

No. 1-10-1872

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THOMAS MOLONY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 09L51647
ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY; BOARD OF REVIEW, and	)	
ALZHEIMERS ASSOCIATION, GREATER	)	The Honorable
CHICAGO CHAPTER,	)	James C. Murray, Jr.,
	)	Judge Presiding.
Defendants-Appellees.	)	

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**ORDER**

JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

*HELD:* Circuit court order upholding an administrative finding that the plaintiff was ineligible to receive unemployment benefits under the Illinois Unemployment Insurance Act affirmed where: the employer presented evidence that plaintiff had violated its electronic communications policy and where plaintiff was afforded a fair and impartial hearing prior to being denied benefits.

¶ 1 Plaintiff, Thomas Molony, appeals the circuit court's judgment affirming the decision of the Department of Employment Security's (IDES) Board of Review to deny his claim for

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unemployment compensation benefits under the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/1 et seq. (West 2008)). On appeal, Molony contends that the court erred in upholding the Board's decision because there was no competent evidence to support a finding that he engaged in "misconduct" pursuant to section 602A of the Act. Molony also argues that the Board's must be overturned because he was denied his due process right to a fair and impartial hearing. For the reasons explained herein, we affirm the judgment of the circuit court.

## ¶ 2 I. BACKGROUND

¶ 3 Molony commenced employment with the Alzheimer's Association, Greater Chicago Chapter (Association) on May 17, 2008, as the Association's Communications Director. At all times during his employment, the Association had an electronic communications policy in place that governed employees' use of various "forms of electronic media and services, including computers, e-mail, telephones, hand-held wireless devices, voicemail, fax machines, external electronic bulletin boards, intranet, and Internet." With respect to an employee's personal use of electronic communications, the Association's policy provided, in pertinent part:

"The computers, electronic media, and services provided by the Chapter are primarily for business use to assist employees in the performance of their jobs. Limited, occasional, or incidental use (typically no more than a few minutes per day) of electronic media (including telephones) for personal, non-business purposes is understandable and acceptable. Any personal use of electronic communications should be done in a manner that does not negatively affect the systems' use for the Chapter's business purposes, and does not interfere with the employee's work duties.

\* \* \*

Any employee who abuses the privilege of access to e-mail or the Internet in violation of this policy will be subject to disciplinary action, up to and including immediate termination of employment, legal action, and criminal liability."

¶ 4 On February 5, 2009, Erna Colborn, the Association's CEO and president, terminated Molony as a result of his excessive personal use of the Association's computers and his violation of the Association's electronic communications policy. The following day, Molony filed a claim for unemployment benefits under the Act. The local IDES office determined that Molony was eligible for such benefits, but the Association appealed the decision, arguing that Molony was precluded from receiving benefits by section 604A of the Act because he had been discharged for "misconduct." The Association submitted a computer log of Molony's internet use during work hours from January 6, 2009, to January 23, 2009, which revealed that he visited a number of websites unrelated to his work at the Association including google.com, facebook.com and daghouse.com and that he spent a significant amount of time blogging. The parties subsequently participated in a telephone hearing before an IDES referee to determine Molony's eligibility for unemployment benefits.

#### ¶ 5 The Hearing

¶ 6 During the hearing, Colborn confirmed that Molony had been employed as the Association's Communications Director for approximately one year and testified that he had been discharged due to his "[g]ross violation of the [Association's] Electronic Communications Policy." Colborn indicated she began investigating Molony's internet usage after she noticed that

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he "began working with his door closed more and more" and after receiving "complaints from fellow staff members that he was inaccessible" and that he failed to follow through on certain tasks. Colborn also reported several instances in which she walked into Molony's office and observed "something up on his computer screen that was not work-related." As a result, she requested the Association's IT Director to provide her with information about Molony's internet history. Colborn then viewed a printout of Molony's internet activity and "came to the conclusion that he had been doing a great deal of personal work on the company's computer using the company resources through the internet."

¶ 7 On February 5, 2009, Colborn confronted Molony about his internet usage. She informed him that she was "sorely disappointed in his behavior" and that she did not believe that the working relationship could continue. Molony asked Colborn to reconsider, and she spent several hours doing so but came to the conclusion that he could no longer continue working in her employ because "the trust had been broken." Colborn acknowledged that the Association permitted its employees to engage in "limited" personal use of electronic communications during work hours, but indicated that Molony's personal internet usage was not limited or incidental; rather, it was taking up a majority of his time.

¶ 8 Molony was given the opportunity to question Colborn but declined to do so. He then testified on his own behalf. Molony confirmed that he met with Colborn on February 5, 2009, and that she confronted him about his internet usage and indicated she did not feel comfortable keeping him in her employ. He begged her to reconsider, and she did, but ultimately concluded that he could no longer keep working for the Association. Colborn then gave him the

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option to resign or be terminated. Molony explained that he elected to resign because he "didn't really know what to do."

¶ 9 Molony acknowledged that he was aware of the Association's electronic communications policy and admitted that he had been visiting websites unrelated to his job responsibilities during work hours, but indicated that he only did so when he "had some downtime during the day." Molony also indicated that he had never been confronted about his internet usage prior to February 5, 2009, and that his meeting with Colborn on that date was the first time that he was made aware that there was a problem. Molony informed the referee that he knew the Association was experiencing some financial issues and that Colborn had attended a Finance Committee meeting prior to confronting him about his internet use. He indicated that he found it "a little bit odd" that he was asked to leave "on the heels of that Finance Committee meeting" and thought that his separation from the Association had more to do with the Association's possible financial constraints than it did with his computer use. Molony reiterated that Colborn had never previously complained of his computer use and had actually praised his prior work performance.

¶ 10 In response to Molony's testimony, the referee asked Colborn whether the Association's financial situation led to her confrontation with Molony. Colborn, however, denied Molony's accusation that their conversation was triggered by the company's financial status and noted that she "refilled his position as quickly as possible," which she would not have done if the Association had been in a difficult financial situation. The referee also inquired why Colborn had not simply issued Molony a warning about his internet usage instead of seeking to terminate

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him from the Association, and she responded that she had various other issues with Molony's job performance, including his failure to respond to her emails and release publications in a timely manner. The discovery of his excessive personal internet usage "was the straw that broke the camel's back." Colborn also acknowledged that she had praised Molony's job performance in the past, but explained that it was merely "an attempt to be supportive."

#### ¶ 11 The Referee's Decision

¶ 12 After hearing testimony from Colborn and Molony, the referee issued a written decision setting aside the determination of the local office. In the decision, the referee found that while the Association did allow its employees limited use of electronic media for personal non-business use, "[Molony's] use was excessive over an extended period of time. The claimant viewed and communicated with several different web sites on the average of 10 times per day." The referee further found that Molony's behavior had amounted to "misconduct" under Section 602A of the Act, explaining:

"[T]he evidence has established a willful and deliberate violation of the employer's electronic communications policy. [Molony] abused the personal use allotment for computers over an extended period of time. As director he was aware of the policy and the consequences for his failure to comply. He disregarded the obligations and duties owed the employer."

Because Molony was discharged for misconduct in connection with his work, the referee concluded that he was disqualified from receiving unemployment benefits under the Act.

#### ¶ 13 The Board of Review's Decision

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¶ 14 Molony appealed the Referee's decision to the IDES's Board of Review. In his written appeal, he argued that there was "no competent evidence in the record" to support the referee's finding that he had engaged in misconduct; rather, the referee's decision was based entirely on hearsay evidence. Specifically, Molony argued that the Association's entire case "consists of what was reportedly told to Ms. Colborn, and what other people allegedly printed out for Ms. Colborn about a computer claimed to be the one [that he] used at work. \*\*\* This is textbook hearsay." Because there was no other evidence in the record to support the hearsay allegations against him, Molony argued that the referee's finding had to be reversed. Molony also cited other grounds for reversing the referee's decision, arguing that the Association's electronic communication's policy allowing "limited" personal use of the Association's computer's was too ambiguous to support a misconduct finding and that the referee "failed to develop the record in a way that evenly presented the evidence of both sides," thereby depriving him of his right to due process.

¶ 15 After reviewing the record, the Board issued a written decision upholding the referee's finding. In doing so, the Board found that the "[r]eferee did afford the claimant a full and fair hearing" and concluded that the referee's determination that Molony was discharged for misconduct was supported by the evidence, stating:

"The claimant was under a duty to conduct himself in a manner so as not to injure the employer's interest. The claimant was discharged due to violating the employer's electronic communications policy. The evidence presented herein showed that the claimant was discharged by the employer after the employer discovered that the claimant

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was using the employer's computer for personal use by going to various message boards and blogging as well as visiting various non-work related websites. The claimant's testimony indicated that he used the employer's computer for personal use by going to various message boards and blogging as well as visiting various non-work related websites as the claimant testified that 'when I had some downtime during the day I would go on these sites and, uh, I checked them out.' \*\*\* The claimant's actions constituted a deliberate and willful violation of the employer's policy concerning employee behavior which caused the employer harm.

Accordingly, we conclude that the claimant was discharged for misconduct connected with work and is subject to a disqualification of benefits \*\*\* under Section 602A of the Illinois Unemployment Insurance Act."

¶ 16 Circuit Court Proceedings

¶ 17 Molony subsequently sought judicial review of the Board's decision in the circuit court. In his written complaint, Molony again argued that there was no competent evidence to support a finding that he engaged in work-related misconduct; rather, the Association only presented hearsay evidence. Molony also reiterated his claims that the Association's electronic communications policy was ambiguous and that the referee failed to develop the record in a fair and impartial manner.

¶ 18 After presiding over a hearing on Molony's complaint for administrative review, the transcripts of which do not appear in the record on appeal, the circuit court issued a written order upholding the decision of the Board. In response to Molony's argument that the administrative

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record was devoid of any competent evidence to support a finding of misconduct, the court observed that "the administrative rules for the hearing do not require compliance with the strict rules of evidence. 56 Ill. Admin. Code 2720.250. Also Molony never objected to any of the testimony or the exhibits presented at his hearing before the Referee." The court then observed that Molony never denied that the internet history that Colborn relied on to support her contention that Molony violated the Association's electronic communications policy was inaccurate. Based on the evidence, the circuit court concluded that the Board's decision that Molony engaged in misconduct was not clearly erroneous. In upholding the Board's decision, the court also rejected Molony's claim that the referee failed to develop a fair record, stating: "The [r]eferee gave Molony an opportunity to state his case. In fact, the [r]eferee asked Mr. Molony if he had any final words, [and] Mr. Molony used that invitation to make a statement. This Court finds the [r]eferee conducted a fair and impartial hearing to both parties."

¶ 19 This appeal followed.

## ¶ 20 II. ANALYSIS

¶ 21 On appeal, Molony disputes the Board's finding that he engaged in work-related misconduct and was thus precluded from receiving unemployment compensation benefits under the Act. He first argues that reversal is warranted because the Board's decision was based entirely on hearsay, namely computer records procured by the Association's IT Director for his boss. Because there was no competent evidence to support the misconduct allegations, Molony maintains that the Board's decision cannot stand.

¶ 22 Defendants dispute Molony's characterization of the evidence presented to the

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Board. Although defendants acknowledge that the computer records were hearsay, they observe that Molony never objected to the IT records or disputed their accuracy at the hearing.

Defendants further argue that the testimony provided by both Molony and Colborn corroborated the computer records and supported the Board's finding that Molony had abused the Association's electronic communications policy. Because the Board's decision was not based entirely on hearsay evidence, defendants contend that the Board's decision should be upheld.

¶ 23 The IDES Board is an administrative agency, and accordingly, this appeal is governed by administrative review law. 735 ILCS 5/3-101 *et seq.* (West 2008); *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 819 (2009). On appeal from the circuit court's ruling on the Board's decision pertaining to unemployment compensation benefits under the Act, we review the decision of the Board rather than the rulings of the circuit court or the hearing referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010); *Sudzus*, 393 Ill. App. 3d at 819.

¶ 24 In a case involving a dispute over unemployment benefits pursuant to the Act, the Board is the trier of fact and its factual findings are deemed *prima facie* true and correct. 735 ILCS 5/3-110 (West 2008); *Messer & Stilp, Ltd. v. Department of Employment Security*, 392 Ill. App. 3d 849, 855 (2009). As such, a reviewing court must uphold the Board's factual findings unless they are against the manifest weight of the evidence. *Sudzus*, 393 Ill. App. 3d at 819; *Manning*, 365 Ill. App. 3d at 556. The Board's legal findings, in contrast, are subject to *de novo* review. *Sudzus*, 393 Ill. App. 3d at 819; *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 556 (2006). The issue before this court, whether an employee was properly

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terminated for work misconduct and is ineligible for unemployment compensation, poses a mixed question of fact and law, as it involves an examination of the legal effect of a given set of facts. *Phistry*, 405 Ill. App. 3d at 607; *Messer*, 392 Ill. App. 3d at 855. As such, the Board's decision on this issue will be upheld unless it is clearly erroneous. *Phistry*, 405 Ill. App. 3d at 607; *Messer*, 392 Ill. App. 3d at 856. A Board's finding is clearly erroneous only "where the reviewing court is left with the 'definite and firm conviction that a mistake has been committed.' " *Kilpatrick v. Illinois Department of Employment Security*, 401 Ill. App. 3d 90, 93 (2010), quoting *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211 (2008).

¶ 25 As a general rule, hearsay evidence should not be admitted during an administrative proceeding. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 94 (1992); *Sudzus*, 393 Ill. App. 3d at 828. However, unobjected-to hearsay statements may be considered and should be given their natural probative value. *Jackson v. Board of Review of the Department of Labor*, 105 Ill. 2d 501, 508 (1985); *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 525 (2008). " '[W]here there is sufficient competent evidence to support an administrative decision, the improper admission of hearsay testimony in the administrative proceeding is not prejudicial error.' " *Abrahamson*, 153 Ill. 2d at 94, quoting *Goranson v. Department of Registration & Education*, 92 Ill. App. 3d 496, 501 (1980). Indeed, section 3-111(b) of the Illinois Code of Civil Procedure expressly provides: "Technical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and

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resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2008). Accordingly, where hearsay is admitted, but there is additional competent evidence to support an administrative agency's decision, that decision should be upheld. *Jackson*, 105 Ill. 2d at 508. In contrast, if an administrative agency's decision is based solely on the admission and consideration of hearsay evidence, the agency's decision should be reversed. *Northern Service Center, Inc. v. Board of Review, Department of Employment Security of the State of Illinois*, 167 Ill. App. 3d 583, 587 (1988).

¶ 26 Here, although the computer records detailing Molony's internet usage during work hours may have been admissible pursuant to the business record exception to the hearsay rule (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992)), defendants acknowledge that a proper foundation was not laid to admit the records into evidence. However, given that Molony failed to object to the records or dispute their accuracy, the Board was entitled to afford the records their natural probative value. *Jackson*, 105 Ill. 2d at 508; *Village Discount Outlet*, 384 Ill. App. 3d at 525. These records reveal that Molony made multiple visits to various websites including facebook.com, myspace.com and flowrestling.org. during work hours. The records also show that Molony participated on multiple online chats on daghouse.com where he discussed his musical likes and interests. Although Molony maintains that the Association presented no other competent evidence to substantiate the computer records and support the allegation that he violated the Association's electronic communications policy, we disagree. Notably, Molony himself, admitted that Colborn confronted him with the computer records procured by the Association's IT Director and that he acknowledged to her, and to the hearing referee, that he visited non-work-

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related websites during work hours. Molony explained that he "would go on these sites" when he "had some downtime" during the work day. Colborn also substantiated the information provided in Molony's computer records. She indicated that she had walked into Molony's office on several occasions and had observed him looking at websites that were not related to his job duties at the Association. Accordingly, given that there was additional competent evidence, including Molony's own testimony, that was presented during the hearing that substantiated the information depicted in the computer records, we find that the mere admission and consideration of the hearsay computer records does not warrant reversal of the Board's decision. See, e.g., *Abrahamson*, 153 Ill. 2d at 94 (finding that the admission of hearsay evidence at an administrative hearing did not warrant reversal of agency's decision where the record contained additional competent evidence to support the decision); *Meeks v. Illinois Department of Employment Security*, 208 Ill. App. 3d 579, 583, 586 (1990) (rejecting the employee's argument that the Board's finding that he engaged in, and was fired for, work-related misconduct was not based on competent evidence where the employee's own testimony acknowledged that he engaged in the behavior of which he accused).

¶ 27 Nonetheless, Molony maintains that the Board's decision must be reversed because the Association, in addition to relying on hearsay evidence, failed to establish the three factors that an employer must show to prove that an employee was terminated for "misconduct" under the Act. Defendants again dispute Molony's characterization of the evidence.

¶ 28 The purpose of the Act is to provide compensation to unemployed individuals to relieve the economic distress that results from involuntary unemployment. *Kilpatrick v. Illinois*

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*Department of Employment Security*, 401 Ill. App. 3d 90, 93 (2010). The right to unemployment compensation benefits, however, is not absolute; rather, an employee must establish his right to such benefits. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006); *Robinson v. Department of Employment Security*, 264 Ill. App. 3d 659, 661 (1994).

Section 602A of the Act precludes individuals who are "discharged for misconduct" from receiving such benefits. 820 ILCS 405/602A (West 2008); see also *Robinson*, 264 Ill. App. 3d at 661 (recognizing that although the Act is to be "liberally construed for the benefit of unemployed individuals" it is "not intended to benefit those who are unemployed as a result of their own misdeeds"). The term "misconduct" is defined by the Act as "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 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 405/602A (West 2008); see also *Robinson*, 264 Ill. App. 3d at 661 (recognizing that the deliberate and willful misconduct at work that renders an employee ineligible to receive unemployment benefits is distinguishable from conduct that merely results from an employee's incapacity, inadvertence, negligence or inability to perform). There are three elements that must be proven to substantiate a finding that an employee engaged in work-related misconduct under the Act: (1) the employee deliberately or wilfully violated his employer's rule or policy; (2) the employer's rule or policy was reasonable; and (3) the employee's violation has either harmed the employer or was perpetrated in spite of previous warnings. *Phistry*, 405 Ill. App. 3d at 607; *Manning*, 365 Ill. App. 3d at 557. Conduct is deliberate or willful where it

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constitutes a conscious act made in knowing violation of an employer's rules. *Phistry*, 405 Ill. App. 3d at 607. In determining whether an employee's conduct harmed his employer, the employee's conduct is evaluated in the context of its potential for harm, and not in the context of its actual harm. *Manning*, 365 Ill. App. 3d at 557.

¶ 29 Here, there is no dispute that the Association had an electronic communications policy in effect throughout the duration of Molony's employment, which provided for "limited, occasional, or incidental use (typically no more than a few minutes per day) of electronic media \*\*\* for personal, non-business purposes." The stated purpose of the policy was to ensure that personal use of electronic communications media would "not interfere with the employee's work duties." Molony acknowledged that he was aware of the policy and that he would spend time on non-work-related websites during work hours. Colborn testified that she became concerned with the extent of Molony's internet usage when she noticed that he began to spend more and more time with his office door closed and began to receive complaints from other employees about Molony's unavailability. Colborn personally observed Molony perusing non-work-related websites on his computer and reported that she had become unhappy with Molony's work-performance and his failure to respond in a timely manner to her emails and adhere to the Association's publication schedule. Based on the record, the Board found that the Association established that Molony deliberately and willfully violated its electronic communications policy, which was a reasonable restraint on employees' personal use of electronic media, and that Molony's conduct harmed the Association. Although Molony describes the policy as "vague" and "ambiguous as to scope," and argues that there was no evidence that his conduct harmed the

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Association, we are unable to conclude that the Board's finding that Molony was terminated as a result of misconduct was clearly erroneous.

¶ 30 Molony next argues that the Board's decision should be reversed because the referee failed to afford him a fair hearing. Specifically, Molony argues that the referee failed to develop the record in a way that evenly presented the evidence of both sides and thus, violated his due process rights.

¶ 31 Defendants respond that the referee questioned both parties in order to fully develop the record. Although the referee asked more questions to Colborn, defendants contend that the questions the referee posed to both parties were non-leading and non-adversarial and that the referee's conduct did not serve to deny Molony his due process rights.

¶ 32 Administrative proceedings are subject to the fundamental principles and requirements of due process law (*Abrahamson*, 153 Ill. 2d at 92; *Segal v. Illinois Department of Insurance*, 404 Ill. App. 3d 998, 1002 (2010)), and a reviewing court has a duty under the Illinois Administrative Review Act to ensure that due process principles were abided by during the administrative hearing (*Niles Township High School District 219 v. Illinois Educational Labor Relations Board*, 369 Ill. App. 3d 128, 135 (2006)). Notably, "due process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand." *Abrahamson*, 153 Ill. 2d at 92. Although it is a flexible concept, the "essence of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Peterson v. Chicago Plan Commission of the City of Chicago*, 302 Ill. App. 3d 461, 466 (1998). An administrative proceeding comports with due process when the

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parties are given: the opportunity to be heard, the right to cross-examine any potential adverse witness, and an impartial ruling based upon a full and fair consideration of the evidence presented. *Gonzalez v. Pollution Control Board*, 2011 IL App (1st) 093021, ¶ 42. A court will find a due process violation only if there is a showing of prejudice. *Id.*

¶ 33 Here, based on the record, we cannot conclude that the referee failed to abide by his duty to conduct a fair and impartial hearing. Neither party was represented by counsel and the referee took an active role in developing the evidence and ascertaining the positions of the parties. Although Molony finds fault with the referee's questioning technique, we note that the administrative code expressly permits referees to pose questions to parties involved in unemployment compensation disputes. See 56 Ill. Adm. Code 2720.245(b) (" Following examination of each witness by the Referee, that witness may be questioned and cross-examined by another party and further questioned by the Referee, if necessary, to ensure clarity and completeness of the issues and of the record"). Based on our review of the record, we do not find that the referee's questions were leading or adversarial or that they rose to the level of a due process violation.

¶ 34 In addition, we observe that Molony was permitted to present his side of the dispute and challenge the evidence against him. He was also given the opportunity to cross-examine Colborn, which he declined to do. Ultimately, the record reflects that the referee took an active role throughout the hearing in order to ensure that both parties had the opportunity to be heard. We conclude that Molony was afforded a fair hearing and that he was not denied his right to due process. See, e.g., *Gonzalez*, 2011 IL App. (1st) 093021, ¶ 43 (rejecting the petitioners' argument

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that they were denied their due process rights during an administrative hearing where the record reflected that they "were given a full opportunity to challenge the evidence against them, present evidence and cross-examine the witnesses"); *Village Discount Outlet*, 384 Ill. App. 3d at 527 (rejecting the appellant's argument that the hearing referee failed to abide by due process requirements and conduct a fair hearing where the record revealed that "the referee took an active role in developing the evidence and fleshing out the positions of the parties").

#### ¶ 35 CONCLUSION

¶ 36 We conclude that the administrative decision at issue herein was supported by competent evidence and that the process employed accorded with due process principles. Accordingly, the judgment of the circuit court upholding the decision of the IDES Board is affirmed.

¶ 37 Affirmed.