

¶ 2 The Board of Review of the Illinois Department of Employment Security (Board) found plaintiff, Louise McCullough, ineligible to receive unemployment benefits under section 602A of the Illinois Unemployment Insurance Act (Act). 820 ILCS 405/602A (West 2010). The circuit court reversed the Board's decision. On appeal, defendants (the Board and the Illinois Department of Employment Security (Department)) contend that the Board's finding that McCullough was discharged for misconduct was neither against the manifest weight of the evidence nor clearly erroneous. We agree with defendants and uphold the Board's decision.

¶ 3 Although McCullough has not filed a brief, we will proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 4 The record shows that McCullough worked as a licensed practical nurse for The Renaissance at Beverly, a nursing home, from October 7, 1999 until May 25, 2011, when she was discharged. At the time she was discharged, McCullough was working the 11 p.m. to 7 a.m. shift and earning \$26.50 per hour. Included in the record is a May 25, 2011, discharge report signed by McCullough's supervisor, Deana Fair, stating, in part, that on May 24, 2011, McCullough refused to clean a medication room as directed by her supervisor and had a bad attitude. The report also indicated that McCullough was previously warned on August 30 and October 23, 2010, and on January 5, 2011. McCullough refused to sign the report. Following her discharge, McCullough applied for unemployment benefits with the Department, and the employer objected. A claims adjudicator found McCullough eligible for benefits because, although McCullough's work performance did not meet the employer's expectations, it was not willful or deliberate.

¶ 5 The Department appealed, and on September 21, 2011, a telephone hearing was conducted by a Department referee. At this hearing, Daniel Johnson, an administrator for The Renaissance, testified that he and Deana Fair, the night supervisor, discharged McCullough in

person on May 25, 2011. Johnson told McCullough that she was being terminated due to repeated occurrences of poor work performance. The final incident that led to her discharge was her refusal on May 24, 2011 to clean the medication room after being told to do so by Fair. When Johnson talked to McCullough regarding the incident, she denied refusing to clean the medication room. Instead, McCullough stated that although she was asked to clean the room, someone else cleaned it. According to Johnson, The Renaissance is harmed by an employee's refusal to obey a directive from a supervisor because it sets a bad precedent that results in other staff members refusing to complete their duties.

¶ 6 Johnson further testified that McCullough received previous warnings, including a suspension in January 2011 for failing to ensure the safety of a resident resulting in a resident's fall, a warning in October 2010 for failing to administer medication to a resident, and a warning in August 2010 for failing to properly "monitor and document intake and output" for a resident. Johnson indicated that the first offense of insubordination results in termination, and McCullough was aware of that policy through the employee handbook, which she received.

¶ 7 Deana Fair testified that she gave McCullough the directive to clean the medication room because it was a part of McCullough's responsibilities as a charge nurse. When Fair checked on the room after McCullough's shift ended, it had not been cleaned. The room was out of order and there were medications "all over the place," paper on the floor, medication that needed to go back to the pharmacy, and paper in the fax machines from old faxes. Fair confronted McCullough after noticing the room was not clean, and McCullough mumbled something and walked away. McCullough never told Fair that she felt the medication room was clean. Fair and another nurse ultimately cleaned the room.

¶ 8 McCullough initially testified that on May 24, 2011, no one asked her to clean the medication room, but then stated Deana Fair asked her to clean that room at about midnight.

McCullough told Fair that the medication room was already cleaned. Fair opened the door to the medication room, and McCullough testified that it was clean. After Fair opened the door and looked in the room, McCullough did not discuss the matter with Fair because Fair was not an easy person with whom to discuss things. McCullough further testified that she never refused to clean the room, received a prior warning for refusing to follow an order, or received a prior warning for refusing to clean the medication room.

¶ 9 In affirming the local office determination that McCullough was eligible for benefits, the referee found that it was not established by a preponderance of the evidence that McCullough was discharged for misconduct. In so finding, the referee held that McCullough did not refuse to follow the employer's directive to clean the medication room because she had already cleaned it. The referee also noted that McCullough had no prior warnings for refusing to follow a directive, and concluded that the employer failed to present competent and compelling evidence to rebut McCullough's statements that the medication room was clean.

¶ 10 The Department appealed the referee's decision to the Board. In the written argument attached to its appeal, Miriam Aruguete, the employer's representative, essentially argued that McCullough refused to clean the medication room, and that any reasonable person would have asked her supervisor to show her what was wrong where there was a difference in opinion.

¶ 11 The Board reversed the referee's decision, finding that the employer testified credibly and competently, and McCullough's rebuttal consisted of little more than blanket denials of the employer's testimony, without offering any independent testimonial or documentary evidence to support her denials. Her reasoning for not discussing the cleanliness of the room with Fair, *i.e.*, that Fair was difficult to talk to, was unavailing. The Board further found that McCullough willfully and deliberately violated the employer's rules, and that she was discharged for misconduct connected with work and was thus subject to disqualification of benefits under

section 602A of the Act. The Board did not consider Aruguete's written argument because she failed to comply with an administrative rule making acceptance of it contingent on providing a certificate of mailing to show that it was served on the other party.

¶ 12 McCullough filed a complaint for administrative review of the Board's decision in the circuit court. On March 28, 2012, the circuit court reversed the Board's decision. This appeal follows.

¶ 13 We review the final decision of the administrative agency, *i.e.*, the Board, and not the decision of the circuit court or the referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The applicable standard of review depends on the issue raised. This court reviews pure questions of law *de novo* (*Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008)), but the Board's findings of fact are governed by a different standard of review, *i.e.*, they are entitled to great deference and will be affirmed unless they are against the manifest weight of the evidence (*Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)).

¶ 14 The question of whether an employee was disqualified from unemployment benefits for misconduct presents a mixed question of law and fact and is subject to the "clearly erroneous" standard of review. *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 395 (2001). An agency's decision may be deemed clearly erroneous only where the reviewing court is left with the definite and firm conviction that a mistake has been made based on the entire record. *AFM Messenger Service*, 198 Ill. 2d at 395. For the reasons which follow, we find that this is not such a case.

¶ 15 To be ineligible for unemployment benefits under section 602A of the Act, a claimant's cause of discharge must be related to work misconduct, which deliberately and willfully violates a reasonable work rule or policy governing work-related behavior. 820 ILCS 405/602A (West

2010). Further, such violation must harm the employer or other employees, or must be repeated after a warning from the employer. 820 ILCS 405/602A (West 2010).

¶ 16 At the hearing, Daniel Johnson and Deana Fair essentially testified that the final incident that led to McCullough's discharge was her refusal on May 24, 2011, to clean the medication room after being told to do so by Fair, who was her supervisor. McCullough's refusal to obey Fair's order harmed the employer because it set a bad precedent for other staff members who might decide to refuse to complete their job responsibilities. McCullough received previous warnings, including a suspension in January 2011 for failing to ensure the safety of a resident, and warnings in August and October 2010 for failing to properly monitor and document intake and output for a resident and administer a resident's medication. Although neither Johnson nor Fair testified that McCullough received any previous warnings for insubordination, Johnson indicated that the first offense of insubordination results in termination, and McCullough was aware of that policy.

¶ 17 McCullough, however, initially testified that no one asked her to clean the medication room on May 24, 2011, but then stated Fair asked her to clean that room. According to McCullough, she told Fair that the medication room was already cleaned, and, when Fair opened the door to the room, it was clean. McCullough did not discuss the matter further with Fair because she was not an easy person with whom to discuss problems. McCullough stated that she never refused to clean the medication room, nor had she received a prior warning for refusing to follow an order.

¶ 18 It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses, and resolve conflicting testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). Here, after considering the testimony of Johnson, Fair, and McCullough during the telephone hearing, the Board disagreed with the referee's

decision and found that the employer testified credibly and competently. In contrast, the Board found that McCullough's rebuttal consisted of little more than blanket denials of the employer's testimony, and she failed to offer any independent evidence to support her denials. The Board thus settled this issue in favor of the employer. The Board, not the referee, is the ultimate fact-finding and decision-making body. *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382, 386 (1994). As the ultimate fact-finder, the Board makes its "own assessment of the evidence on the record, including assessing the credibility of the witnesses." *520 South Michigan Avenue Associates v. The Department of Employment Security*, 404 Ill. App. 3d 304, 317 (2010), citing *Gregory v. Bernardi*, 125 Ill. App. 3d 376, 379 (1984) (rejected the argument that the administrative officer who hears live testimony should be given greater consideration on administrative review than the Board). After reviewing the record, and deferring to the Board's assessment, we cannot say that this conclusion was against the manifest weight of the evidence. *Caterpillar, Inc. v. Doherty*, 299 Ill. App. 3d 338, 344 (1998).

¶ 19 Considering the Board's findings as *prima facie* true and correct (*Horton v. Department of Employment Security*, 335 Ill. App. 3d 537, 540 (2002)), we find that the Board's determination that McCullough was ineligible for unemployment benefits was not clearly erroneous (*AFM Messenger Service*, 198 Ill. 2d at 395). McCullough knowingly violated a company policy by refusing a directive from her supervisor after being warned and suspended for poor work performance. Moreover, her actions harmed her employer by setting a bad example for the other employees and disrupting the duties of Fair and another nurse who had to clean the medication room.

¶ 20 For the foregoing reasons, we reverse the circuit court's judgment and uphold the Board's decision disqualifying McCullough from receiving unemployment benefits.

¶ 21 Judgment reversed.

1-12-1260