

No. 1-10-2896

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CONCORDIA UNIVERSITY,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the
v.	)	Circuit Court of
	)	Cook County, Illinois.
BOARD OF REVIEW, STATE OF ILLINOIS	)	
DEPARTMENT OF EMPLOYMENT	)	No. 2010 L 50282
SECURITY, administrative agency, MAUREEN	)	
T. O'DONNELL, Director, State of Illinois	)	Honorable
Department of Employment Security, and LISA	)	Sanjay T. Tailor,
LOVITSCH, individual claimant,	)	Judge Presiding.
	)	
Defendants-Appellees.	)	

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JUSTICE JOSEPH GORDON delivered the judgment of the court.  
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

*HELD:* Former university softball coach sought unemployment compensation benefits. The university filed a protest, claiming that she was ineligible for benefits because she had been fired for multiple instances of misconduct, including lying to university officials about her reasons for renting a Hummer for a team softball trip. The Board of Review of the Department of Employment Security found that she was not fired for misconduct, and the circuit court affirmed. The university appealed to this court, which also affirmed, holding that the Board's finding that the claimant did not lie was not against the manifest weight of the evidence, and the hearing referee acted within her discretion in barring the university's untimely-presented witnesses.

¶ 1 In this appeal, Concordia University (Concordia) seeks reversal of a decision of the Board of Review, State of Illinois Department of Employment Security (Board) to award unemployment compensation to former Concordia employee Lisa Lovitsch.

¶ 2 In March 2009, Lovitsch was the head women's softball coach at Concordia. During that month, the softball team took a trip to Arizona which was planned and led by Lovitsch.

Following allegations that Lovitsch engaged in unprofessional behavior on that trip, Concordia decided to terminate Lovitsch's employment as of March 19, 2009. Specifically, Concordia alleged that Lovitsch (1) rented a Hummer as a team vehicle instead of a less expensive vehicle, (2) subsequently lied to Concordia staff about her reason for the Hummer rental by claiming that it was the only vehicle available at the rental agency, (3) engaged in inappropriate contact with player Taylor Anderson by crossing her legs over Anderson's legs while the two of them were reclining on a futon together, (4) subsequently lied to Concordia staff about her physical contact with Anderson, (5) failed to take proper action when player Colleen Malaney<sup>1</sup> fell ill during the trip, (6) during the return trip, left player Michelle Seris to find her own terminal at the airport in Phoenix, and failed to properly provide adult support and transportation back to campus upon Seris' arrival at Midway Airport, (7) questioned player Courtney Campbell about her investigatory interview with Concordia concerning Lovitsch's conduct during the trip, and (8) improperly disregarded Jensen's concerns, expressed in a confidential meeting, about maintaining good grades while also working and playing softball, and breached confidentiality by

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<sup>1</sup> The record is inconsistent with respect to the spelling of Malaney's last name. We shall adopt the spelling in Concordia's brief.

telling other players that Jensen was thinking of quitting the team.

¶ 3 After her termination, Lovitsch sought unemployment benefits from the Illinois Department of Employment Security (IDES). Concordia filed a protest, stating that she was ineligible under section 602(A) of the Unemployment Insurance Act (the Act), which provides that any individual discharged for “misconduct” is ineligible for benefits. 820 ILCS 405/602(A) (West 2008). Following an administrative hearing before a Hearing Referee (referee) of the Board, the referee found that the allegations against Lovitsch had “no merit.” Concordia appealed to the Board, which also found in favor of Lovitsch.

¶ 4 Concordia then brought an action for administrative review of the Board’s decision in the circuit court. The circuit court affirmed the Board’s decision. Concordia now appeals to this court. For the reasons that follow, we affirm the decision of the Board.

#### ¶ 5 I. BACKGROUND

¶ 6 On February 16, 2010, Concordia filed a complaint in the circuit court seeking administrative review of the Board’s decision that Lovitsch was not discharged for misconduct and was therefore eligible for unemployment benefits. In response, the Board filed a copy of the record of proceedings under review. The record contains Lovitsch’s initial appeal to the Board for unemployment benefits, dated April 23, 2009, and a formal protest filed by Concordia in response, asserting that Lovitsch was discharged for misconduct. Attached to Concordia’s protest is a copy of the termination letter sent on March 19, 2009, from Pete Gnan, the director of intercollegiate athletics at Concordia, to Lovitsch. The letter states that Lovitsch’s employment is terminated for “multiple instances of misconduct” and lists the eight allegations of misconduct

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described above.

¶ 7 The transcript of the hearing before the IDES referee reflects that, at the start of the first day of the hearing, Lovitsch brought two witnesses which she intended to present: Anderson, the player who was sitting with her on the futon, and Darwin Hanson, who was the assistant softball coach for Concordia in March 2009. Concordia brought three witnesses: Elizabeth Woten, the director of human resources, Gnan, the director of intercollegiate athletics, and Kathy Gebhardt, the head volleyball coach and senior women's administrator.

¶ 8 The first witness for Concordia was Woten. Woten testified that Lovitsch was employed at Concordia from September 27, 2006, until March 20, 2009, when she was discharged by Gnan. She stated that Lovitsch was not fired over any single incident, but over several incidents, which she listed as follows: renting a Hummer instead of a less expensive vehicle, lying about that rental, having inappropriate physical contact with a player, failure to appropriately take action in response to a player's illness, leaving a player at an airport without supervision, interfering with the university's investigation by questioning players about the investigation, and improperly disregarding a player's confidentiality concerns.

¶ 9 On cross-examination, Woten stated that she was not present in Arizona when the bulk of the alleged misconduct happened, nor was she present when statements were taken from any of the individuals who were in Arizona during the softball trip. When asked what part she played in the investigation, she stated that she "was informed" of all conversations that took place between Gnan and Gebhardt.

¶ 10 The next witness for Concordia was Gnan, the director of intercollegiate athletics. Gnan

stated that Lovitsch's termination arose out of a series of incidents that happened during a one-week softball trip to Arizona. He explained that during the first week of March 2009, the softball team, their coaches, and their athletic trainer went to Arizona for the purpose of playing softball games. Gnan did not accompany them on the trip. He first became aware that there was an issue concerning the events of the trip on Monday, March 9, when a couple of the softball players, having returned from the trip, made complaints to him and to Gebhardt about Lovitsch's conduct during the trip. Gnan and Gebhardt investigated these complaints by interviewing various softball players one-on-one and by interviewing Lovitsch herself.

¶ 11 Gnan then proceeded to detail his findings with regard to the various allegations of misconduct against Lovitsch. With regard to the Hummer rental, Gnan stated that he asked Lovitsch why she rented the Hummer, and that "she said when she got to the counter that was the only available vehicle that they had left at the counter." Gnan testified that he subsequently contacted the rental car agency and learned that Lovitsch had reserved the Hummer on December 15. Thus, he concluded that "Coach Lovitsch did not tell me the truth that it was the only vehicle left at the rental agency, because she had rented it three months prior."

¶ 12 Gnan also testified that various softball players came forward to express concerns about Lovitsch and Anderson lying on a futon together "in a, probably not a position that they would've thought a coach and a player would be at." Gnan stated that the players' reports of inappropriate contact were corroborated by Kim Kistler, an athletic trainer who accompanied the team on their trip to Arizona. He stated that when he spoke with Lovitsch, she denied any inappropriate contact, but he did not believe her denial, because multiple witnesses had reported

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the incident and because Lovitsch's statements about the Hummer made him question her credibility.

¶ 13 Counsel for Concordia then began to ask Gnan about the allegations that Lovitsch mishandled the situation which arose when player Malaney became ill during the trip. The referee stopped him, asking whether Concordia had testimony from Malaney herself, testimony from a doctor, or any documentation from a doctor. When counsel from Concordia answered in the negative, the referee barred Gnan from testifying about the incident, except for testifying as to any admissions made by Lovitsch relating to the incident.

¶ 14 Gnan stated that when he questioned Lovitsch about Malaney's illness, Lovitsch told him that she was not aware that Malaney was ill until Kistler, the athletic trainer, advised her that Malaney needed to be taken to a doctor. Gnan further stated that Lovitsch admitted that Malaney's parents asked to take Malaney to a doctor, and that Lovitsch denied their request, because, in Gnan's words, "she was responsible for the team members, and that if she had released them, then she would not be, she didn't have control over that situation."

¶ 15 Counsel for Concordia next asked Gnan about the allegations that, on the return trip, Lovitsch failed to provide adult supervision and transportation for Seris, who had booked tickets on a different flight than the rest of the team. Here, again, the referee limited Gnan's testimony on this matter to any "admissions" that had been made to him by Lovitsch. Gnan stated that Lovitsch admitted the following: She dropped Seris off at the car rental facility, leaving Seris to proceed to her airport terminal, while Lovitsch and the other players went to a different airport terminal. When Seris arrived at her destination airport, Lovitsch did not personally pick her up

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to bring her back to campus; indeed, Lovitsch left the airport before Seris' plane was scheduled to land.

¶ 16 Counsel for Concordia then attempted to ask Gnan about the allegations that, while the university's investigation into Lovitsch's actions was ongoing, she attempted to interfere with the investigation. Gnan testified that athletes came to university officials and said that Lovitsch had questioned them. The referee asked whether Gnan had personally witnessed Lovitsch questioning any of the athletes, and Gnan responded that he had not. The referee then barred him from testifying any further on the matter.

¶ 17 Finally, counsel for Concordia asked Gnan about the allegations that Lovitsch improperly disregarded a player's confidentiality concerns with respect to a conversation about her ability to fulfill her academic responsibilities while remaining on the team. Gnan stated that one of the players, Jensen, told him that she had what she felt was a confidential conversation with Lovitsch. Subsequently, another player spoke to Jensen about that conversation, giving Jensen "a hard time" because Jensen was apparently thinking about quitting the team.

¶ 18 Near the conclusion of Gnan's testimony, the referee stated that the hearing would need to be continued to a later date, because she had four other hearings to be conducted on that day. Counsel for Concordia requested that the second hearing date be delayed so that he could request subpoenas for additional witnesses. The referee denied the request, stating, "If these individuals were required to provide their testimony, they should've been made available today. So I will not allow a subpoena at this point for those individuals."

¶ 19 On the second day of the hearing, counsel for Concordia arrived with six new witnesses

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in tow, in addition to the three witnesses that he had originally brought to the first day of the hearing. Those six new witnesses, all of whom had gone on the trip to Arizona, were athletic director Kistler, Colleen Malaney (the player who fell ill during the trip, hereinafter Malaney), Malaney's mother (hereinafter Ms. Malaney), Jensen and Seris (the players who went home on a different flight than the rest of the team), and Campbell (a player who was allegedly questioned by Lovitsch about the university's investigation into Lovitsch's behavior). The following colloquy then occurred with the referee:

“Referee: Okay, which witnesses have first-hand knowledge?

Counsel for Concordia: All of them, Your Honor.

R: All right. Pick two that have the most relevant information to provide, because all we're doing is it's the same information over and over again. Pick two that you feel are the best.

C: I cannot cover all the reasons for termination, Your Honor, with two, but if you just want me to pick my...

R: I want you, in your best judgment, to pick two of the witnesses that you feel will present the case best for the employer.”

Counsel for Concordia then selected athletic director Kistler and player Jensen to testify.

¶ 20 Kistler testified regarding three of the allegations of misconduct against Lovitsch: her actions with Anderson on the futon, her handling of Malaney's illness, and her allegedly mishandled arrangements for the return trip of Jensen and Seris. She stated that she saw two instances of inappropriate conduct between Lovitsch and Anderson on different days. In the first



incident, she said, Lovitsch and Anderson were seated on a futon reviewing the playbook and “they were sitting very close together.” In the second incident, Lovitsch was lying on the futon, and Anderson was sitting with her. On cross-examination, Kistler stated that she did not see Lovitsch touch Anderson suggestively or hear either of them use suggestive language, and they were not undressed. When asked what was unusual about their behavior on the futon, she said, without further elaboration, “The fact that it was one person and they were very close together...”

¶ 21 Regarding Lovitsch’s handling of Malaney’s illness, Kistler stated that, on Sunday or early Monday morning of the Arizona trip, Malaney began to get sick. On Tuesday, Kistler witnessed a conversation between Mrs. Malaney and Lovitsch in which Mrs. Malaney asked if, on Wednesday, Malaney could stay at the hotel at which her parents were staying instead of going sightseeing with the rest of the team, so that she could rest. (No games were scheduled for Wednesday; instead, the team was going sightseeing at Colossal Caverns.) Lovitsch denied Mrs. Malaney’s request, telling her that she could not allow Malaney to be out of her sight. At the time of that conversation, Kistler said, Malaney was coughing, had a headache, and was experiencing difficulty breathing, and her condition was getting worse.

¶ 22 Kistler testified that on Wednesday, Malaney accompanied the rest of the team on their sightseeing trip to Colossal Caverns. After they had returned from the caverns, Kistler said, Malaney told Kistler that she could not breathe properly. Kistler and Lovitsch brought Malaney to a clinic. Kistler stated that a registered nurse at that clinic diagnosed Malaney with acute sinusitis, bronchitis, and possibly pneumonia. However, on cross-examination, Kistler stated that Malaney saw a doctor on Thursday, and the doctor did not make any positive findings for

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pneumonia or any other illness.

¶ 23 Regarding the transportation arrangements for Jensen and Seris' trip back from Arizona, Kistler explained that Jensen and Seris joined the team at the beginning of spring semester, after the other players had already purchased their airline tickets for their trip to and from Arizona. As a result, Jensen and Seris were traveling home on a different airline. When Jensen and Seris arrived at their destination airport, Kistler said, there was no coach, assistant coach, or other adult present to bring them back to campus. Kistler said that Malaney volunteered to pick up Seris, and she thought that Jensen was going to be picked up by her parents.

¶ 24 Concordia then called Jensen to testify. Jensen stated that she played on the Concordia softball team during the 2009 season. At that time, she was a full-time student and also had a job. Lovitsch was considering implementing two softball practices a day, and Jensen was concerned that the time commitment would make it difficult for her to maintain her grades. Jensen testified that one day, before practice, she expressed these concerns to Lovitsch. "And she [Lovitsch] basically told me too bad," Jensen said. She stated that, while they were having this conversation, they were some distance away from the other players, such that it was confidential.

¶ 25 Approximately ten to fifteen minutes after having that conversation with Lovitsch, according to Jensen, she was approached by Anderson, who said, "Do you want me to kill you?" Anderson told Jensen that Lovitsch said that Jensen wanted to quit the team. Jensen told Anderson that she did not want to quit the team, but that it would be difficult for her to keep up her grades while attending two softball practices every day.

¶ 26 At the close of Jensen's testimony, counsel for Concordia renewed his objection to the referee's refusal to allow him to present all of his new witnesses. The referee stated:

"And please understand, Mr. Bennett, for the record, the reason I'm not going to allow the other witnesses is because you know you got a bite of the apple here when you should've gotten a bite of the apple. And I've been more than lenient in allowing the additional witnesses to come in at the last minute. If these witnesses had all this first-hand information, you should've had them available at the first hearing or at the first opportunity."

¶ 27 The final witness for Concordia was Gebhardt, the head volleyball coach and senior women's administrator, who was one of the three witnesses that Concordia brought on the first day of the hearing. Gebhardt stated that she interviewed Lovitsch as part of the university's investigation into her conduct. As part of that interview, she and Gnan asked Lovitsch why she rented a Hummer. Lovitsch told them that the team needed a second vehicle, and the Hummer was cheaper than another full-size, 15-passenger van. Counsel for Concordia then asked, "Did she say that that was the only vehicle available...?" Gebhardt responded, "She said that when she had made the reservation, it was the only vehicle available, there were no other options."

¶ 28 Lovitsch then testified on her own behalf. She stated that she did not lie about the Hummer rental. She testified that she was asked to arrange for vehicle transportation for the Arizona trip. She ended up renting two vehicles: a 15-passenger van and the Hummer, which she reserved on December 15, 2008. The Hummer was listed on the car rental website as a "special SUV, H3 or similar." She explained that the "special SUV" had fold-down seats, which

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the team needed to transport cargo from one location to another. The 15-passenger van did not have fold-down seats, so it was used mainly for transporting people. Lovitsch stated that, as far as she was aware, when she arrived at the airport, there were no other vehicles at the airport that would have been suitable for her cargo and passenger transportation needs. She further stated that her intent was to rent vehicles at a reasonable cost, and the amount of money that she spent was necessitated by the amount of vehicle space she needed.

¶ 29 During cross-examination, Lovitsch stated that, upon her return, she was questioned by Gnan and Gebhardt as to why she chose to rent the Hummer. The following exchange then occurred:

“Counsel for Concordia: Okay, and what did you answer to them when you, when they asked you that question about the Hummer?

Lovitsch: It was the only vehicle available for the cost, the number of people, and the cargo that we had.

C: Did you tell them it was the only vehicle available at the airport when you picked it up?

L: Yes.

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C: Okay. You told Mr. Gnan and Ms. Gebhardt in the meeting that the reason you chose the Hummer is because it was the only one available, correct?

L: Correct.”

Counsel for Concordia asked Lovitsch if that was a lie, since, in fact, she had reserved that

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vehicle months prior to picking it up at the airport. Lovitsch denied any falsehood. Then the referee spoke:

“Referee: Ms., you understand Ms. Lovitsch, when you were asked by Concordia personnel if that was the only car available, you told them yes, correct?”

Lovitsch: That is correct.

R: Okay, in reality though when you made, this is what Mr. Bennett is asking, when you made the reservation two and a half months prior to that, were there not other options available besides the H3 or something similar?

L: Based on, I’ll go back to my earlier testimony, based on the number of people and the number of luggage pieces that were shown on the website or carrental.com, this particular vehicle, which said H3 or similar, which is called a special SUV, featured the best possible cost...

R: So what you’re saying is based on the cargo and the number of passengers, there was no other options in your mind, is that what you’re stating?

L: Correct.”

¶ 30 Lovitsch also testified on direct examination that she had never “been out” with Anderson socially apart from the rest of the team, and she did not do anything inappropriate with Anderson on a futon or otherwise. She stated that she never had any unusual or inappropriate contact with a player.

¶ 31 With regard to her handling of Malaney’s illness, Lovitsch stated that she was first alerted that Malaney was ill on Wednesday. On Monday, the team played two games, and Malaney

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played in both of them. Likewise, on Tuesday, the team played two games and Malaney played in both, although Lovitsch pulled her out of the second game after the fifth inning because “she wasn’t her peppy self.” Lovitsch testified that Malaney did not express any health concerns during the games. Also on Tuesday, Lovitsch said, Mrs. Malaney handed Lovitsch a bag containing over-the-counter drugs, saying that they were for Malaney. Mrs. Malaney also asked whether Malaney could spend the next day resting at the hotel where her parents were staying instead of going to the team outing at the Colossal Caverns. Lovitsch refused. She testified that it was her understanding that the university would not allow players to be out of her sight without a written agreement. In retrospect, Lovitsch opined that Malaney had an ulterior motive for wanting to skip the team outing, namely, that she wanted to go to a Cubs game with her parents instead, although Lovitsch admitted that she was not aware of this ulterior motive at the time she denied Mrs. Malaney’s request.

¶ 32 Lovitsch said that Malaney seemed “fine” during the team outing on Wednesday. However, after the team had returned from the outing, Malaney started “yelling” that she was sick and needed care. Thirty minutes later, Lovitsch said, she brought Malaney to a clinic at Walgreens. There were no x-ray machines at the Walgreens clinic, so the following day, assistant coach Hanson brought Malaney to another clinic. Lovitsch stated that she was not informed of any positive diagnosis of illness resulting from that visit. After that incident, according to Lovitsch, the team played two games on Thursday and two games on Friday, and Malaney played in all of them.

¶ 33 With regard to the return trip of Jensen and Seris, Lovitsch testified that both Jensen and

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Seris were advised when they joined the team that they would have to make their own flight return arrangements from Arizona. According to her, the two players were well aware that they would not return home on the same flight as the rest of the team. As for transportation from their destination airport back to campus, Lovitsch said that Jensen told her that she would be picked up by her parents, while Seris said that she would be picked up by her boyfriend. Later, Lovitsch said, she overheard Malaney saying that she was going to pick Seris up. Lovitsch knew that such an arrangement would be impossible, since Malaney was on the flight with the rest of the team, so Lovitsch made arrangements for the assistant basketball coach to bring Seris back to campus.

¶ 34 Lovitsch testified that, on the Monday after she returned from the Arizona trip, Gnan and Gebhardt questioned her about various aspects of the Arizona trip. She thought the questioning was “unusual” but did not yet clearly understand that she was being investigated. After that meeting, she noticed that the team seemed lethargic at practice, and she asked team captain Campbell if everything was all right. According to Lovitsch, Campbell replied that the team was simply tired from having been together for a week. Lovitsch testified that she became fully aware of the investigation three to four days after her return. At that time, she said, she asked player Clarissa Laguski what was going on. However, Lovitsch stated that she did not suggest to any player what to say in the investigation, nor did she attempt to convince any player not to say anything.

¶ 35 Finally, in response to the allegations that she revealed the contents of a confidential conversation with Jensen, Lovitsch stated that several players were “floating around” during the conversation and could have overheard what they were saying. In particular, Lovitsch said,

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Anderson was walking by within hearing range. As for the contents of the conversation, Lovitsch said that she told Jensen that she understood her concerns, but it was not a good time for her to discuss them. She denied telling Jensen “too bad.”

¶ 36 Lovitsch then called Anderson to testify. Anderson stated that she never observed Lovitsch doing anything of a sexual nature that she felt was inappropriate, or indeed anything at all that she felt was inappropriate. When asked about the incident on the futon, she testified that she was sitting cross-legged, and Lovitsch was also seated on the futon, with a bag between them. She stated that they were looking at a scorebook and not discussing anything other than the statistics in the scorebook.

¶ 37 Regarding Jensen’s confidentiality concerns, Anderson stated that she did not overhear the conversation between Jensen and Lovitsch. After the conversation, Lovitsch mentioned to Anderson and to around three other nearby players that she was concerned about Jensen not playing and wanted to see if the other players could help find a way for her to keep playing. Anderson stated that Lovitsch did not disclose anything about Jensen’s grades in that conversation.

¶ 38 Lovitsch’s final witness was Hanson, who was the assistant softball coach in March 2009 and who accompanied the team on their trip to Arizona. Hanson testified that, during the trip, he observed Lovitsch and Anderson seated on a futon. Anderson was leaning against the back of a couch, and Lovitsch’s coaching bag was in between the two of them. Anderson had a statistics book and a notepad, and the two of them were “working on stats.” Hanson stated that he did not observe any unusual or inappropriate conduct from either of them.



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¶ 39 With regard to Malaney and her illness, Hansen testified that Malaney played in all of the team's games during the Arizona trip. On Tuesday, she was taken out near the end of the second game because she looked "a little tired" and they were going to try another player in her position. Hansen did not think this was unusual. Also on Tuesday, after the game was over, Hanson overheard Malaney saying that she was going to a Cubs game on Wednesday with her parents. Hanson stated that he relayed this information to Lovitsch.

¶ 40 Hanson testified that on Wednesday, during the team trip to Colossal Caverns, Malaney appeared to be all right. He did not recall that she was coughing. He first became aware of her illness after the cavern trip, when Lovitsch told him that she needed to take Malaney to a doctor. That night, at the house where the team was staying, Hanson was downstairs, and he could hear the players upstairs, including Malaney, laughing, talking, and joking. He stated that he went upstairs a couple of times and saw Malaney playing with the others. He opined that Malaney was feeling fine.

¶ 41 After the conclusion of the hearing, the referee issued a decision finding that Lovitsch had not been discharged for work-related misconduct and was therefore not disqualified from receiving unemployment benefits. The referee explained:

"The major allegation of inappropriate contact with a player was not observed and determined to be hearsay. The employer failed to establish that the rental of the Hummer was exorbitantly more expensive than other large vehicles. Finally, it is obvious from the testimony of all parties concerned, a few minor complaints based on hearsay allegations resulted in a hunt that had no merit."

¶ 42 Concordia appealed the referee's decision to the Board of Review. In its appeal, it argued that the referee's decision warranted reversal on various substantive grounds, including the charge that Lovitsch lied to her employer about the Hummer rental, and because the hearing officer erred in limiting the number of witnesses that Concordia could present on the second day of the hearing.

¶ 43 With regard to the university's argument that it was unfairly prejudiced by the referee's decision not to allow it to call all six of the additional witnesses it brought on the second day of the hearing, the Board stated:

“We note that this was [a] two day hearing that lasted five hours. We find that the employer's attorney was given an [*sic*] sufficient opportunity to present firsthand witnesses in order to prove its case. Furthermore, the employer has failed to make an offer of proof specifying what information these witnesses would testify to. Therefore, we find that the Hearing Referee did not abuse her discretion in not allowing the employer to call additional witnesses in this case.”

With regard to the allegation that Lovitsch lied to university officials about her reasons for renting the Hummer, the Board stated:

“We are not convinced that the claimant lied during the employer's investigation. We find that the information obtained by the employer's witness from the airport rental company is hearsay, and, furthermore, does not impeach the claimant's alleged statements made during the employer's investigation.”

The Board concluded that the evidence did not establish that Lovitsch's actions constituted

willful and deliberate misconduct but that, at best, the university's evidence showed that she was discharged for poor work performance. Thus, the Board found that she was not disqualified from receiving unemployment benefits.

¶ 44 Upon reviewing the Board's decision, the circuit court affirmed. Concordia now appeals to this court.

## ¶ 45 II. ANALYSIS

¶ 46 On appeal, Concordia limits itself to two contentions of error. It first contends that the Board erred in finding that Lovitsch did not lie regarding her rental of the Hummer.<sup>2</sup> Concordia further argues that an employee's lie constitutes misconduct under the Act as a matter of law. Therefore, Concordia asks us to reverse the decision of the Board. In the alternative, Concordia contends that the Referee deprived Concordia of a full and fair opportunity to be heard by refusing to allow the testimony of four of Concordia's witnesses. Therefore, Concordia says, if we do not outright reverse the Board's decision, we should remand the case so that Concordia may present the testimony of these four witnesses. For the reasons stated below, we affirm the decision of the Board.

¶ 47 In rendering this decision, we are mindful that, on administrative review of a claim for

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<sup>2</sup> For purposes of this appeal, Concordia explicitly relinquishes any claim that the act of renting the Hummer constituted misconduct in and of itself, stating in its brief that "Concordia is not contending on this appeal that Claimant's rental of the Hummer itself amounts to misconduct under the Act, but rather that her lie regarding the rental independently meets the misconduct standard." (Emphasis in original.)

unemployment compensation, we review the decision of the Board, not the decision of the circuit court or the decision of the referee. *Village Discount Outlet v. Department of Employment Security*, 384 Ill. App. 3d 522, 524-25 (2008). The factual findings of the Board are deemed *prima facie* true and correct and will not be reversed unless they are against the manifest weight of the evidence. *Id.*, citing *City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 205 (1998). The Board's findings on pure questions of law, to the extent that such issues would arise in this appeal, are reviewed *de novo*. *City of Belvidere*, 181 Ill. 2d at 205.

A.

¶ 48 Concordia's first contention is that the testimony of Gnan and Lovitsch herself at the hearing is sufficient to establish that Lovitsch lied about her reason for renting the Hummer, and such a lie is independently sufficient to constitute misconduct under the Act. In support of the latter, Concordia cites *Medvid v. Department of Employment Security*, 186 Ill. App. 3d 747, 751 (1989), in which the court upheld the Board's finding that an employee was discharged for misconduct where she lied about her reason for absence from work by calling in sick when she was in fact working for another employer. The Board does not contest Concordia's contention that a lie by an employee to her employer can, in and of itself, constitute misconduct under the Act. However, the Board contends, and we agree, that the Board's finding that Lovitsch did not lie to Concordia officials about the Hummer rental was not against the manifest weight of the evidence.

¶ 49 As set forth in detail above, various parties, including Lovitsch herself, testified that Lovitsch told Gnan and Gebhardt that she rented the Hummer because it was the only vehicle

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available. Concordia argues that, when Lovitsch said that the Hummer was “the only vehicle available,” she was referring to the time she arrived at the car rental facility in Arizona to pick up the vehicle. That is, in the words of Concordia’s brief, Lovitsch wanted to mislead Gnan and Gebhardt into believing that “she was essentially forced to rent the Hummer because it was the only vehicle available when she arrived at the airport.” Concordia claims that Lovitsch made this statement to cover up the fact that she had actually reserved the Hummer months in advance of the Arizona trip, in December 2008. The Board, on the other hand, puts a different gloss on Lovitsch’s statement. According to the Board, when Lovitsch said that the Hummer was “the only vehicle available,” she meant that, at the time she was making vehicle reservations in December 2008, the Hummer was the only vehicle that was suitable for her purposes, since she needed a large vehicle with fold-down seats in order to transport all of the team’s cargo. Thus, the Board argues, Lovitsch’s statement was neither misleading nor deceptive, but an accurate description of the situation that she encountered when making vehicle reservations for the trip, and it presents no contradiction with the fact that she reserved the Hummer in advance of the trip.

¶ 50 The Board’s interpretation of Lovitsch’s testimony in this regard is not against the manifest weight of the evidence. Concededly, during cross-examination, counsel for Concordia asked her, “Did you tell them [Gnan and Gebhardt] it was the only vehicle available at the airport when you picked it up?” Lovitsch responded, “Yes.” However, she later clarified this statement in response to questioning by the referee:

“Referee: Ms., you understand Ms. Lovitsch, when you were asked by Concordia

personnel if that was the only car available, you told them yes, correct?

Lovitsch: That is correct.

R: Okay, in reality though when you made, this is what Mr. Bennett is asking, when you made the reservation two and a half months prior to that, were there not other options available besides the H3 or something similar?

L: Based on, I'll go back to my earlier testimony, based on the number of people and the number of luggage pieces that were shown on the website or carrental.com, this particular vehicle, which said H3 or similar, which is called a special SUV, featured the best possible cost...

R: So what you're saying is based on the cargo and the number of passengers, there was no other options in your mind, is that what you're stating?

L: Correct."

Thus, although Lovitsch's initial statement that the Hummer was "the only vehicle available" might be construed as a comment on the inventory of the car rental facility at the time of her arrival, she later explains that, in fact, she meant that when she was making vehicle reservations months earlier, she believed that the Hummer was her only option based on the cargo and passenger space that she needed.

¶ 51 This clarification of Lovitsch's statement by Lovitsch is corroborated by Gebhardt's testimony. Counsel for Concordia asked Gebhardt whether Lovitsch had told her and Gnan that the Hummer was the only vehicle available. Gebhardt replied, "She said that *when she had made the reservation*, it was the only vehicle available, there were no other options." (Emphasis

added.) Thus, what Gebhardt was told by Lovitsch is fully consistent with Lovitsch's clarification testimony at the hearing. Accordingly, there is ample basis upon which to defer to the Board's determination of Lovitsch's credibility in offering her clarification, as well as the Board's acceptance of the truth of Gebhardt's corroborative testimony. See *White v. Dep't of Employment Sec.*, 376 Ill. App. 3d 668, 672 (2007) (where there was conflicting testimony at a hearing before an IDES referee as to whether plaintiff voluntarily left work without good cause attributable to his employer, the court on appeal deferred to the Board's factual finding that plaintiff voluntarily left work, stating, "We will not judge the witnesses' credibility or reweigh the evidence").

¶ 52 Concordia nevertheless seeks to draw support for its interpretation of Lovitsch's statement from Gnan's testimony that "she said when she got to the counter that was the only available vehicle that they had left at the counter." According to Concordia, this statement indicates that Lovitsch was, in fact, making a statement about the state of the car rental facility's inventory upon her arrival at the facility, rather than when she made the reservation months earlier. Indeed, Gnan himself opined at the hearing that Lovitsch had lied to him by telling him that "it was the only vehicle left at the rental agency," because she had rented it three months earlier.

¶ 53 However, to the extent that conflicting inferences could be drawn from the testimony at the hearing, it was the Board's prerogative to decide between them. We cannot second-guess the Board's judgment under the manifest weight of the evidence standard as long as there is evidence to support its factual findings, which, as discussed, is provided through the testimony of

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Gebhardt and Lovitsch. Therefore, we cannot say that the Board's finding that Lovitsch did not lie about her reason for renting the Hummer was against the manifest weight of the evidence.

See *White*, 376 Ill. App. 3d at 672.

¶ 54 B.

¶ 55 Concordia next contends that the referee deprived Concordia of a full and fair opportunity to be heard by refusing to allow testimony from all of Concordia's witnesses. As noted, on the first day of the hearing before the referee, Concordia only brought three witnesses, all of whom were university administrators who had not been on the trip to Arizona. Due to time constraints, the Referee continued the hearing to a second day. On that second day, Concordia brought six new witnesses who had personally witnessed the events in question. The Referee would not permit all six new witnesses to testify but, rather, instructed counsel for Concordia to select "two of the witnesses that you feel will present the case the best for the employer." Counsel for Concordia chose to call (1) athletic trainer Kistler, who testified about Lovitsch's conduct with Anderson, Lovitsch's actions with regard to Malaney's illness, and Lovitsch's actions with regard to the return trip of Jensen and Seris, and (2) player Jensen, who testified that Lovitsch revealed the contents of an allegedly private conversation they had together. Consequently, the remaining four Concordia witnesses did not get a chance to testify: player Malaney, who fell ill during the trip; Mrs. Malaney, her mother; player Seris, one of the players who took a different flight home from the rest of the team; and player Campbell, who, according to counsel for Concordia, witnessed the inappropriate contact between Lovitsch and Anderson, and was subsequently "interrogated" by Lovitsch about the investigation into Lovitsch's conduct.



Concordia contends that the exclusion of these four witnesses was in error, since, without the testimony of these four witnesses, Concordia was unable to show that the allegations against Lovitsch were meritorious. The Board, on the other hand, contends that the referee acted within her discretion, because, under the Illinois Administrative Code, each party is required to appear at the start of an IDES administrative hearing with all the witnesses it intends to call.

¶ 56 Although unemployment hearings must comport with due process (*Stone v. Department of Employment Security Board of Review*, 213 Ill. App. 3d 739, 745 (1991)), such process does not mandate a full judicial proceeding (*Williams v. Board of Trustees of Morton Grove Firefighters' Pension Fund*, 398 Ill. App. 3d 680, 691-92 (2010)). Rather, “A fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling upon the evidence.” *Abrahamson v. Illinois Dept. of Professional Regulation*, 153 Ill. App. 3d 76, 95 (1992). Moreover, in reviewing the parties’ contentions, we are mindful that the IDES interpretation of the regulations governing its administrative hearings is entitled to deference by reviewing courts. *Sudzus v. Department of Employment Security*, 393 Ill. App. 3d 814, 825 (2009).

¶ 57 The Board cites to these regulations in support of its position in the instant action, contending that the referee acted within her discretion in disallowing the additional witnesses pursuant to the following provision: “Each party shall appear at the hearing before the Referee with witnesses or documents it believes to be necessary to establish or refute allegations set forth in the appeal.” 56 Ill. Admin. Code § 2720.210(a). Thus, the Board argues, Concordia was required to appear at the first hearing with all of the witnesses it intended to call, and the referee

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was not obligated to hear any other, subsequently-introduced witnesses, even though the referee in fact decided to be lenient and hear two additional witnesses.

¶ 58 Concordia contends that this rule is inapposite because it does not explicitly set forth any procedure for hearings that span multiple days, as did the hearing in the present case. However, Concordia does not contest that, under this rule, if the referee had chosen to hold the entire hearing on a single day rather than continuing it to a second day, Concordia would not have been entitled to bring in new and additional witnesses during the middle of the hearing. Thus, any witnesses that it might have been allowed to bring on the second day would have been a windfall occasioned by the fortuitous circumstance of the referee's own scheduling concerns. Concordia has not offered any reason that it should necessarily be entitled to such a windfall. Nor has Concordia offered any reason that the six additional witnesses it sought to bring on the second day could not have been brought earlier.

¶ 59 Moreover, we note that Concordia was not deprived of an opportunity to be heard, in that it had full opportunity to bring any witnesses it chose on the first day of the hearing, and, in fact, the referee permitted Concordia to introduce two new witnesses on the second day to present firsthand testimony as to Lovitsch's alleged misconduct. Thus, as noted, Kistler testified at length regarding the alleged inappropriate conduct of Lovitsch and Anderson on the futon, Lovitsch's handling of Malaney's illness, and Lovitsch's transportation arrangements for Jensen and Seris. Jensen testified regarding Lovitsch's alleged breach of confidentiality with respect to a conversation they had together. Furthermore, Concordia was also able to present extensive testimony about Lovitsch's rental of the Hummer and the admissions she made to university

officials during the university's investigation into her actions. Accordingly, we cannot say that the referee abused her discretion in declining to allow Concordia to introduce four additional and untimely-presented witnesses on the second day of the hearing.

¶ 60 Concordia nevertheless cites *Stone*, 213 Ill. App. 3d 739, in support of its contention that the referee's actions in the instant case constituted a violation of due process. In *Stone*, plaintiff was discharged from his job with his employer and applied for unemployment benefits, and the issue before IDES was whether plaintiff had been discharged for misconduct. *Id.* at 741.

Initially, the referee found that plaintiff was not discharged for misconduct. *Id.* at 741. The employer appealed to the Board, which remanded the case to the referee for further hearings with specific instructions to incorporate the proceedings of the first hearing into the record of the hearing on remand. *Id.* at 741. However, at the hearing on remand, the referee stated that he did not have a transcript of the prior hearing and would therefore be conducting the hearing *de novo*. *Id.* at 741. Plaintiff did not have any advance notice that the hearing would be conducted *de novo*. *Id.* at 745. As a result, the testimony of Busse, a witness at the original hearing whose testimony plaintiff considered beneficial to his case, was omitted. *Id.* at 742. Busse had testified at the first hearing, and she was not in attendance at the second hearing because her prior testimony was to have been included in the record. *Id.* at 742. On appeal, the *Stone* court held that the referee denied plaintiff's right to a fair hearing by conducting the *de novo* hearing in the absence of Busse and reaching his decision without the transcript of her testimony. *Id.* at 742.

¶ 61 *Stone* does not discuss the content of Busse's testimony, nor does it discuss whether there were any other witnesses who testified on behalf of the plaintiff. Therefore, we cannot compare

the extent to which the *Stone* plaintiff may have been deprived of any other opportunity to present any testimony to the present case, in which Concordia was afforded the opportunity to present extensive evidence as to Lovitsch's alleged misconduct over two days of hearings, calling a total of five witnesses, two of whom accompanied Lovitsch on the trip to Arizona and could personally attest to Lovitsch's actions on that trip. However, we need not look to any comparisons regarding the quality or quantity of testimony offered on appellant's behalf, since there is one very obvious distinction, namely, the fact that, in *Stone*, the omission of Busse's testimony was not due to any fault on the part of plaintiff. Plaintiff could not have known that, contrary to the Board's directions on remand, the referee would conduct a *de novo* hearing instead of considering the transcript of the prior hearing at which Busse testified. Thus, plaintiff could not have known to bring Busse to the second hearing. By contrast, in the instant case, Concordia knew that the referee was going to conduct a *de novo* hearing on the issue of Lovitsch's misconduct, and, because it could not have had any foreknowledge that the hearing would be continued to a second day, it should have brought all the witnesses it needed to build its case on the first day. As noted, Concordia does not allege that any of the new witnesses it brought on the second day of the hearing would have been unavailable on the first day.

¶ 62 *Figueroa v. Doherty*, 303 Ill. App. 3d 46 (1999), the only other case cited by Concordia on this point, is even more readily distinguishable. In *Figueroa*, plaintiff was fired for allegedly stealing lemons from his employer. *Id.* at 47. When he sought unemployment benefits at a hearing before an IDES referee, he appeared without counsel but brought an interpreter to the hearing which he required to translate the proceedings into Spanish for him. *Id.* at 47. The

referee, not wanting to spend the time required for full translation, specifically directed the interpreter to translate for plaintiff only when plaintiff had a specific question about the testimony. *Id.* at 51. At one point during the proceedings, the referee directed the interpreter to translate for plaintiff a summary of the evidence against him that was “highly inaccurate.” *Id.* at 52. When plaintiff testified, the referee directed the interpreter to summarize plaintiff’s testimony rather than translate it word for word. *Id.* at 51. Moreover, “the referee failed to develop the record fully, as the record contains only a nearly indecipherable statement of Figueroa’s argument, and the referee asked no questions and made no effort to clarify the testimony.” *Id.* at 52. On appeal from the referee’s ruling in favor of the employer, the *Figueroa* court held that the referee deprived plaintiff of his right to a fair hearing:

“The failure to provide a complete translation of all proceedings deprived Figueroa of his right to a fair hearing that he understood and at which he would be understood. [Citation.] That failure became more egregiously prejudicial when the referee instructed the interpreter to translate for Figueroa a not merely incomplete, but also highly inaccurate, summary of the evidence against him. The referee further breached his duties by failing to fully develop Figueroa’s position in a clear, comprehensible record.” *Id.* at 52.

The facts of *Figueroa* stand in stark contrast to the facts of the present case. Here, there is no question about the ability of Concordia’s representatives to follow the events at the proceeding and to comply with the administrative regulations governing the scheduling of witnesses.

¶ 63 For the foregoing reasons, we affirm the decision of the Board.

¶ 64 Affirmed.