2020 IL App (3d) 180736-U

Order filed September 24, 2020
Modified upon denial of rehearing December 3, 2020

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2020

JAMES YOUNG, Petitioner-Appellant, v. THE ILLINOIS LABOR RELATIONS BOARD and VILLAGE OF UNIVERSITY PARK, Respondents-Appellees.	)))))))))))	Petition for Review of Order of the Illinois Labor Relations Board dated September 12, 2018. Nos. S-CA-15-095 S-CA-15-111 Appeal from a Decision of the Illinois Labor Relations Board.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Lytton and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The manifest weight of the evidence supports the decision of the Illinois Labor Relations Board.

¶ 2 In 2015, James Young, petitioner, filed unfair labor practice charges with the Illinois Labor Relations Board (Board) alleging his employer, the Village of University Park (Village), retaliated against him for engaging in union activity, resulting in a direct order that Young surrender his badge and identification and subsequent termination from the Village of University Park Police

Department (Department). Following investigation, a complaint was issued alleging the Village violated section 10(a) of the Illinois Labor Relations Act (Act) (5 ILCS 315/10(a)(1), (a)(2) (West 2016)). The Board found Young's allegations insufficient to sustain a cause of action against the Village. We review whether the Board's decision was against the manifest weight of the evidence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 For several years, Young worked as a part-time police officer for the Village. From 2009 until his termination, he served as a union steward and was affiliated with the American Federation of State, County, and Municipal Employees (AFSCME).

¶ 5 In his capacity as union steward, Young filed grievances on behalf of two fellow part-time officers in 2013 that were resolved in their favor. Young also filed a grievance on his own behalf in May of 2014, alleging an unfair labor practice against the Village regarding the hiring of another officer. In September 2014, Young filed another grievance on behalf of himself and two other part-time officer concerning missing benefit time and another alleging Commander Darryl Stroud had tampered with his time sheet. That same month, Young received an arbitration award on a previously filed grievance concerning a 35-day suspension leveled against him for violating a direct order not to attend a concealed carry class. The award reduced the suspension to a written reprimand for violating the direct order.

¶ 6 In December 2014, Young's scheduled hours were reduced. He was only scheduled to work four hours per pay period. Young was placed on golf course duty in December. Within the Department this assignment was viewed as a perk and was usually assigned to senior, full-time officers and trickled down based on seniority. He also did not receive his paycheck for the pay period ending December 19. Young testified that he was always having pay problems.

¶ 7 As a matter of policy, the Department requires part-time officers to submit their scheduling request no later than the 15th of the prior month. Young failed to submit his schedule request on time for January 2015. As a result, Young was not scheduled to work. Sergeant Murphy directed Young to "insure [*sic*] that you submit your requested hours to work within the time permitted in the future." Young did not submit a schedule in order to work in February 2015. He acknowledged that no one directed him to not submit a schedule but believed he could not do so "because [he] was suspended."

¶ 8 On December 3, 2014, Stroud issued a memo advising all Department patrolmen that they were to complete the mandatory annual firearms qualification testing. Of note, the memo stated,

> "2. Please communicate to me if you have any problems or concerns, if [you] need to get in the cleaning room, and/or if you think you need to practice before the qualification date.
>
> ***
>
> 4. On the day of qualification dates, officers will be selected to report to the range as they are free.
>
> 5. Officers needing additional (remedial) training will be provided 3-total attempts, consistent with academy practices to successful [*sic*] pass the course of fire.
>
> 6. Officers who fail the 3-attempts will be removed from active service until such time as they meet the basic qualification standards. YOU WILL NOT BE ABLE TO CARRY A FIREARM UNTIL YOU QUALIFY (POLICE/ARSON FIRE)[.]
>
> * * *

9. *Please make every effort to notify me if you are on vacation[,] training[,] or leave time that conflicts with the below listed dates before qualification time period.*" (Emphasis and underlining in original.)

The memo laid out the "range dates" to qualify. January 1, 6, 7, and 8. In all, 12 opportunities to qualify were allotted.

¶ 9 Young testified he did not receive this memo in his Department mailbox or see it posted on Stroud's office door. He stated he did not find it unusual the notice was not in his mailbox. Young learned of the upcoming firearm qualification from a coworker on December 23. The same day, Young wrote a memo to Stroud stating he wanted to use the weapons cleaning room and firing range for practice shooting before qualifications.

¶ 10 Young did not receive a response to his first memo. On December 27, Young wrote a similar, second memo and went to the station to place the memo in Stroud's mailbox. Once at the station, Young encountered Stroud. Stroud stated he was not present "officially" because he was on vacation and offered Young the opportunity to practice shoot that day with a group of retired officers qualifying for concealed carry permits. Young declined the opportunity; Stroud told him to follow up with him after his vacation "within a week."

¶ 11 Subsequently, Young again attempted to contact Stroud. On January 8, 2015, Young sent a message intended for Stroud to Dolores Buckley who worked in close proximity to Stroud. The message stated that Young attempted to contact Stroud but the numbers he called were either disconnected or had full mailboxes. That afternoon Stroud called Young, but Young missed the call and was unable to reach Stroud when returning the call. Also, on January 8, Stroud informed Police Chief Ed Bradley that Young failed to complete the mandatory firearms qualification.

¶ 12 Young prepared an e-mail stating that he finally communicated with Stroud over the phone on January 9. During the hearing, Young testified that this conversation took place on January 8. Stroud informed Young that the range was shut down because of flooding from damaged pipes. According to Young, he and Stroud agreed that Young would contact Stroud again within a week.

¶ 13 Also, on January 9, Young received a memo from Bradley ordering him to turn in his Department identification and badge because of his failure to complete the mandatory firearms qualification. Young complied. From that time until February 15, 2015, there is no indication in the record that Young took any action to address his failure to qualify with Department personnel.

¶ 14 Young visited the Department on February 15 to submit his schedule request for March, along with a memo inquiring when he could return to duty. The sergeant on duty told Young he was unable accept anything from Young. Young e-mailed the memo, schedule, and his account of the interaction with the sergeant to Bradley, Stroud, the Village manager, and union personnel.

¶ 15 Two days later, two officers from the Department hand-delivered a termination letter to Young's home. The letter, dated February 11, was signed by Bradley. The letter was to inform Young that his position with the Department was terminated because of "job abandonment" due to his failure to submit a work schedule for the months of January and February, along with his failure to complete the mandatory firearms qualification. According to the letter, Young's termination was effective February 12. Young filed a grievance regarding his termination. AFSCME did not seek to arbitrate the grievance and submitted a decision letter that is included in the record.

¶ 16 An administrative hearing ensued. In addition to the above, Young testified that he did not attempt the firearms qualification within the specified date range, lived within walking distance of the Department, and that he was home on the qualification dates. He later added he also may have

been somewhere else besides home on the qualification dates. Young did not seek to qualify on the dates provided because of Stroud's statement that Young should follow up with him about practicing after vacation. Young did not want to disobey an order from Stroud after previously receiving discipline for such actions. Young was never selected to report to the range or offered remedial attempts to qualify. He stated that remedial dates were offered in the past, but they were not in 2015. Young acknowledged he was unaware whether all the other officers had passed the qualifications by January 8. Young further acknowledged that by failing to attend the firearm qualifications, he was out of Departmental compliance.

¶ 17 Police Chief John Pate, the then-current police chief of the Village, testified. He stated that annual qualifications for firearms is a condition of employment. When asked what would happen if an officer who attended qualifications failed to qualify, Pate stated they would be provided an opportunity to requalify. If they fail to qualify, it is a dischargeable offense. Further, a failure to appear for qualification would be deemed a "failure to follow a direct order to attend a scheduled training event based on a prior notification, and would lead to disciplinary action based on the manner of how it occurred. If an employee inevitably based on receiving notification to qualify fails to qualify, then that invalidates their ability to carry a firearm." Additionally, Pate noted that the training board sends out reminders that all training records must be updated to show officers had qualified by February 1 or they would be deemed noncompliant, not January 9.

¶ 18 The administrative law judge (ALJ) took the matter under advisement and issued her decision and order for the Board to consider, rejecting certain claims while finding other meritorious. Relevant here, the ALJ found that the Village violated section 10(a)(1), independently and derivatively, and section 10(a)(2) of the Act when Bradley ordered Young to surrender his badge and later terminated him. This was based on the finding that there was sufficient

circumstantial evidence to show a causal nexus between Young's protected union activity and the adverse employment actions.

¶ 19 The ALJ found evidence of improper motivation on the part of the Village for two reasons. First, there was a pattern of conduct directed at those "engaging in protected concerted activity." Namely, (1) the Village had previously suspended Young which was later reduced in arbitration to a written reprimand; (2) in December 2014, the Village scheduled Young to work less hours than he previously worked; (3) Young was not paid for some of the hours he worked in December; (4) Stroud failed to schedule Young for the mandatory firearms qualification; and (5) Bradley ordered Young to surrender his badge for failing to pass the firearms qualification. Second, the ALJ found Bradley's reasoning for the badge surrender order and termination "inconsistent with department policy."

¶ 20 The Village filed its exceptions with the Board taking issue with the ALJ's decision regarding improper motivation and arguing the Village had a legitimate business reason for the adverse employment actions.

¶ 21 In its decision, the Board adopted the ALJ's findings of fact. Upon review, the Board stated the circumstantial evidence relied on by the ALJ to establish the required causal connection was "insufficient," opining the evidence was "far too tenuous to demonstrate the required nexus." Additionally, the Board found the ALJ's other findings inconsistent with the finding of a causal connection. Namely, (1) the Village did not offer shifting explanations; (2) the timing of Bradley's actions was not suspicious; and (3) there was no evidence of expressed hostility on Bradley's part toward Young's protected activity. Without any grounds to support a causal connection, the Board rejected the ultimate conclusion of the ALJ without addressing the Village's other exceptions.

¶ 22 Young appeals. On appeal, he adopts the findings of the ALJ and presents them as his arguments. In addition to the Village briefing the matter, the Attorney General filed a brief on behalf of the Board.

¶ 23 II. ANALYSIS

¶ 24 Initially, we must admonish counsel for Young. As the Attorney General and the Village point out, parts of Young's briefing fail to comply with Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018). Young's statement of facts fails to cite to the record in portions. He also fails to cite to authority to support arguments or cites to authority that does not support the argument. Further, statements made within Young's briefs are either misleading or altogether false. We warn counsel that engaging in similar behavior when submitting matters to this court in the future will result in severe consequences.

¶ 25 Turning to the substance of the appeal, Young argues the Board misapplied the law, the Board failed to explain its reasoning and reject the ALJ's findings, the Board's ultimate decision was against the manifest weight of the evidence, and that the Village did not present a legitimate, nonpretextual business reason for the badge surrender and termination.

¶ 26 When considering an allegation under section 10(a)(1) of the Act that a public employer engaged in an adverse action against a public employee who participated in protected concerted activity, the charging party must show " 'that the employee's protected conduct was a substantial or motivating factor in the adverse action.' " *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 345 (1989) (quoting *National Labor Relations Board v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983)). When considering an allegation under section 10(a)(2) of the Act that a public employer illegally engaged in an adverse action against a public

employee who participated in protected union activity, the charging party must show that the adverse employment action was " 'based in whole or in part on antiunion animus.' " *Id.*

¶ 27 When there are allegations that the employer's retaliation against the employee for engaging in protected activity violated both section 10(a)(1) and section 10(a)(2) of the Act, the employee necessarily contends that the employer's motives for an adverse action were improper. *Slater v. Illinois Labor Relations Board, Local Panel*, 2019 IL App (1st) 181007, ¶ 17. "In such circumstances, the alleged section 10(a)(1) violation is derivative of the section 10(a)(2) violation, and the Board follows the framework applied to section 10(a)(2) claims to determine whether an employer took an adverse action for an illegal motive." *Id.*

¶ 28 Among other factors, the Board may reasonably infer antiunion motivation from: (1) the employer's expressed hostility toward union activity along with knowledge of the employee's union activity; (2) the proximity in time between the employee's union activity and the adverse action taken by the employer; (3) disparate treatment of employees or a pattern of conduct that targets union supporters for adverse employment action; (4) inconsistencies between the employer's proffered reason for taking the adverse action and other actions of the employer; and (5) shifting explanations for the adverse action by the employer. *Burbank*, 128 Ill. 2d at 346

¶ 29 Motive is a question of fact and as such, a Board's finding as to motive will only be set aside if it is against the manifest weight of the evidence. *Burbank*, 128 Ill. 2d at 345. "[T]he Board's finding must be accepted if supported by substantial evidence." *Id.* A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based on the evidence. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998).

¶ 30 The Illinois State Labor Relations Board is an administrative agency and, pursuant to section 3-110 of the Administrative Review Law, an administrative agency's findings and conclusions on questions of fact are deemed to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2018). "In examining an administrative agency's factual findings, a reviewing court does not weigh the evidence or substitute its judgment for that of an administrative agency" but, rather, ascertains whether the findings and decision of the Board are against the manifest weight of the evidence. *City of Belvidere*, 181 Ill. 2d at 205. "The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992).

¶ 31 The majority of Young's arguments are without merit. Young first contends that the Board misapplied the law, arguing the Board required him to show all five of the so-called *Burbank* factors to evidence an antiunion motivation. Young makes this argument even in the absence of the Board explicitly making any such ruling. To the contrary, the Board found Young failed to establish *any* of the five factors. Given Young is attempting to challenge a ruling the Board did not make, we will not address the argument.

¶ 32 Young goes on to argue that the Board only considered three of the inexhaustive list of factors provided in *Burbank* to the exclusion of the others. Also, that the Board did not reject the ALJ's findings. We disagree. Again, the Board made clear that it was rejecting the findings of the ALJ and that the *Burbank* factors the ALJ found existed were based upon facts that were "far too tenuous" to form the required causal nexus. The Board also found insufficient evidence to establish any of the remaining three factors. Taken together, the Board clearly considered all five of the factors listed in *Burbank* and rejected the ALJ's findings.

¶ 33 Young then complains the Board did not explain its reasons for rejecting the ALJ's findings regarding the pattern of conduct and inconsistencies between the Village's explanation of Young's suspension and termination and Department policy. Similarly, this statement ignores the Board's finding that the circumstantial evidence was insufficient and "far too tenuous" to establish the required causal nexus. Further, it is axiomatic that this court reviews the Board's judgment not its reasoning and can affirm for any reason apparent from the record. *Ball v. Board of Education of City of Chicago,* 2013 IL App (1st) 120136, ¶ 27.

¶ 34 Young also argues the Board's ultimate conclusion, that he failed to establish a *prima facie* case, was error. Young concedes in his brief that this argument revolves around whether the Board erred in deciding if there was improper motive on the part of the Village for his badge surrender and termination. As explained above, the standard of review when examining the Board's ultimate finding on this issue is deferential. *Supra* ¶¶ 26-30.

¶ 35 Here, substantial evidence supports the findings of the Board. Young was aware of the need to qualify in order to carry a firearm. The memo concerning qualification plainly states, "YOU WILL NOT BE ABLE TO CARRY A FIREARM UNTIL YOU QUALIFY[.]" This statement unequivocally sets out the Department's policy on failing to attend qualification. Young admitted his failure to attend firearms qualification rendered him out of Departmental compliance. Pate testified that firearms qualification was a condition of employment and failing to attend qualification would be deemed a "failure to follow a direct order to attend a scheduled training event based on a prior notification, and would lead to disciplinary action based on the manner of how it occurred." Further, "If an employee inevitably based on receiving notification to qualify fails to qualify, then that invalidates their ability to carry a firearm." Pate stated a failure to qualify is a dischargeable offense. The testimony from Pate that Young would not have been out of

compliance until February 1 is in direct contradiction of the qualification memo. Additionally, this testimony concerned filing qualification results with the State Training Board, not departmental policy.

¶ 36 Further, as laid out in the qualification memo, additional, remedial attempts plainly refer to additional attempts to qualify after previous attempts have failed. Pate's testimony supports this conclusion as he stated additional opportunities to qualify were related to unsuccessful performance on the qualification. Failure to attend could result in discharge. Young failed to attempt to qualify at all. Subsequently, he made no attempt to correct this failure.

¶ 37 Young contends that the Village "prevented" him from qualifying. That conclusion is unsupported by the record. While Stroud undoubtedly could have been more helpful in facilitating range time for Young to practice, it is not readily apparent that anyone other than Young prevented his attendance at qualification. Stroud offered an opportunity for Young to practice and Young declined. To contend now that he was "prevented" from completing the firearms qualification is disingenuous at best. Neither Stroud nor Bradley exempted Young from qualification. None of Young's conversations with Stroud concerned actually qualifying, only practicing. Young never appeared at the Department to qualify. As the memo noted, officers were "selected" as they were "free to qualify," not scheduled. Young was not present at the Department on the firearms qualification days to be selected. While Young testified he spoke with Stroud on the last day of qualification, his e-mail to a coworker drafted subsequent to this conversation shows the conversation took place the day after the final day of qualification and Young was still only inquiring about the opportunity to practice, not qualify. Young's failure to qualify was self-inflicted.

¶ 38 Young also failed to submit his schedule in a timely manner for January and failed to submit one at all for February. Young attempts to blame a suspension as the reason he did not submit a schedule for February. Nonetheless, he conceded that no one told him not to submit a schedule. His contention that he could not submit a February schedule is rebutted by the fact he attempted to submit a schedule for March when he would have still been on any alleged suspension.

¶ 39 Further, Young points to (1) other part-time officers leaving the Department, (2) his scheduled hours and pay issues, and (3) reduction of previous discipline to show a pattern of conduct. Looking at the record, it is not clear what happened to the other part-time officers. The reason for their departure was never developed during the hearing and therefore cannot form a basis for a pattern of conduct. While Young's hours were reduced in December, he also testified that he was assigned to the golf course. An assignment seen as a perk, usually given to senior, full-time members of the Department. The Board correctly characterized the pay issues as tenuous, as Young testified he was always having issues with the computerized payroll system. It is also not clear what control over the payroll system, if any, Bradley wielded. As to the reduction in his discipline, Young is correct that he was able to reduce the punishment for previously disobeying a direct order. Still, the arbitrator did not find Young should go unpunished and merely reduced the punishment to a written reprimand. Young admitted he violated a direct order. And did so again by failing to attend firearm qualification.

¶ 40 Taken as a whole, Young's failure to qualify and submit schedules makes it apparent that the timing of his badge surrender and termination were not suspicious. The qualification memo stated absent qualification, an officer would not be able to carry a firearm. Qualification was a condition of employment. Once he failed to qualify, Bradley requested Young surrender his

identification and badge. Thereafter, Young did nothing to remedy the lacking prerequisite to employment and failed to submit a schedule. It was not until February 15 that Young made contact with anyone in the Department. This supports the finding of job abandonment by Bradley.

¶ 41 There is sufficient evidence in the record to support the Board's decision. Accordingly, the Board's decision is not against the manifest weight of the evidence.

¶ 42 Leaving no stone unturned, Young asserts the Village had the burden of proving a legitimate, nonpretextual business reason for the badge surrender and termination. However, this burden only shifts to the Village after Young establishes his *prima facie* case. The Board found Young failed to do so and therefore did not consider whether there was a legitimate, nonpretextual business reason. We now affirm the Board, and as a consequence will not address this argument.

¶ 43 Upon denial of Young's petition for rehearing, we acknowledge that in the previous order we cited the decision letter from AFSCME wherein a union representative explains the reasons the union decided not to arbitrate Young's claims. This letter was cited to as an additional evidentiary basis supporting the Board's decision. Young argues any reliance placed on the letter was improper as it was a privileged communication. After removing the decision letter from our consideration, the end result remains the same. There is sufficient evidence in the record to support the Board's decision. The remaining arguments contained in Young's petition for rehearing are either without merit or fail to impact the outcome in this matter.

¶ 44 III. CONCLUSION

¶ 45 For the foregoing reasons, we affirm the judgment of the Illinois Labor Relations Board.

¶ 46 Board decision affirmed.