SECOND DIVISION
March 8, 2016

No. 1-15-0255

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL HOLLIDAY, Plaintiff-Appellee, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, BOARD OF REVIEW, Defendants- Appellants, and R.J.B. PROPERTIES, INC. c/o UC EXPRESS ADP, INC., Defendant.	)	Appeal from the Circuit Court of Cook County. No. 14 L 050531 Honorable Robert Lopez Cepero, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence supported the factual finding of the IDES Board of Review that the claimant was ineligible for benefits after being discharged for employment-related misconduct.

¶ 2 Defendants, Illinois Department of Employment Security (IDES), its Director, and the Department's Board of Review (Board) appeal from a circuit court order reversing a decision of the Board which had found that plaintiff, Michael Holliday, was ineligible to receive unemployment benefits because his employment was terminated due to misconduct. On appeal, defendants contend the Board's decision was based on a factual finding that was not against the manifest weight of the evidence and should not have been reversed. We reverse the circuit court's reversal of the Board's decision.

¶ 3 Plaintiff was employed by RJB Properties, Inc. (RJB) from August 12, 2003, until his employment was terminated on November 26, 2013. RJB provides maintenance and custodial service for its clients, including the Chicago Public Schools (CPS). Plaintiff worked for RJB in a dual capacity, as a custodian at Spencer Technology Academy and as a project manager at another site.

¶ 4 Following his discharge by RJB, plaintiff applied for unemployment insurance benefits, and IDES notified RJB of Holliday's claim. RJB advised the IDES claims adjudicator that plaintiff had been discharged because he had been using the school facility for his personal use by opening the school for vendors on weekends in exchange for payment from them which he "pocketed." On December 20, 2013, an IDES claims adjudicator determined that plaintiff was eligible for benefits.

¶ 5 RJB appealed the adjudicator's determination of eligibility and requested a hearing before an IDES administrative law judge (ALJ). On February 28, 2014, an ALJ conducted an evidentiary hearing by telephone with plaintiff and with RJB employees Elena Valdez and Bart Skomorowski. The ALJ stated the issue as whether plaintiff was discharged for misconduct in

connection with work pursuant to section 602A of the Unemployment Insurance Act (the Act) (820 ILCS 405/602A (West 2014)).

¶ 6 Elena Valdez, of RJB's Human Resources division, testified that plaintiff had been discharged for violating a code of conduct policy in the RJB handbook, which plaintiff had received. The policy, a copy of which is contained in the record, stated that RJB employees should maintain the highest ethical standards in the conduct of company affairs, and conduct the company's business with integrity and comply with all applicable laws in a manner that excludes considerations of personal advantage or gain. It further stated in pertinent part:

> "Employees should avoid any situation which involves or may involve a conflict between their personal interest and the interest of the Company. *** [E]mployees dealing with customers, suppliers, contractors, competitors or any person doing or seeking to do business with the company are to act in the best interest of the company."

It also stated that any violation of the policy would subject the employee to administrative disciplinary action or immediate discharge.

¶ 7 Valdez testified: "We were notified that there had been some activities on the weekend by clients or vendors from the school to set up and take down *** the gym room for perhaps meetings and that Mr. Holliday was accepting money from them." Plaintiff was accepting the fees that should have gone to RJB.

¶ 8 Valdez spoke with the principal of Spencer Technology Academy, who told her that there had been activities on the weekends, involving either the school or vendors. On those occasions, plaintiff had been performing services such as setting up and taking down the gym for meetings, and vendors would pay plaintiff directly. One such incident was a job fair in February 2013. The

school reported to RJB that "this was happening," *i.e.*, that plaintiff was charging the vendors on his own and pocketing the money rather than "putting the money through the company."

¶ 9 Valdez also testified that on weekends when plaintiff was not scheduled to work, he was present at the school without the knowledge or consent of RJB. While it appeared the school principal had given plaintiff permission to be in the school on weekends to play basketball,[1] RJB did not know that he was present in the school on the weekends for personal use. Plaintiff's hours at the school were Monday through Friday, 6 a.m. to 2:30 p.m. Outside of those hours, plaintiff was not to be in the school. Even if the principal gave him permission, the principal was not his boss or his employer. Plaintiff violated RJB policy by doing so because he worked for RJB, not the school, and it was a liability to RJB for plaintiff to be in the school outside his normal shift.

¶ 10 Bart Skomorowski, an RJB manager, testified that he heard plaintiff had been using the school facilities on weekends, and he spoke to plaintiff at a weekly RJB meeting. Plaintiff told Skomorowski that the school principal gave him permission to use the school facilities to play basketball on weekends. Skomorowski told plaintiff that RJB custodians were to be in the school facility only at the times they were scheduled to work, and that plaintiff could not be in the school on weekends without prior consent from RJB.

¶ 11 After learning plaintiff was in the facility on weekends, Skomorowski did "some research" and learned that plaintiff would bring vendors from outside the school, would negotiate

[1] The record contains an email sent by Shawn L. Jackson, Ph.D., Principal, Spencer Technology Academy, CPS, stating: "This email is to confirm that I gave Michael Holliday access to the gymnasium on Saturdays. His access to the building at this time was done with my knowledge. Mr. Holliday was also allowed to open and close the building when given permission by myself or another administrator."

prices with those vendors, and would take the money "and put it in his pocket." RJB had specific contract rates that it charged for overtime or for extra programs. It was RJB's responsibility to negotiate prices for those vendors to come into the school, and RJB would bill them directly. However, plaintiff was negotiating different rates with the vendors and then keeping the money.

¶ 12 Skomorowski spoke with the school principal who said he did give plaintiff access to the school to play basketball, but that under no circumstances was plaintiff to take money for bringing in vendors. The principal understood the procedure to be that if money were exchanged between vendors and RJB, a purchase order was required. However, there were no purchase orders and RJB did not receive money for plaintiff's weekend services to vendors. The principal also told Skomorowski that plaintiff said he did not want to be removed from the school because he had the potential of making a lot of money. Skomorowski stated that that comment threw up "a red flag."

¶ 13 Skomorowski explained that, in the event the school had a job fair or after-school program or other function, the normal procedure would be that the school would make up a purchase order for the work, such as setup or cleanup, and have someone there from RJB while the event was happening. The purchase order would be sent to RJB, which would then bill CPS, and RJB would pay plaintiff an hourly rate for his work. Skomorowski testified that plaintiff violated the policy by not reporting the situation "and then repeatedly taking money from our client's vendors for his personal gain, which made it a conflict of interest." RJB's client in this instance was CPS. Plaintiff was aware of the RJB policy because he signed that he had received an employee handbook containing the policy and because he had gone through extensive training as a project manager at one of RJB's other locations.

¶ 14 Both Skomorowski and Valdez testified that a meeting was held in Valdez's office on November 19, 2013, at which Valdez, Skomorowski, and plaintiff were present. Skomorowski testified that at that meeting, plaintiff admitted that for over a year he had taken $200 from church groups or other vendors for doing the extra weekend jobs. The following direct exchange took place between Valdez and plaintiff during the telephone evidentiary hearing concerning what was said at the November 19 meeting:

> "VALDEZ: Bart [Skomorowski] asked you has there ever been… been any time that you have taken money from these vendors and you said yes. You couldn't remember how many, you couldn't remember how much, but you said it was approximately $200. They'd come in, you'd do a little set-up or you would clean, whatever. And, you know, they'd slip you some money.
>
> PLAINTIFF: That's what she's saying. I… I don't remember that.
>
> VALDEZ: That's the conversation we had on *** the 19th of November."

¶ 15 Plaintiff testified he had not taken money from vendors on weekends. The only thing he told Skomorowski and Valdez at the November 19 meeting was that he got extra money from overtime pay. He denied telling them that he was getting extra money from vendors for services performed. He insisted that any time he opened the school, the principal sent in a purchase order.

¶ 16 Plaintiff testified he was not aware he was being investigated for using the school gymnasium for personal use. He said it started when Skomorowski and another manager decided they were going to transfer him from the school. He told Skomorowski, "Hey, Bart, I did a lot of overtime from working over here at the school this year." Plaintiff responded that he would get $200 to $300 of overtime a month. Plaintiff denied pocketing money from vendors without the

submission of purchase orders. He testified at the hearing: "I'm saying I'm looking at my overtime right now. *** I never took any money from any vendor outside of RJB writing me a check for my overtime. And *** if it's possible that I could fax these to you, if we could get a continuance I could fax you the copies of *** my payroll registration ***."

¶ 17 In response to plaintiff's testimony that he could prove he was paid for overtime on weekends, Valdez testified: "If there had been events at the school in the year and a half [plaintiff] was there, and some of these events did go through the correct procedures of a purchase order through the school and then, yes, he would have been paid overtime. The problem here is that there were other times that, of course, we have no record of because they were cash transactions." "And yes, he'll have pay stubs showing that. That's not the issue. The issue is the stuff that was under the table."

¶ 18 Three days after the evidentiary hearing, the ALJ rendered her written decision, reversing the determination of the local office that plaintiff was eligible to receive benefits. The ALJ found that plaintiff was employed by a janitorial service and assigned to work at a school. He was discharged when his employer found he was working at the school on weekends without the employer's permission. The ALJ noted that plaintiff produced a letter from the school principal stating that plaintiff had permission to open and close the building on Saturdays. However, plaintiff did not testify he had his employer's permission to work for their client (the school) on Saturdays. The employer's two representatives at the hearing conducted an investigation of plaintiff's weekend work. They testified plaintiff admitted to them he had been "letting people in and out" at the school on Saturdays and had taken money outside of his regular paycheck for doing that extra work. Plaintiff denied that he told them he had taken money from vendors or the

employer's client. The ALJ concluded that plaintiff was aware of, and violated, a known company rule and his conduct was willful and deliberate; and he was not eligible for benefits because he was terminated for misconduct connected with his work pursuant to section 602A.

¶ 19 Plaintiff appealed *pro se* to the Board of Review for administrative review of the referee's decision. After reviewing the entire record, the Board found that the referee's decision was supported by the record and the law, and affirmed the denial of unemployment benefits.

¶ 20 Plaintiff sought judicial review. The circuit court reversed the decision of the Board and reinstated the determination of the local office that plaintiff was eligible to receive unemployment benefits. The court ruled that the employer, RJB, had failed to establish that plaintiff willfully and deliberately violated its rules and that plaintiff's termination was for misconduct pursuant to section 602A. The court criticized the ALJ's written decision on the basis that it failed to make a credibility determination between plaintiff and RJB's two witnesses. The court also charged that RJB's witnesses, "who claim to have had a conversation" with plaintiff, "used each other's self-serving testimony to bolster their hearsay statements" and that the ALJ relied on "double hearsay," *i.e.*, what the principal may have told them. The court also concluded that RJB's witnesses failed to identify any vendor, or any dates or times, when a vendor paid plaintiff for his services. With respect to RJB's claim that plaintiff was not authorized to be present in the school on weekends without the prior consent of RJB, the court stated: "This goes to the Employer's relationship with the principal and the CPS, not its relationship with Plaintiff." The court concluded: "[T]hat the Employer and the CPS may have a contractual dispute does not mean that Plaintiff was terminated for misconduct" pursuant to section 602A.

¶ 21 Defendants timely appealed to this court.

¶ 22 Plaintiff has not filed an appellee's brief in response to defendants' contentions. Nevertheless, we may decide the merits on appeal because the issue is sufficiently simple that we do not need the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976); *In re Guardianship of Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 14.

¶ 23 On appeal to this court, defendants contend that the Board's final administrative decision denying plaintiff unemployment compensation benefits was not contrary to the manifest weight of the evidence and was erroneously reversed where there was ample evidence to support the Board's decision that plaintiff was guilty of employment-related misconduct, including testimony of RJB's witnesses that plaintiff had admitted receiving $200 from outside vendors. We agree with defendants that the decision of the Board was supported by the record and was reversed erroneously by the circuit court.

¶ 24 In reviewing a final decision under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2014)), we review the administrative agency's decision, not the circuit court's determination. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). It is the responsibility of the administrative agency to weigh the evidence, determine the credibility of witnesses, and resolve conflicts in testimony. *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009). We will reverse an agency's factual findings only where they are against the manifest weight of the evidence. *Young-Gibson v. Board of Education of City of Chicago*, 2011 IL App (1st), 103804, ¶ 56. Findings are against the weight of the evidence when an opposite conclusion is clearly evident from the record. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 173 (2008).

¶ 25 The Board's ultimate determination here, on the question of whether an employee was properly terminated for misconduct in connection with his work, was a mixed question of fact and law to which we apply the "clearly erroneous" standard. *Livingston v. Department of Employment Security*, 375 Ill. App. 3d 710, 715-16 (2007); *Hurst*, 393 Ill. App. 3d at 327. The agency's final decision will be overturned only where clearly erroneous. *Czajka*, 387 Ill. App. 3d at 173. Misconduct is defined as (1) a deliberate and willful violation of (2) a reasonable rule or policy (3) that harms the employer or other employees or has been repeated by the former employee despite a warning or the employer's explicit instructions. *Phistry*, 405 Ill. App. 3d at 607; 820 ILCS 405/02A (West 2014). An employee willfully violates a work rule or policy when he is aware of and consciously disregards that rule. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007).

¶ 26 Here, the RJB employee handbook contained a policy which stated in pertinent part: "Employees should avoid any situation which involves or may involve a conflict between their personal interest and the interest of the Company. *** [E]mployees dealing with customers, suppliers, contractors, competitors or any person doing or seeking to do business with the company are to act in the best interest of the company." The written policy further stated that any violation would subject the employee to administrative disciplinary action or immediate discharge. Plaintiff was aware of the policy because he "signed off" on the employee handbook and was a project manager at a different location.

¶ 27 The testimony at the evidentiary hearing established that plaintiff violated the policy when he failed to have a purchase order generated for services he performed for vendors who visited the school. RJB was put on notice by the school principal that on some occasions plaintiff

would perform services, such as setting up and taking down equipment in the gymnasium for job fairs or other events, and would pocket the money from the vendors for those services. An RJB investigation ensued, culminating in a meeting of Valdez, Skomorowski, and plaintiff in Valdez's office on November 19, 2013. Both Skomorowski and Valdez testified that at that meeting, plaintiff admitted that for over a year he had taken $200 from vendors for providing extra weekend services. Plaintiff denied making this admission and testified the dollar amount he mentioned at the meeting referred to his overtime pay. He stated he was in possession of his payroll records and offered to fax them to the ALJ. Valdez responded: "And yes, he'll have pay stubs showing that. That's not the issue. The issue is the stuff that was under the table." Valdez insisted plaintiff had admitted to her and Skomorowski that the vendors would come in, plaintiff would "do a little set-up or *** clean, whatever," and the vendors would "slip [plaintiff] some money." Plaintiff responded equivocally, "I don't remember that."

¶ 28 The evidentiary hearing testimony came down to a question of credibility. In reversing the determination that plaintiff was eligible to receive unemployment benefits, the decision of the ALJ comports with a finding that RJB's witnesses were found to be more credible than plaintiff.

¶ 29 In administrative review cases such as this, the weight of the evidence and the credibility of the witnesses are uniquely within the province of the administrative agency. *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 546 (2002). An agency's findings of fact are considered *prima facie* true and correct. *Young-Gibson*, 2011 IL App (1st) 103804, ¶ 56. Here, in finding plaintiff willfully and deliberately violated a known company policy, the Board concluded that the RJB witnesses were more credible than plaintiff about whether plaintiff had admitted to taking money from vendors against the company's policy. A

reviewing court is prohibited from substituting its judgment for that of the Board. *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 317 (2010). Therefore, we conclude that the decision of the Board was not manifestly erroneous.

¶ 30 Defendants raise additional arguments in support of the Board's decision and challenging the conclusions of the trial court. The court's order criticized the Board for failing to make specific credibility findings concerning the conflicting testimony and improperly relying on hearsay testimony. However, we deem it unnecessary to address those contentions because we review the decision of the Board, not the trial court. *Phistry*, 405 Ill. App. 3d at 607.

¶ 31 Having reviewed the record and deferring to the Board's credibility determinations, we cannot conclude that the facts of this case leave us with the " 'definite and firm conviction that a mistake has been committed.' " *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 393 (2001), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Board's factual findings were not against the manifest weight of the evidence, and its conclusion that those facts constituted misconduct under the Act was not clearly erroneous. Accordingly, we reverse the judgment of the circuit court and affirm the Board's decision.

¶ 32 Board affirmed; circuit court reversed.