proved by clear and convincing evidence that they would have given Wagner a negative performance evaluation in the absence of his protected conduct. We disagree and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. Plaintiff's Employment at DCEO

¶ 6 In May 2010, DCEO hired Wagner on a probationary basis to manage a program in conjunction with the Occupational Safety and Health Administration (OSHA), known as the Illinois On-Site Safety and Health Consultation Program (the OSHA program). This program was primarily funded by a federal grant from DOL pursuant to a cooperative, intergovernmental agreement. The purpose of the OSHA program was to provide consulting resources to small businesses in Illinois to improve workplace safety and health. As part of the agreement, DOL imposed various conditions on DCEO including compliance with relevant federal laws and regulations. DCEO management informed Wagner prior to his employment that over the last several years, DCEO experienced difficulty complying with the conditions imposed by the agreement. An audit performed from October 1, 2007, to September 30, 2009, (2009 audit) revealed several deficiencies with DCEO's management of the OSHA program.

¶ 7 Wagner's first day at DCEO was June 7, 2010. He reported to Mehrberg, who served as deputy director of the Office of Entrepreneurship and Innovation, an agency under DCEO. In turn, Mehrberg reported to Ribley, who served as director. As part of his management duties, Wagner worked with Robert Murphy, an employee with DOL, who served as Wagner's federal contact for the OSHA program.

¶ 13

1. *Wagner's Case-in-Chief*

¶ 14

a. Warren Ribley

¶ 15 Warren Ribley testified that he served as the Director of the Illinois Office of Entrepreneurship and Innovation, an agency under DCEO, during the period of 2010 to 2011. During this time, he had “fairly limited” to “virtually no involvement” with the OSHA program. Ribley had “no personal knowledge” of the quality of Wagner’s work performance as manager of the OSHA program. Ribley relied upon Mehrberg as Wagner’s direct supervisor for evaluating his work performance. Ribley expected Wagner to correct any compliance issues in the program and that “would have been a very important part of [Wagner’s] job.”

¶ 16 The trial court admitted Mehrberg’s 90-day probationary evaluation of Wagner, dated August 31, 2010, into evidence. Ribley testified he signed the evaluation, and he agreed that it rated Wagner as unacceptable in all performance categories. Ribley ultimately terminated Wagner’s employment in a letter dated June 10, 2011. Ribley testified the primary basis for Wagner’s termination was the negative performance evaluation. After Wagner took his leave of absence, he never returned to DCEO.

¶ 17 Ribley also testified that the Governor’s office had to approve any agency expenditures involving hiring and travel, even if the funds were available through a federal grant program and would not come out of the Illinois treasury. If a state agency failed to use funds provided by a federal grant during the contract period, that money would be “deobligated,” *i.e.*, returned to the federal government.

¶ 18

b. Tina Dye

¶ 19 Tina Dye testified she was a human resource specialist at DCEO in 2010. During the period of January 1, 2010, to September 15, 2010, she served temporarily as the acting

human resource (HR) manager. Her involvement with the OSHA program was limited to hiring. Dye's knowledge of what Wagner "was or was not doing" with the OSHA program during the course of his employment came solely through her review of emails on which she was copied. Based on the email exchanges she observed between Mehrberg and Wagner, she believed the professional relationship "wasn't working out." Mehrberg expressed this sentiment with Dye within the first few weeks of Wagner's employment.

¶ 20 Dye testified that in August 2010, she was copied on an email exchange between Wagner and Merhberg discussing their disagreement regarding DCEO's priorities in filling certain OSHA program positions. In that exchange, Wagner insisted the safety supervisor position should take priority because he believed DCEO's agreement with DOL required the position be filled. The position was originally posted in July 2010. On August 5, 2010, Dye emailed Wagner to ask when he wanted to schedule interviews. By September 2010, the safety supervisor and several other OSHA program positions had not been filled.

¶ 21 Dye "had a fairly high level of frustration concerning the relationship" between Mehrberg and Wagner because "they were just constantly arguing via email" and would regularly copy her and others from DCEO in those emails.

¶ 22 c. Mica Chunes

¶ 23 Mica Chunes testified she was an industrial hygiene supervisor for the OSHA program and served as the acting program manager for approximately one year beginning in 2009. The main responsibilities for the OSHA program manager were to (1) apply for the grant from the federal government and (2) report back to the grantor as to how the program accomplished the goals established in the grant.

¶ 24 Chunes testified that OSHA conducted biannual reviews of DCEO's management of its OSHA program. In its audit report, OSHA would provide "findings" and "recommendations" regarding DCEO's practices. "Findings" were any deficiencies OSHA identified in DCEO's administration of the OSHA program, and "recommendations" were the changes OSHA expected DCEO to implement in order to comply with the agreement or its regulations.

¶ 25 During Chunes's tenure as acting program manager, she found the position to be "difficult," involving "lots of tracking of detail." She found the position "hard to learn" because "the reports are hard to keep track of" and "[DCEO] is very particular about how things are carried out on the budget side and the deobligating monies and tracking when things are paid and how they're paid." She relied on other divisions or offices within DCEO to assist with certain tasks.

¶ 26 Chunes explained that pursuant to OSHA regulations, the industrial hygiene and safety consultants who performed health and safety field visits were required to receive medical evaluations. The medical evaluations included a pulmonary function test to determine whether it was safe for the consultant to wear a respirator. OSHA required consultants with the program to wear the same protective equipment, such as respirators, that employees at the businesses they evaluated were required to wear. Consultants could not simply purchase respirators at a medical supply store because they first needed a "fit test" to determine the appropriate type of respirator for the individual consultant. Chunes was required to obtain approval from the HR department for the consultants' medical evaluations. However, during her time as acting program manager, HR never approved the evaluations. Chunes testified there were funds available in the grant for the evaluations and respirators.

¶ 27 When Wagner started as program manager, Chunes resumed her role as the industrial hygiene supervisor and reported directly to him. They worked together frequently, and Chunes assisted him in applying for the federal grant. Wagner began work on June 7, 2010, and the grant application was due at the end of the month. The application required a lot of work, and Wagner devoted the majority of his time while at DCEO preparing the grant application. Wagner was on a “learning curve” and was a “good student” in learning his new duties and the specifics of the OSHA program.

¶ 28 Chunes further testified that around the time Wagner submitted the grant application, Chunes, Wagner, and Mehrberg spoke on the phone regarding Wagner’s concerns that certain actions Mehrberg wanted to take violated the terms of the OSHA program agreement. Mehrberg’s reaction to Wagner’s concern was “negative” and she was “angry.”

¶ 29 On cross-examination, Chunes admitted that DOL found in its 2009 audit of the OSHA program that DCEO had issues filling vacancies for the OSHA program since 2005—five years before Wagner’s employment there. She also admitted that DOL made findings in the same audit about DCEO’s failure to provide proper safety equipment to consultants. Chunes testified that neither Mehrberg nor the HR department provided a reason why medical evaluations for the consultants’ safety equipment were not approved; she was only told that employees should go to their personal physicians.

¶ 30 d. Peter Wagner

¶ 31 i. *The 2009 Audit*

¶ 32 Wagner testified that prior to his employment at DCEO, he was a senior engineering analyst at the Illinois Commerce Commission for 16 years. His first day at DCEO was June 7, 2010.

¶ 33 On his second day of employment, he met with Murphy (his federal liaison) and Mehrberg. They discussed the 2009 audit, including DOL’s findings and recommendations. Wagner testified that he found the audit significant at the time because when he interviewed with Mehrberg, she informed him the program had issues and needed a strong manager to correct them. Murphy explained DCEO’s main priorities should be addressing the issues with medical evaluations for the consultants’ auditory and respiratory safety equipment and filling various vacant staff positions, including a safety supervisor. Wagner testified that after this conversation with Murphy, he believed that if he did not address these issues, DCEO would be “at risk of hurting [its] employees, [it] would be in violation of federal regulations and that [it] would be in violation of the program agreement also.”

¶ 34 ii. *The Safety Supervisor Position*

¶ 35 Wagner testified when he started at DCEO, the safety supervisor position was vacant. Wagner’s understanding was that the position needed to be filled under the terms of the grant agreement. Federal regulations required the safety supervisor to have an OSHA certification, which Wagner did not have.

¶ 36 On June 17, 2010, Mehrberg and Wagner exchanged emails regarding the safety supervisor position. Mehrberg believed the safety supervisor position could be combined with Chunes’s industrial hygiene supervisor position, and she was concerned that there was not enough work for two supervisors. Wagner believed the positions required different skill sets and it was not feasible or within OSHA’s regulations for the positions to be combined. Merhberg did not want to interview candidates for the safety supervisor position until Wagner found out from the HR department whether the two supervisor positions could be combined. On June 18, 2010, Wagner emailed Mehrberg explaining that DCEO would need to deobligate funds related to the

delay in hiring a safety supervisor. Around that time, Wagner also informed Murphy at DOL that DCEO was not actively seeking to fill the safety supervisor position and that Mehrberg intended to eliminate the position.

¶ 37 Wagner testified that on August 11, 2010, Dye emailed Mehrberg and Wagner about the safety supervisor position. Dye stated she did not believe it made sense to fill the vacant safety consultant position in Chicago until the safety supervisor position was filled. Wagner testified that when he received this email, he believed it “was not a good idea” to hire a new safety consultant in Chicago without a supervisor “for a number of reasons.” One reason was that without a supervisor, a new consultant may not be adequately prepared to perform field visits, which Wagner believed could be “dangerous.”

¶ 38 Towards the end of August 2010, the HR department authorized Wagner to interview candidates for the safety supervisor position. Wagner and Mehrberg conducted several interviews, but they were still in the process of interviewing candidates when Wagner took his medical leave of absence.

¶ 39 *iii. The Grant Application*

¶ 40 Wagner testified that within the first week of his employment, he learned he would be responsible for drafting the OSHA program budget proposal and grant application, which was to be filed with DOL several weeks later. In order to complete the application, Wagner needed assistance from the fiscal and HR departments. He also sought Mehrberg’s assistance in reviewing a portion of the application. He submitted the application in a timely manner and DOL approved it. Wagner spent roughly half of his time at DCEO working on the application and spent the rest addressing deficiencies identified in the 2009 audit. He was also “trying to do the safety supervisor job” because the position was vacant.

¶ 41

iv. The Auditory and Respiratory Programs

¶ 42 Wagner testified that based upon his review of OSHA's finding regarding medical evaluations for the auditory program, he believed DCEO needed to provide consultants with hearing tests performed by a specialist to comply with OSHA's regulations. As part of that evaluation, consultants would be fitted for certain equipment such as ear plugs and ear muffs. The grant provided funding for these evaluations.

¶ 43 Wagner spoke with Murphy on several occasions regarding the progress on the auditory and respiratory programs. He submitted requests to the financial department for the equipment and evaluations, and he copied Mehrberg on the requests. No medical evaluations were ever approved. Mehrberg told him that the evaluations were not authorized and they should be covered by the consultants' health insurance plans as physicals. Wagner responded they were not standard physicals, but instead specialized medical evaluations required by OSHA regulations. Wagner informed Murphy on separate occasions in both August and September 2010 that DCEO refused to approve the medical evaluations.

¶ 44 Between September 15, 2010, and September 22, 2010, Wagner and Mehrberg again exchanged emails regarding the medical evaluations. Wagner cited to federal statutes and regulations outlining requirements for the evaluations and the "recommendation" from the 2009 audit. Mehrberg replied that she believed the statute was ambiguous and, in her own communications with the HR department, stated the evaluations were recommended by OSHA but not "mandatory." Wagner warned her that if DCEO continued to deny the medical evaluations, DOL would find the OSHA program to be noncompliant. Wagner forwarded the email chain to Murphy.

¶ 45

v. Employee Issues

¶ 46 On Wagner’s second day of work, Mehrberg asked Wagner to discipline a consultant named Rex Burmeister because he failed to attend a mandatory staff meeting. She believed Burmeister intentionally scheduled a conflict to avoid attending the meeting. After Wagner investigated the incident, he reported back to Mehrberg that he did not discipline Burmeister because he did not believe it was appropriate. Mehrberg was unhappy with Wagner’s response and accused Wagner of “siding with [Burmeister] against her.”

¶ 47 *vi. Travel Issues*

¶ 48 Wagner testified that sometime during the summer of 2010, DOL held a regional meeting. When Murphy asked Wagner and Chunes to attend the meeting, Wagner submitted a travel request to Mehrberg. Either Mehrberg or Anita Patel from the financial office at DCEO denied the request, citing a statewide ban on out-of-state travel by the Governor’s office. DOL would have covered the cost of Wagner’s attendance.

¶ 49 *vii. The Performance Evaluation*

¶ 50 On August 31, 2010, Mehrberg sent Wagner her 90-day probationary performance evaluation. After he received the evaluation, he and Mehrberg spoke on the phone about it. Mehrberg informed Wagner that he was not working out and he did not seem to be a good fit with the program. At trial, Wagner described the evaluation as “awful” and felt that it was neither fair nor accurate.

¶ 51 *viii. Cross-Examination*

¶ 52 On cross-examination, Wagner testified that Mehrberg gave him a poor performance evaluation in retaliation for raising the auditory and respiratory program issues with Murphy, even though she and Murphy were aware of those issues before Wagner was employed at DCEO.

¶ 53 In August 2010, Mehrberg forwarded Wagner’s concerns about the medical evaluations to Bridget Devlin, the deputy director of the HR department, and inquired as to why DCEO would not approve them. Devlin reviewed all of the information Wagner provided and determined that because physicals are provided to consultants in their health insurance plan, any additional evaluations constituted unnecessary spending. Devlin also explained that the Governor’s directive about cutting costs applied regardless of whether the agency was spending federal or state dollars.

¶ 54 Wagner testified he believed DCEO was not going to fill the safety supervisor position, even though the position had been posted and he had received applications. On August 11, 2010, Mehrberg emailed Wagner asking when he planned to schedule interviews, as he had received all of the applications from the posting on August 5, 2010, but never informed her. On September 13, 2010, Wagner interviewed candidates for the position. DCEO did not extend an offer to any candidates before Wagner took his leave of absence on September 24, 2010, because there was an issue with the interviews. Wagner was required to conduct “Rutan” interviews—meaning that, under federal law, all interviews for the position would be conducted in a similar fashion under similar circumstances. During the interviews, Wagner did not ask the same questions of all candidates, and therefore all of the interviews would have to be rescheduled.

¶ 55 Wagner believed that Mehrberg gave him a poor performance evaluation because he refused to discipline two employees at her direction, Burmeister and Carolyn Barber, Wagner’s office assistant. Wagner did not know that before he started at DCEO, Mehrberg told Burmeister he was required to attend a staff meeting on Wagner’s first day and Burmeister would need to reschedule any conflicts. On his first day at DCEO, Wagner gave Burmeister permission to miss the staff meeting because of a conflict. Additionally, Wagner expressed

concerns to Mehrberg that Barber was struggling with “picking up certain parts of the [OSHA] program or parts of her job duties.” Mehrberg advised Wagner that when he “complained about [Barber’s] subpar performance,” he needed “to counsel her and write her up if necessary.”

¶ 56 Throughout July and August, Wagner emailed Chunes about equipment he wished to purchase for the program to avoid deobligating the funds that provided for them. On September 2, 2010, Mehrberg emailed Wagner to explain that “the budget is an all inclusive plan of what we would ideally like to have,” and that “[j]ust because it is in the budget, items are not automatically approved for purchase.” Mehrberg reminded Wagner that they had “discussed on several occasions there are DCEO procedures that need to be followed.”

¶ 57 In August 2010, Wagner exchanged emails with Mehrberg and Anita Patel, the chief financial officer (CFO) of DCEO, regarding the purchase of promotional items for a program called the Safety and Health Achievement Recognition Program (SHARP). The SHARP program provided incentives for Illinois employers to minimize workplace accidents and injuries and reach OSHA program goals. Patel emailed Wagner to remind him that although the OSHA program was federally funded, both Patel and the Governor’s office needed to approve any purchases “that have the perception of being questionable to the public.” On August 24, 2010, Mehrberg emailed Patel and Wagner that she was searching for anything in the agreement stating that the purchase was mandatory so that she could approve it. Wagner informed Mehrberg that the promotional items were included in the budget but there was no language indicating they were mandatory. Wagner expressed to Patel that “many of these [DCEO approval] exercises present significant obstacles to the [OSHA] program and provide little or no cost savings to the State.”

¶ 58 In September 2010, Wagner purchased safety shoes and prescription safety glasses. On September 22, 2010, Mehrberg emailed Jeffrey Stauter, the senior advisor to the director, and Terry Lutes, the chief operating officer (COO), stating that she received two invoices showing Wagner purchased these items without discussing it with her and without her approval. Wagner bought the items on his own and requested reimbursement. Wagner agreed that there was a procedure for making such purchases and that he had not followed it.

¶ 59 *2. Defendants' Case-in-Chief*

¶ 60 a. Jill Mehrberg

¶ 61 Mehrberg testified she worked at DCEO from May 2009 to April 2016. She worked in various management roles in private industry prior to her employment at DCEO. During 2009 and 2010, she served as deputy director of the Office of Entrepreneurship and Innovation. As part of her duties, she oversaw the OSHA program. She also managed five other programs. Her main responsibilities were to (1) oversee each program, (2) work with program managers to ensure they performed adequately, (3) advocate for the programs, and (4) work with their constituents. Mehrberg reported to Ribley.

¶ 62 i. *The Performance Evaluation*

¶ 63 Mehrberg testified she hired Wagner on a probationary basis sometime in May 2010. As part of the probation, she would conduct performance evaluations after the first three and six months of Wagner's employment. In August 2010, she prepared Wagner's first performance evaluation.

¶ 64 Mehrberg stated she found Wagner's performance unacceptable in all categories. In her evaluation of whether Wagner met "objective one," which was "formulates and develops policy for the division, provides guidance and advice to the deputy director," Mehrberg indicated

that Wagner tried to “find issues from the past rather than focus on how [DCEO was] going to make this program better.” He “delegated his responsibilities” to both Mehrberg and the finance department, which she found inappropriate. Mehrberg had to “rewrite and redo a lot of the work that wasn’t even done or was just a copy” of Chunes’s previous work.

¶ 65 Mehrberg testified that throughout Wagner’s employment, Mehrberg received various complaints about Wagner. Mehrberg stated, “In my whole working life, I have never had that many people who were deputy director or part of the director’s office calling and meeting with me and sending notes as to *** the issues that they were experiencing with *** Wagner right away.” When Mehrberg discussed the evaluation with Wagner, he told her she would not let him do what he needed to do as program manager. She responded that she would not allow him to go outside of the agency’s guidelines and that they could not “ignore the rules of the State in regards to purchasing and other things like that.”

¶ 66 ii. *DCEO Procedure Issues*

¶ 67 Mehrberg explained that Illinois had various fiscal problems in 2010, causing the Governor to issue a mandate that included a hiring freeze and a ban on all out-of-state travel unless it was shown to be mandatory. For the OSHA program, DCEO was required to provide written documentation from DOL that any hiring or out-of-state travel was mandatory. To make a purchase at DCEO, an individual employee had to fill out a form, explain the rationale, and submit it to a supervisor. If the supervisor approved the purchase, it was submitted to the procurement department. Mehrberg stated that in the three months she worked with Wagner, he did not follow these procedures. She received calls from the COO asking about Wagner’s purchases for boots, safety glasses, and a request for a vehicle. Wagner never asked Mehrberg about these purchases, and she had not approved them.

¶ 68 DCEO also had procedures for disposing of state equipment. Wagner allegedly disposed of some printers or computers, and the information technology department asked her about it. She was not aware Wagner had done this, and when she asked him about it, he responded that they were “just sitting around,” were “junk,” and he “just got rid of them.”

¶ 69 *iii. The Medical Evaluations*

¶ 70 Mehrberg testified that prior to Wagner’s employment, she met with Chunes to discuss medical evaluations for the auditory and respiratory programs. Chunes informed Mehrberg the evaluations were mandatory. At that time, Mehrberg contacted the HR department to obtain approval, which was denied due to the Governor’s mandate to cut costs and HR’s belief the evaluations would be covered under the consultants’ insurance plans as “physicals.” In order for her to obtain approval beyond her management level, she needed documentation from DOL showing they were mandatory. When Wagner emailed her about the evaluations, Mehrberg explained to him that she previously worked with the HR department on the issue when Chunes was the temporary OSHA program manager. She forwarded the information she received from Wagner to HR to see if it was sufficient to obtain approval. The HR department again denied approval for the evaluations.

¶ 71 *iv. Safety Supervisor*

¶ 72 Mehrberg testified that in the summer of 2010, there were several vacant positions in the OSHA program, including for a safety supervisor. Although the safety supervisor would directly report to Wagner, Mehrberg needed to be involved in the hiring process. On August 11, 2010, Mehrberg emailed Wagner because HR had asked her about the applications for the safety supervisor position they had sent to Wagner on August 5. He never informed her about the applications.

¶ 73

v. Employee Discipline

¶ 74

Mehrberg testified that she never asked Wagner to discipline any employees.

Mehrberg explained that whenever she received complaints about employee performance from a supervisor, she asked the supervisor to document the issues, meet with the employee, and create a corrective action plan. Mehrberg explained this procedure to Wagner when he informed her of the issues with Barber.

¶ 75

vi. Cross-Examination

¶ 76

On cross-examination, Mehrberg agreed that DOL audited DCEO's OSHA program prior to Wagner's employment. Mehrberg reviewed the audit. DOL recommended DCEO develop and implement a written respiratory program, which included medical evaluations. When asked if this task was completed during Mehrberg's time overseeing the OSHA program, Mehrberg replied that all employees had health insurance, they could have a medical evaluation, but that she could not tell an employee to go to the doctor. During her time overseeing the program, Chunes wrote the respiratory protection program, and Mehrberg told employees they should use their health insurance plans to obtain their medical evaluations. Wagner and Chunes called the evaluations "physicals." At the time, Mehrberg did not understand that the "physicals" to which Wagner and Chunes referred were not general annual physicals.

¶ 77

At some point in the summer of 2010, Wagner and Chunes requested to attend a regional meeting for state OSHA programs. When asked whether the grant from DOL would cover the cost of their attendance, Mehrberg responded that the COO told her that "just because the money is coming from the federal government doesn't mean we can turn around and send people on [out-of-state] trips."

¶ 78 When Mehrberg and Wagner discussed filling vacancies in the OSHA program, she told Wagner they were “not on the same page” because Wagner felt that they should not hire a new consultant until the safety supervisor position was filled. Mehrberg wanted to fill the consultant position because it had already been posted. If they did not fill it before the deadline, she would have to explain that to the union, repost the position, and go through the approval process again because of the hiring freeze.

¶ 79 Mehrberg agreed that on August 27, 2010, she stated that Wagner “created potential issues for [DCEO] with [its] grantor, [DOL].” Burmeister told her that Wagner and Chunes were “making up things about the program and *** basically giving non-factual information to [DOL] *** about different decisions, what the process was.” She did not recall what exactly they told DOL, but she remembered Burmeister telling her things that were “unbelievable.” Murphy’s supervisor told Mehrberg that Wagner was “coming to [DOL] and providing information [and] they didn’t understand why” and that she and Wagner “needed to all get on the same page.” DOL felt that there was a “personnel situation” and, as grantor, “they felt that they needed to talk to [Mehrberg] directly about the program and the lack of management.”

¶ 80 On September 24, 2010, Mehrberg emailed Stauter, Lutes, and DCEO chief of staff Stephen Konya the following message:

“In my conversation with [Murphy] it became clear that [DOL is] not mandating that the State cover the cost of the ‘physicals’ but rather the [s]tate cover the cost of medical audio and respiratory tests, which is quite different. He also conveyed to me that ‘recommended’ means ‘required/mandatory’ and will sent [*sic*] me a letter clarifying that.

The big issue here is that our program manager [Wagner]—a DCEO employee—should not be going to US DOL (our grantor) and creating issues for us—stating to them that [Merhberg] will not approve and comply. Rather [Wagner] needs to take ownership and support DCEO and State policy. Furthermore, if [Wagner] could have been proactive, as I instructed him, he could have clarified these are NOT physicals *** and have US DOL send us a note clarify [*sic*] recommended meant required/mandatory so we would have a better case to get these approved. *** I have asked [Wagner] in several emails and phone conversations to provide information to me directly stating that recommended meant required/mandatory—even a simple note from [Murphy], but he refused to respond.”

¶ 81 At some point in her preparation of Wagner’s performance evaluation, Mehrberg drafted a document which was marked as Plaintiff’s Exhibit 36 and admitted into evidence. The document was titled “Peter Wagner – Manager” and stated the following:

- “- Failed to perform in few months on job
 - Took 1st week off as vacation and several more during his brief tenure. Originally requested 2 more summer weeks off, but cancelled after review.
 - Failed to perform tasks on job description – wrote in 3 month probationary review
- I had to rewrite several portion [*sic*] on the application and finance had to create financials, and Mica did the input
 - Peter delegated his work to me, Cynthia, Mica, finance, others
 - Peter would fail to follow through on essential tasks

- Peter would fail to respond to my inquiries, and when did after delays, would not address questions
 - Peter would not go through proper channels for purchases – i.e. car, glasses, boots
 - Peter failed to abide by agency protocol and procedures – car, HR requests, IT requests
 - Peter failed to enter the 9th month budget into the system and travel requests were using old codes – Cynthia fixed
 - Peter fought to cooperate with placing cars into management operations
 - Peter continue [*sic*] to supply information to US DOL that would place DCEO in precarious situations
 - Peter spent no time overseeing staff in the field
 - Peter spent no time doing outreach – I repeatedly requested
 - When I inquired what he was doing – he could never explain
 - Many notes that show his insubordination
- Overall Peter did not make the effort to learn the program, put in or advocate processes/procedures/protocol
- Spent his time trying to fight with me and others.”

¶ 82

b. Anita Patel

¶ 83

Anita Patel testified that she worked as the CFO of DCEO during the period of 2009 to 2010. As CFO, she oversaw DCEO spending, some of which required her prior approval. During her time as CFO, she worked with Wagner to develop a budget for the OSHA

program. She explained to Wagner that the budget was “just a proposal of the costs that you plan to expend” and did not mean “that there’s a final approval of those costs.” Over the course of Wagner’s employment, Patel received “numerous” complaints about him from the managers she supervised.

¶ 84 Patel recalled an email exchange between Wagner, Merhberg, and herself involving Wagner’s request to purchase promotional items for the SHARP program. She had to explain to Wagner that her approval procedure was necessary because it was mandated by the State. After the exchange, she recalled sending an email to Mehrberg stating that Wagner “just bought himself a whole world of pain,” and that she would “now be personally reviewing every expenditure and put him through more exercises” because she could. She was frustrated with Wagner because she and others in her department had already explained these procedures to him.

¶ 85 Patel reported her issues with Wagner to Mehrberg. She felt it was her responsibility to ensure Mehrberg was aware Wagner was “having kind of a repetitive issue with [them] *** explaining that some of these costs [were] not allowable.” She did not know whether Wagner did not grasp DCEO procedures, but she knew that “he did not agree with them and so he would consistently just question it.”

¶ 86 On cross-examination, Patel stated that Wagner occasionally asked Patel questions, which was not unusual for someone new to a program manager position. Wagner also requested program money for hiring and equipment. He often expressed his impatience with the state procedure, which involved several levels of approval. With the exception of his purchase of boots and glasses, Patel did not recall any instances where Wagner bypassed state protocols when making a purchase for the OSHA program.

¶ 87 At the conclusion of this testimony, the parties agreed to submit closing arguments in writing.

¶ 88 *3. The Trial Court's Judgment*

¶ 89 On August 9, 2010, the trial court entered a judgment in favor of the defendants. Attached to the judgment was a 16-page memorandum of opinion in which the court explained in great detail its factual findings and how the law applied to those findings. In the memorandum, the court concluded that (1) Wagner engaged in “protected activity” under the Ethics Act and (2) Wagner’s protected activity was a contributing factor to retaliatory actions taken against him by DCEO. The court limited its finding of protected activity to Wagner’s disclosure to DOL that Mehrberg prevented him from complying with the cooperative agreement. However, the court further concluded that defendants proved by clear and convincing evidence they would have given Wagner a negative performance evaluation in the absence of the protected activity. In support of the court’s conclusion, we note that the court wrote (among other findings) that Wagner “repeatedly provided [Mehrberg] with evidence of insubordination, disobedience, insolence, and general negativity.”

¶ 90 This appeal followed.

¶ 91 **II. ANALYSIS**

¶ 92 On appeal, Wagner argues the trial court erred by finding defendants proved by clear and convincing evidence they would have given him a negative performance evaluation in the absence of his protected activity. Defendants argue the trial court erred in finding Wagner engaged in any protected activity. As we discuss below, we need not address defendants’ argument because we agree with the trial court that Wagner would have received a negative performance evaluation in the absence of any protected activity.

¶ 93

A. The Standard of Review

¶ 94 “The standard of review in a bench trial is whether the judgment is against the manifest weight of the evidence.” *Chicago’s Pizza, Inc., v. Chicago’s Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859, 893 N.E.2d 981, 991 (2008). “ ‘A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.’ ” *Buckner v. Causey*, 311 Ill. App. 3d 139, 143, 724 N.E.2d 95, 99 (1999) (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995)).

¶ 95 “As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony.” *Chicago’s Pizza*, 384 Ill. App. 3d at 859. A reviewing court will not disturb the lower court’s findings unless a contrary finding is clearly apparent. *Id.*

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B. The Ethics Act

¶ 97 Under section 15-10(1) of the Ethics Act, a state employee or state agency shall not take any retaliatory action against a state employee where the state employee “[d]iscloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of any officer, member, State agency, or other State employee that the State employee reasonably believes is in violation of a law, rule, or regulation.” 5 ILCS 430/15-10(1) (West 2010). “A violation of this Article may be established only upon a finding that (i) the State employee engaged in conduct described in Section 15-10 and (ii) that conduct was a contributing factor in the retaliatory action alleged by the State employee.” *Id.* § 15-20. The Ethics Act defines “retaliatory action” as “the reprimand, discharge, suspension, demotion, denial of promotion or transfer, or change in the terms or conditions of employment of any State employee, that is taken

in retaliation for a State employee's involvement in protected activity ***." *Id.* § 15-5. A defendant may refute the alleged retaliatory action by demonstrating "clear and convincing evidence that the officer, member, other State employee, or State agency would have taken the same unfavorable personnel action in the absence of that conduct." *Id.* § 15-20.

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C. This Case

¶ 99 Wagner argues the trial court's finding that defendants proved by clear and convincing evidence they would have given him a negative performance evaluation in the absence of his protected activity was against the manifest weight of the evidence. We disagree.

¶ 100 The trial court's conclusion was not against the manifest weight of the evidence because defendants presented overwhelming evidence that Wagner's negative performance evaluation was related to a number of performance factors independent from his protected activities. We note there are no references to any of Wagner's communications with DOL in the performance evaluation, and it is clear Mehrberg did not find them relevant. We agree with the court that Plaintiff's Exhibit 36, which we discuss below, provides compelling evidence of Mehrberg's overall motivation for the negative performance evaluation.

¶ 101 Of the approximately fifteen complaints contained in the document, only one related to Wagner's disclosures to DOL, stating he "continue[d] to supply information to US DOL that would place DCEO in precarious situations." Wagner's disclosures involved findings from DOL's 2009 audit—meaning DOL was aware of the auditory and respiratory program compliance issues long before his disclosures—and, therefore, Mehrberg did not find them particularly damaging at all. Instead, Mehrberg was annoyed with Wagner's efforts to shift blame to the agency for his lack of leadership. Although Wagner attempted to explain the difference between medical evaluations and physicals, Mehrberg did not understand this

distinction until she spoke directly with Murphy in September 2010. Even during her initial misunderstanding, she made efforts to push the issue on Wagner's behalf by providing all of his justifications to HR and requesting that Wagner obtain written documentation from DOL.

¶ 102 Next, Wagner constantly questioned DCEO procedures despite repeated explanations from various individuals about the purchasing, hiring, and travel constraints related to Illinois fiscal issues. Even if Wagner followed these procedures in most instances, Mehrberg received numerous complaints about his repeated criticisms. Wagner refused to accept that items identified in the grant budget would not automatically be approved, even if the funds were provided by the federal government. When Wagner wanted to purchase the promotional items for the SHARP program, he was reminded again of the Governor's mandate to cut costs on premium items and complained about DCEO's purchasing process. When he requested approval for out-of-state travel to the regional OSHA meeting, he was reminded again there was a statewide ban on out-of-state travel and again complained about DCEO's travel approval process.

¶ 103 On one occasion, Wagner completely bypassed procurement protocol and purchased new boots and safety glasses for himself, claiming he was told to do so by his employees. As program manager, Wagner was required to determine the proper process for obtaining these items rather than rely on statements from his employees. Patel testified that she did not know whether Wagner understood the procedures, but knew "he did not agree with them and so he would consistently just question it." In another instance, Wagner disposed of IT equipment without consulting anyone and without obtaining approval. When Mehrberg questioned him, he referred to the equipment as "junk" and acknowledged that he threw it away.

¶ 104 Additionally, Wagner disclosed to Murphy that DCEO had no intention of hiring a safety supervisor—despite the fact that DCEO accepted applications for the position and HR sent Wagner the applications. Although Mehrberg initially asked Wagner to determine whether the two supervisor positions could be combined, she apparently accepted they could not because she later asked to assist in reviewing applications and to participate in interviews. HR provided Wagner applications for the safety supervisor position, but Wagner never told Mehrberg, who found out from HR almost a week later. Wagner misrepresented the status of the hiring process to Murphy and failed to inform Mehrberg when he received the applications.

¶ 105 Moreover, defendants showed that Wagner was responsible for some of the hiring delays about which he complained because he was unwilling to hire for the entry-level consultant position that Mehrberg requested he prioritize. Wagner believed filling the safety supervisor position first was more critical because the consultant would not have adequate management support. Even assuming he was correct, Wagner ignored a direct request from Mehrberg, who had administrative reasons for seeing the position filled, and instead complained to Murphy. When Wagner finally conducted interviews for the position, he failed to comply with the Rutan process and the interviews had to be rescheduled.

¶ 106 Although Wagner claimed he did not delegate his work to Mehrberg or others, Mehrberg found significant issues with Wagner’s preparation of the grant application. She testified that most of the document appeared to be copied from Chunes’s previous work or was prepared by Chunes. Mehrberg had to rewrite or heavily edit significant portions of Wagner’s work.

¶ 107 Mehrberg also disagreed with Wagner’s personnel management. Though it is unclear whether Mehrberg ever specifically asked Wagner to discipline Burmeister or Barber,

