

No. 1-11-2436

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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RIVER FOREST COMMUNITY CENTER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 11 L 50236
MAUREEN O'DONNELL, THE ILLINOIS	)	
DEPARTMENT OF EMPLOYMENT SECURITY	)	
BOARD OF REVIEW and MARCUS L.	)	
HUMPHREY,	)	The Honorable
	)	Alexander P. White,
Defendants- Appellees.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court, with order.  
Justices Cunningham and Connors concurred in the judgment and order.

**ORDER**

¶ 1 *Held:* We affirm the circuit court's judgment upholding the Board's determination that Humphrey is eligible to receive unemployment benefits where his conduct in failing to follow his employer's cash handling policy was not willful and deliberate.

¶ 2 Plaintiff River Forest Community Center (RFCC) appeals the order of the circuit court affirming defendant Illinois Department of Employment Security Board of Review's (Board) determination that defendant Marcus L. Humphrey did not engage in misconduct that rendered him ineligible for unemployment benefits. On appeal, RFCC contends (1) the Board erred in finding that Humphrey did not engage in deliberate and willful misconduct; and (2) the Board's determination was error because it failed to follow its precedent or explain why it departed from precedent. For the reasons that follow, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court affirmed the Board's determination on July 18, 2011. RFCC filed a notice of appeal on August 16, 2011. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 RFCC is a not-for-profit organization that offers a variety of programs for residents of the community. It also makes available for rent some of its facilities, including the gymnasium. On November 5, 1998, RFCC hired Humphrey as its Facility Manager. His responsibilities included scheduling rentals of the facility, collecting rental payments, issuing receipts, and supervising staff members who also collected rental payments and issued receipts. The cash-handling policy at RFCC required keeping at least one copy of every receipt, as well as the cash collected, in the cash box. Humphrey acknowledged that he was informed of the policy, and understood the policy, when he was hired.

¶ 7 On Monday and Wednesday evenings, RFCC rented out its gymnasium for use by community basketball leagues. The rental payments for the basketball league totaled between \$350 and \$400 each week. Although in most cases the rent was paid in cash, sometimes the rent was paid by credit card or check. According to the cash policy, employees receiving rental payments were required to issue a receipt, keep a copy of the receipt in the receipt book, and deposit cash into the cash box to be given to office personnel the next day.

¶ 8 In March 2010, RFCC discovered that it had not received most of the expected payments from the basketball league over the past 6 to 12 months. Dick Chappell, RFCC's director, stated that receipts were found from payments made by check or credit card, but only one or two receipts for cash payments existed. He questioned Humphrey, who responded that he issued receipts for cash payments and put them either in the mailbox of office staff or in the cash box, or sometimes he gave them to other supervising personnel. After Chappell's conversation with Humphrey, receipts for cash payments were regularly issued. On May 14, 2010, RFCC discharged Humphrey. It also terminated four other employees, Mark Williams, Columbia Caffy, Troy Curtis, and Tyron Fizer.

¶ 9 Humphrey applied for unemployment benefits and RFCC challenged his claim. It argued that Humphrey was terminated for misconduct. In an interview with the claims adjudicator, Humphrey acknowledged that he was told of the rule that receipts must be issued for all rental payments, and he stated that he did issue receipts for all payments he received. However, he stated that any employee at the front desk could collect payments and he was not aware that employees under his supervision did not always issue receipts until so informed by Chappell. The claims adjudicator determined that Humphrey was discharged for misconduct connected with work by violating the cash

handling policy, and he was ineligible for benefits. Humphrey appealed the determination.

¶ 10 The referee conducted a telephone hearing with Humphrey, Chappell, and the investigator hired by RFCC, Catherine Dick. Chappell testified that Humphrey was seen handling cash payments that were never turned in or receipted. Dick stated that Humphrey told her that he would collect receipts and payments at least once a week, but the receipts in the book did not support his statement. Dick also confirmed that Troy Curtis, who worked under Humphrey and also collected rental payments, was discharged for failing to handle cash properly. Humphrey stated that he issued receipts for all cash he received. He acknowledged that he was responsible for other employees who also collected payments, but he could not explain the missing cash or receipts. He stated, "I'm the boss. Yeah. They're my responsibility, but like I said over 11 years I never had a problem." He reiterated that he did not know of the missing cash or receipts until Chappell and Dick gave him that information on April 19, 2010.

¶ 11 The referee found Humphrey ineligible for unemployment benefits. Humphrey was responsible for handling and keeping track of the payments, and for the employees under his supervision. His failure to handle the payments as required by RFCC rules constituted misconduct under section 602(A) of the Unemployment Insurance Act (Act) (820 ILCS 405/602(A) (West 2008)). Humphrey appealed this decision to the Board.

¶ 12 The Board reversed the referee's determination. Although Humphrey did not handle payments properly, the Board found that his failure to follow RFCC's cash policy did not constitute "a willful disregard of [RFCC's] interests" sufficient to render him ineligible for unemployment benefits. It further found that "[a]t best" RFCC proved that Humphrey was "unable to perform his

job within the parameters set by the employer." The Board held that "incapacity, inadvertence, negligence or inability to perform assigned tasks" is not misconduct as defined by the statute. The trial court affirmed the Board's decision and RFCC filed this timely appeal.

¶ 13

#### ANALYSIS

¶ 14 RFCC contends the trial court erred in affirming the Board's decision because Humphrey's failure to ensure the proper receipt and handling of all cash payments received by him and his subordinates constituted deliberate and willful misconduct under section 602(A) of the Act. We review the final decision of the Board, not the determination of the trial court. *Robbins v. Board of Trustees of Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997). On administrative review, this court may not resolve conflicts in testimony, reweigh the evidence, or determine the credibility of witnesses. *Siler v. Department of Employment Security*, 192 Ill. App. 3d 971, 973-74 (1989). The findings of the Board are considered *prima facie* true and correct, and we will not disturb those findings unless they are against the manifest weight of the evidence. *Jackson v. Board of Review*, 105 Ill. 2d 501, 513 (1985).

¶ 15 However, we review the ultimate issue of whether Humphrey engaged in misconduct disqualifying him from unemployment benefits under the clearly erroneous standard because it involves a mixed question of law and fact. *Oleszczuk v. Department of Employment Security*, 336 Ill. App. 3d 46, 50 (2002). This standard requires the examination of the legal effect of a given set of facts. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). The Board's decision is clearly erroneous where a review of the record leaves this court with a "definite and firm conviction that a mistake has been committed." *AFM Messenger Service, Inc. v.*

*Department of Employment Security*, 198 Ill. 2d 380, 395 (2001).

¶ 16 Section 602(A) of the Act states:

"An individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work. \*\*\* For purposes of this subsection, the term "misconduct" means the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of [his] work, provided that such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." 820 ILCS 405/602(A) (West 2008).

¶ 17 The Act requires proof of three factors in order to find that an employee has engaged in misconduct: (1) employee violation of a reasonable rule or policy; (2) the violation was deliberate and willful; and (3) the violation harmed the employer or other employees. *DeBois v. Department of Employment Security*, 274 Ill. App. 3d 660, 664 (1995). The only factor contested before us is whether Humphrey engaged in deliberate and willful misconduct. Conduct involving mere inadvertence, negligence, or inability to perform required tasks is insufficient to show a deliberate and willful violation. *Siler*, 192 Ill. App. 3d at 975. Misconduct is evident, for example, where an employee intentionally takes the employer's property out of sight of his supervisor, hides the property in his locker until the end of the day, and then takes the items with him. See *Ray v. Department of Employment Security Board of Review*, 244 Ill. App. 3d 233, 236 (1993).

¶ 18 Here, the findings showed that RFCC hired Humphrey as its Facility Manager. His responsibilities included the collection of rental payments, issuing receipts for the payments, and

supervising staff who also collected payments and issued receipts. RFCC's cash handling policy was to keep a copy of the receipt and any cash payment collected in the cash box. Humphrey knew and understood this policy. In March 2010, RFCC discovered it had not received the expected cash from basketball rentals over the past 6 to 12 months. In its investigation, it questioned Humphrey who stated that he issued receipts for any cash payments he received and put the receipts and cash in the cash box or he gave it to office staff authorized to handle payments. He further stated that he was not aware that employees under his supervision who also collected rental payments did not always issue receipts, until he was so informed by Chappell. Humphrey acknowledged his responsibility for his subordinates, but did not know what happened to the missing cash.

¶ 19 Mere failure to follow correct procedures or disregard for the employer's requirements is insufficient to show misconduct under section 602(A) of the Act. *Siler*, 192 Ill. App. 3d at 975. See also *Zuaznabar v. Board of Review of the Department of Employment Security*, 257 Ill. App. 3d 354, 357 (1993). The Board found that "[a]t best" RFCC proved that Humphrey was "unable to perform his job within the parameters set by the employer." As such, his conduct did not represent "a willful disregard of [RFCC's] interests" sufficient to render him ineligible for unemployment benefits. The Board's determination was not clearly erroneous.

¶ 20 RFCC disagrees, citing as support *Perto v. Board of Review*, 274 Ill. App. 3d 485 (1995).<sup>1</sup> In *Perto*, the findings showed that the plaintiff was required by his employer to perform

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<sup>1</sup>RFCC also cites to two unpublished orders of this court. However, pursuant to Illinois Supreme Court Rule 23(e) (Ill. S. Ct. R. 23(e) (eff. July 1, 2011)), such orders are not precedential and may not be cited as authority.

commodity counts each week, but he admitted that he stopped doing the counts "even though he was aware that his employer was concerned about cash shortages." *Id.* at 492. The plaintiff attributed some of his failure to perform the task to a malfunctioning cash register, but he never stated that he informed his employer of the problem. *Id.* The *Perto* court found that the plaintiff's conduct showed "a deliberate and willful violation of his employer's rule requiring weekly commodity counts." *Id.* In *DeBois*, another case relied on by RFCC, the plaintiff falsified her time sheets to show that she worked more hours than she actually worked. *DeBois*, 274 Ill. App. 3d at 662-663. The court affirmed the Board's finding that she willfully violated the employer's policy regarding the accurate completion of time sheets. *Id.* at 666.

¶ 21 Unlike the plaintiffs in *Perto* and *DeBois*, Humphrey never stated that he consciously disregarded RFCC's cash policy. Rather, he consistently stated that whenever he received a cash payment he issued a receipt and put the cash in a box or gave it to office personnel authorized to handle payments. Humphrey also testified that he was unaware that his subordinates did not always issue receipts, and he did not know what happened to cash payments they might have received. The Board clearly found Humphrey's testimony credible. As such, his conduct does not compare to the "deliberate and willful" misconduct of the plaintiffs in *Perto* and *DeBois*.

¶ 22 RFCC also contends that Humphrey's misconduct was willful and deliberate because he understood the cash handling policy but did not follow it. The policy requires Humphrey to collect rental payments and issue receipts, and to supervise employees who also handle payments. Humphrey acknowledged that he did not monitor his subordinates' handling of payments because "over 11 years [he] never had a problem" with it before. Humphrey did not

satisfactorily perform his duties and RFCC properly discharged him as a result. However, the Board found that Humphrey's conduct showed an inability "to perform his job within the parameters set by the employer" rather than deliberate and willful misconduct. Although Humphrey's failure to follow rules may have justified his discharge, his failure did not constitute misconduct sufficient to disqualify him from receiving unemployment benefits. *Zuaznabar*, 257 Ill. App. 3d at 357.

¶ 23 RFCC also argues that four months before ruling on Humphrey's case, the Board ruled that Curtis, one of Humphrey's subordinates, engaged in willful and deliberate misconduct by failing to follow the cash policy. RFCC argues the Board should have treated the two cases similarly because both Humphrey and Curtis were responsible for following the same cash policy and offered similar excuses for the missing money. RFCC contends that the Board must either follow its precedent or explain its departure from precedent, citing as support *Hunt Super Service, Inc. v. Edgar*, 172 Ill. App. 3d 512, 518 (1988). Since the Board did neither in Humphrey's case, RFCC argues that we must reverse the Board's decision. *Hunt*, however, acknowledges that "an agency is not absolutely bound by its prior rulings" especially if the case before it is factually distinguishable. *Id.* Furthermore, it is well established that an administrative body may "deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding." *Hazelton v. Zoning Board of Appeals*, 48 Ill. App. 3d 348, 352 (1977).

¶ 24 To address this issue, we would need to look at facts that were not made part of the record at Humphrey's hearing. In reviewing the orders of administrative agencies, a court may

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consider only the evidence submitted at the administrative hearing and may not hear additional evidence. *Acevedo v. Department of Employment Security*, 324 Ill. App. 3d 768, 773 (2001).

Although the record on appeal contains the Board's decision in Curtis' case, there is no transcript of Curtis' hearing and therefore no record of the facts obtained at the hearing. Even if this court were to take judicial notice of the Curtis decision, as requested by RFCC, the Board's findings contained therein are not sufficient to address whether the two cases are factually similar so as to require the Board to explain its decision in Humphrey's case. Therefore, this court is precluded from considering this issue on administrative review.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.