



conducted a telephone hearing with plaintiff and DOC's telecommunications manager. The DES referee agreed with the claim adjudicator and found that plaintiff was ineligible for unemployment benefits under the Act because he engaged in conduct unbecoming an employee and violated a written policy prohibiting racial discrimination. Plaintiff appealed to the DES Board (Board), arguing that section 602(A) of the Act did not apply to him because he did not commit a felony. After reviewing the record, the Board affirmed. In May 2010, plaintiff filed a complaint for administrative review in the circuit court. Following a January 2011 hearing, the court affirmed the Board's decision.

¶ 4 Plaintiff appeals, arguing that DES improperly concluded that he engaged in statutory "misconduct" that would render him ineligible for benefits under the Act because (1) DES failed to find facts sufficient to provide meaningful review on appeal; (2) actual harm, rather than potential harm, is necessary to render an employee ineligible for benefits; and (3) DES' determination that plaintiff's violation of DOC rules was willful and deliberate is clearly erroneous. Because plaintiff failed to present these arguments to the Board, he has forfeited them, and we affirm.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff worked for DOC from August 1988 until his employment was terminated in January 2010. At the time of his discharge, plaintiff was employed as a communications equipment technician in DOC's Springfield office.

¶ 7 On October 5, 2009, plaintiff brought two nooses to work that he fashioned out of rope. He left one of the nooses on the rear deck of his car, where it was visible through the back window. He displayed the second noose in his office, hanging it by its loop on a bolt he used as

a coat hook.

¶ 8 Frank Hughes, plaintiff's coworker, noticed the noose located in the work area and mentioned to plaintiff that the noose might be offensive to some people. Plaintiff did not remove the noose but did offer to cover it if Hughes was offended. Later, Hughes noticed the noose in plaintiff's car. The next morning, worried that someone might see the nooses, Hughes and another coworker reported what they had observed to their immediate supervisor. The supervisor removed the noose from plaintiff's work area without plaintiff's knowledge. The supervisor took the noose to Larry Moritz, the telecommunications manager, who, in turn, contacted Larry Sims, an internal investigator.

¶ 9 Upon returning to work, Sims interviewed plaintiff. During the interview, plaintiff denied being part of any hate group, asserted he did not view the noose as a racist symbol, and stated that he was not trying to scare or threaten anyone. He explained that he only made the nooses because he had some spare rope, and the nooses were "just knots to him." Plaintiff was aware that another noose was found at the City Water, Light and Power plant in Springfield, which caused "a stir" shortly before he brought his noose into his office, but he was not aware of the details of that incident. Sims suggested that plaintiff remove the noose from his car to avoid any additional problems. In response, plaintiff stated that the noose was his property and he did not have to remove it.

¶ 10 Sims also interviewed the two men who reported the nooses, as well as their immediate supervisor. Hughes told Sims that he had asked plaintiff to remove the noose, informing plaintiff that the noose may offend someone regardless of whether he intended it to be offensive. Plaintiff refused. Hughes stated that he was personally offended because he did not

believe the noose was appropriate, especially in light of other recent noose incidents that had occurred in Springfield.

¶ 11 On October 7, 2009, plaintiff was placed on paid leave pending an investigation. DOC subsequently concluded that plaintiff had violated the rules prohibiting racial harassment and conduct unbecoming an employee. DOC also concluded that plaintiff had given false information to the investigator, although the alleged false information was not specified. Plaintiff was placed on unpaid leave effective January 2, 2010, and his employment was terminated on January 20, 2010.

¶ 12 Shortly thereafter, plaintiff applied for unemployment benefits. DOC protested, arguing that plaintiff was discharged because he engaged in misconduct by hanging a noose in his work area. Specifically, DOC asserted that plaintiff violated company policies concerning standards of conduct, discrimination, and harassment, with the effect of creating a hostile working environment and subjecting DOC to potential lawsuits.

¶ 13 In February 2010, the claims adjudicator agreed with DOC, finding plaintiff ineligible for benefits under section 602(A) of the Act. 820 ILCS 405/602(A) (West 2010). Plaintiff appealed the claims adjudicator's determination.

¶ 14 In March 2010, an DES referee conducted a telephone hearing with plaintiff and DOC's telecommunications manager, Larry Moritz. Moritz recounted the results of the investigation, including the statements given by those involved. He outlined the DOC rules that plaintiff violated and acknowledged that plaintiff had no previous relevant disciplinary issues. Moritz further testified that DOC employees from any of 38 correctional facilities, some of whom were minorities, could have come to plaintiff's work area and been offended by the noose.

¶ 15 Plaintiff testified that he did not believe bringing the noose to work was wrong because it was "just a knot to him"—"a novelty item" that he made to "show off." He admitted that he was told that the noose was a racist symbol but stated that he did not agree with that assessment. Plaintiff acknowledged that he had heard about another noose incident in Springfield, but he did not know any of the details of that incident.

¶ 16 Following that March 2010 hearing, the DES referee issued his decision, finding that plaintiff was ineligible for unemployment benefits under the Act because he engaged in conduct unbecoming a State employee and violated a written policy prohibiting racial discrimination. The referee stressed that nooses are offensive to some people and concluded that plaintiff intentionally, willfully, and deliberately brought the noose to work.

¶ 17 Shortly thereafter, plaintiff appealed to the DES Board, arguing only that section 602(A) of the Act did not apply because he did not commit a felony. The Board reviewed the entire record, including plaintiff's application for benefits and the transcript of the referee's hearing. On May 14, 2010, the Board affirmed the denial of benefits, incorporating the referee's decision as part of its findings.

¶ 18 On May 27, 2010, plaintiff filed a complaint for administrative review in the circuit court. In February 2011, the court affirmed the Board's final administrative decision.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Plaintiff argues that DES improperly concluded that he was engaged in misconduct that would render him ineligible for benefits under the Act because (1) DES failed to find

facts sufficient to provide meaningful review on appeal; (2) actual harm, rather than potential harm, is necessary to render an employee ineligible for benefits; and (3) DES' determination that plaintiff's violation of DOC rules was willful and deliberate is clearly erroneous. DES responds that this court should deem plaintiff's arguments forfeited because plaintiff failed to raise them before the Board and has abandoned the point he raised before the Board and substituted an entirely new set of arguments here, which the Board did not have an opportunity to hear. We agree with DES.

¶ 22 Failure to assert an argument during administrative proceedings results in forfeiture of that argument. *Philpott v. Board of Trustees of Charleston Firefighters' Pension Fund*, 397 Ill. App. 3d 369, 373-74, 931 N.E.2d 256, 260 (2010); *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 715, 881 N.E.2d 358, 362 (2007) (refusing to consider arguments raised for the first time on judicial review). The Illinois Supreme Court recently stated that "raising an issue for the first time in the circuit court on administrative review is insufficient [to avoid forfeiture]. The rule of procedural default specifically requires first raising an issue before the administrative tribunal rendering a decision from which an appeal is taken to the courts." *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 213, 886 N.E.2d 1011, 1019 (2010).

¶ 23 Plaintiff's only argument before the Board was that section 602(A) of the Act did not apply because he did not commit a felony. On appeal, plaintiff has completely abandoned this argument, and asserts three entirely new, unrelated arguments. Accordingly, we agree with DES that plaintiff forfeited these arguments. In so concluding, we acknowledge that plaintiff submitted a memorandum of law to the circuit court in support of his petition for administrative

review in which he asserted that his actions did not constitute "misconduct" under the Act because DOC did not suffer actual harm, nor was his conduct repeated in the face of an explicit warning. In administrative cases, however, this court is limited to reviewing only the decision of the administrative agency. 735 ILCS 5/3-110 (West 2010); *Cinkus*, 228 Ill. 2d at 213, 866 N.E.2d at 1020; see also *Marconi v. Chicago Heights Police Pension Board.*, 225 Ill. 2d 497, 532, 870 N.E.2d 273, 292 (2006) (This court may not hear any evidence that was not brought before the Board.). Plaintiff could have raised these issues before the DES Board. He did not. As a result, we conclude that plaintiff has forfeited review of these issues and we refuse to reach them on appeal.

¶ 24

### III. CONCLUSION

¶ 25 For the reasons stated above, we affirm the circuit court's judgment affirming DES's decision.

¶ 26 Affirmed.