2013 IL App. (1st) 120567-U

SIXTH DIVISION
December 13, 2013

No. 1-12-0567

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARIBEL IRETA, Plaintiff-Appellant, v. THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, DIRECTOR OF EMPLOYMENT SECURITY, BOARD OF REVIEW and NATIONAL LOUIS UNIVERSITY C/O NSN JERRY WEINSTEIN, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11 L 51066 Honorable Daniel T. Gillespie, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held*** **:** The circuit court's decision affirming the Board of Review's order denying unemployment benefits to the claimant was reversed. The claimant received a fair hearing, and her allegations of procedural error either lacked merit or did not result in prejudice to her. The Board's determination that the claimant's conduct constituted misconduct under the Unemployment Insurance Act was clearly erroneous.

¶ 2 *Pro se* plaintiff Maribel Ireta (the claimant) appeals from an order of the circuit court of Cook County affirming a decision by the Board of Review (the Board) her unemployment benefits. On appeal, the claimant contends that: the Illinois Department of Employment Security (IDES) violated the adjudication and appeal provisions of the Illinois Administrative Code (the Code) and the Illinois Unemployment Insurance Act (the Act) and that her conduct did not constitute misconduct under the Act.

¶ 3 At the outset, IDES maintains that the statement of facts contained in the claimant's appellant's brief contains arguments, assertion of facts without citation to the record on appeal and factual allegations not contained in the record on appeal in violation of Supreme Court Rule 341(h)(6) (eff. July 1, 2008). In addition, we note that the claimant's brief does not contain an appendix including the documents required by Rule 342(a) (Ill. Ct. R. 342(a) (eff. Jan. 1, 2005)). See Ill. S. Ct. R. 341(h)(9) (eff. July 1, 2008).

¶ 4 Our supreme court rules are not mere suggestions; they are mandatory, and this court possesses the discretion to impose sanctions for violations. *Pickus Construction & Equipment v. American Overhead Door*, 326 Ill. App. 3d 518, 520 (2001). The fact that the claimant is representing herself in this appeal does not excuse her failure to follow the rules governing appellate procedure. *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 825 (2010). A party's failure to comply with Rules 341 and 342 justifies dismissal of an appeal. *Fender v. Town of Cicero*,

347 Ill. App. 3d 46, 51 (2004). Such a severe sanction, however, is reserved for those situations in which the alleged violations of appellate procedural rules interfere with or preclude our review. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005). Since we are able to provide meaningful review of merits of the issues raised in this case, the appeal will not be dismissed. However, we will disregard any improper or unsupported statements contained in the claimant's statement of facts. See *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 21.

¶ 5 BACKGROUND

¶ 6 Grievance Proceedings

¶ 7 The claimant was employed by NLU from November 12, 2007, until December 6, 2010. She was one of three administrative assistants III in the provost's office, working under the supervision of Lois Bishop, the executive director and Ana Maria Soto, the director, of articulation and compliance, part of the Latino initiatives. The claimant was rated highly effective on her performance reviews for both 2008 and 2009. Her 2009 review noted that the claimant's job responsibilities had grown beyond the capacity of one person to handle while still maintaining the quality of the services.

¶ 8 On May 10, 2010, the claimant filed a grievance with NLU's Human Resources Department (HR Department) alleging that (1) the responsibilities of the position she was hired for did not match her actual responsibilities in that position; (2) she was discriminated against in her attempts to correct the description discrepancies; and (3) she was treated with a lack of professionalism by members of the provost's office, specifically, Lois Bishop, Ana Maria Soto,

Kathy Walsh, the acting provost, and George Litman, the former provost.

¶ 9 Erin Haulotte of the HR Department conducted an investigation of the claimant's grievance. On July 28, 2010, Ms. Haulotte sent an e-mail to the claimant advising that as a result of her investigation, she determined that the individuals named in the grievance had not violated any of the NLU policies implicated in the grievance and that no disciplinary action would be taken. Nonetheless, Ms. Haulotte opined that the problem arose because of a lack of communication and that Ms. Walsh and Mr. Litman should have intervened when it became clear that the staff and the situation were not being managed properly.

¶ 10 On September 21, 2010, the claimant appealed Ms. Haulott's decision that her grievance had no basis to Thomas Bergmann, vice-president of the HR Department. On December 3, 2010, McCeil Johnson,[1] NLU's legal counsel, wrote to the claimant advising her that no basis was found for overturning Ms. Haulotte's decision. On December 6, 2010, the claimant was given a written notice of termination. The notice stated in pertinent part as follows:

> "Specific incident(s) prompting termination and/or work standard violated: National-Louis University is committed to maintaining a fair and respectful environment for work and study. Reports of possible violations are taken seriously and acted upon in an appropriate and timely manner. The expectation is that during an investigation all relevant individuals would lend their full cooperation. That being said, Maribel has failed to properly and timely cooperate with an ongoing investigation. Her uncooperative,

[1]A "Roxelle Johnson" testified at the hearing before the referee. It appears from the record that "Roxelle Johnson" and "McCeil Johnson" are one in the same person.

> misleading and sometimes hostile/combative behavior during the investigative process has created a contentious work environment making it impossible to continue. Maribel's unprofessional behavior has intentionally hindered the efforts of those who have invested efforts and time into conducting a thorough investigation."

With respect to the effect of the claimant's behavior on NLU's practices and business, the notice stated further that "Maribel's unprofessional behavior has caused those involved with the investigation to unnecessarily take additional steps and expend additional time and effort, thereby adversely affecting the University. Additionally, her unprofessional behavior has created an untenable employment relationship."

¶ 11 Unemployment Benefits Claim Proceedings

¶ 12 The claimant filed a claim for unemployment benefits. In response to the claim, NLU sent a notice of possible ineligibility to IDES on December 13, 2010. On December 16, 2010, IDES claims adjudicator Scott Kochindorfer issued a determination that the claimant was eligible for unemployment benefits. The adjudicator noted that while both NLU and the claimant agreed that she had filed the grievance under investigation, NLU claimed that the claimant refused to cooperate in the investigation and that her attitude was unprofessional and led to her discharge. The claimant acknowledged that she might have appeared uncooperative but only because the investigation was being done by the individuals she filed a grievance against. Based on the evidence, the adjudicator found that the claimant was discharged because NLU was dissatisfied with her attitude, and her actions resulting in her discharge did not harm NLU or its other employees. The determination notice provided further in pertinent part as follows:

"If you disagree with this determination, you may request a reconsideration/appeal in person, by mail, or by fax. Your request must be filed ***within thirty (30) days after the date this notice was given or mailed to you. *** A letter will suffice if you do not have a form. ***

If your request results in an appeal, a hearing will be held before a referee who will give you an opportunity to present evidence."

¶ 13 On January 14, 2011, NLU's representative faxed a letter to the appeals section of the IDES, stating that NLU wished to appeal the adjudicator's December 16, 2010, determination. The letter then stated: "Please issue a benefit appeals hearing with notice sent to [NLU's representative]."

¶ 14 In response to NLU's request, on January 25, 2011, adjudicator Charlene Derewjanko issued a "Reconsidered Determination." The claimant was determined to be ineligible for unemployment benefits because the conduct for which she was discharged from NLU was "within the claimant's control to avoid," and therefore, "the claimant was discharged for misconduct connected with the work." The claimant sent a "Request for Reconsideration of Claims Adjudicator's Determination and, if applicable, Appeal to the Referee." On February 25, 2011, the adjudicator Derewjanko issued a "Notice of Reconsideration and Appeal" finding that the claimant was ineligible for unemployment benefits based on misconduct connected with the work. The notice further provided that an appeal to the IDES referee was filed on February 24, 2011.

¶ 15 Hearing Before the IDES Referee

¶ 16 A telephonic hearing on the denial of the claimant's claim for unemployment benefits was held on March 10, 2011, before Referee Celeste O. Haley. The following is a summary of the pertinent testimony at the hearing.

¶ 17 Questioned by NLU's representative, Ms. Haulotte testified that the claimant was discharged on December 6, 2010, for her uncooperative attitude and insubordination during an appeal proceeding, in violation of NLU's code of conduct policy. The claimant had acknowledged receiving a copy of the employee handbook on December 7, 2007, which contained both the code of conduct policy and NLU's discipline policy. Ms. Haulotte stated that the claimant received warnings regarding her behavior, but she did not personally give any of the warnings to the claimant. She described the harm that the claimant's actions caused as "reputational" harm because the claimant had direct interaction with the students, and a student witnessed the claimant's behavior. In addition, NLU was harmed by the time spent in conducting the investigation of the claimant's appeal.

¶ 18 Ms. Haulotte described the claimant as "uncooperative and unwilling to meet and/or provide documents which she herself thought were relevant to the investigation." The claimant's unresponsiveness and lack of cooperation with Ms. Johnson and Mr. Bergmann reached the point where the situation became so contentious that "we were unable to work with her." Ms. Haulotte stated that none of the individuals named in the claimant's grievance participated in the investigation process.

¶ 19 On cross-examination by the claimant, Ms. Haulotte denied that the claimant was

discharged as a reprisal for pursuing her grievance. She maintained that the discharge was for general insubordination and refusal to cooperate during the investigation process.

¶ 20 Questioned by NLU's representative, Ms. Johnson testified that she became involved with the claimant's grievance during her appeal from Ms. Haulotte's finding that there was no basis for the grievance. In a September 27, 2010, e-mail, the claimant expressed concern for her personal safety. Ms. Johnson and Mr. Bergmann attempted to set up a meeting with the claimant, but she failed to respond to their request. On September 28, 2010, they went to the claimant's office and requested that she meet with them in Mr. Bergmann's office to discuss a relocation plan for her. Following a discussion of the relocation plan, the claimant presented a series of questions that neither Ms. Johnson nor Mr. Bergmann were prepared to answer. The atmosphere of the meeting became very hostile. As a result, the meeting to discuss the investigation was rescheduled.

¶ 21 Ms. Johnson testified further that on October 4, 2010, she asked the claimant to meet with her prior to reporting to her new location. At their meeting, the claimant indicated that she was comfortable with her new location and with her new supervisor. Ms. Johnson informed the claimant that the investigation process would commence when Mr. Bergmann returned on October 5, 2013. Later that day, the claimant sent an e-mail to Ms. Johnson requesting that the meeting be rescheduled to October 6, 2013. At the meeting on October 6, 2013, the claimant wanted to know why she could not be transferred to another position. Mr. Bergmann explained that there was a transfer process. The meeting became very heated. Mr. Bergmann and Ms. Johnson suggested that the investigation would proceed better if the claimant gave them specific questions to address. Between October 14, 2013, and November 30, 2013, numerous requests

for the list of questions as well as requests for meetings were sent to the claimant, who failed to respond to and/or follow through on the requests.

¶ 22 On November 30, 2013, Ms. Johnson and Mr. Bergmann attempted to meet with the claimant. After locating her with the assistance of a student worker, Ms. Johnson and Mr. Bergmann attempted to talk with the claimant. The claimant told them she had sent an e-mail to NLU's president and asked if they had spoken with her. After confirming that the president had not received the e-mail from the claimant, Ms. Johnson e-mailed the claimant informing her that the president had not received the e-mail. According to Ms. Johnson, the claimant "made very disparaging remarks against the President indicating that she was outraged that the President had not responded to her e-mail." Ms. Johnson asked the claimant to resend the e-mail to the president and to copy Ms. Johnson since the claimant did not want to have any further communication with Mr. Bergmann. The claimant agreed to resend her e-mail to the president, but failed to do so.

¶ 23 On December 2, 2010, Ms. Johnson attempted to meet with the claimant to set up a final investigation interview but was unable to contact her. She concluded the investigation on December 3, 2010. Due to the claimant's continuing refusal to meet with them and the contentious nature of the interview process, Mr. Bergmann and she could not resolve the plaintiff's concerns.

¶ 24 When asked how the claimant contributed to the hostile atmosphere of the meetings, Ms. Johnson testified that "in just general communication she became hysterical, would start crying, and just overreacting to sort of a basic discussion scenario. And so it was just an untenable

situation."

¶ 25 On cross-examination by the claimant, Ms. Johnson acknowledged that at the October 6, 2010, meeting, Mr. Bergmann, as well as the claimant, displayed frustration. Ms. Johnson testified that the claimant had agreed to submit her list of questions by October 14, 2010. Ms. Johnson acknowledged that her December 3, 2010, letter to the claimant was not a corrective action, but it did contain information concerning the claimant's hostile and uncooperative behavior.

¶ 26 The claimant testified that on December 6, 2010, she was informed of her discharge from NLU by Mr. Litman and Ms. Haulotte. The reason they gave was that she had "created an untenable employment relationship." Neither of them explained what that meant nor did they inform her what policy she had violated.

¶ 27 The claimant testified that she disputed the findings of Ms. Haulotte's investigation of her grievance. On September 21, 2010, she had an altercation with one of her supervisors who told her find another job. She then e-mailed Mr. Bergmann and requested that the situation be investigated and that she be removed from that location. The claimant had a brief meeting with Ms. Johnson and Mr. Bergmann on September 27, 2010. The claimant maintained that the next meeting was on October 4, 2010, at which time Ms. Johnson and Mr. Bergmann advised her that they were looking into the situation. While the claimant could not be transferred, they would try to relocate her.

¶ 28 The claimant testified that at the October 6, 2010, meeting, Mr. Bergmann was "beginning to act inappropriate[ly]" and maintained that it was she who took the initiative to stop

the meeting. They all agreed that the claimant should rewrite all the issues she had so they could be investigated. The claimant acknowledged that she became emotional while explaining to Ms. Johnson and Mr. Bergmann how difficult it was to compile all that information. She further acknowledged that she had agreed to provide the information to them within two weeks.

¶ 29 The claimant admitted that she did not send the material to Ms. Johnson and Mr. Bergmann as she had agreed. Rather, on October 25, 2010, she sent the material to NLU's president. She did not provide it to Ms. Johnson and Mr. Bergmann because she was pursuing a complaint against them and wanted unbiased investigators appointed. The claimant did not respond to any further communication from Ms. Johnson or Mr. Bergmann due to her experiences with them at the meetings.

¶ 30 The claimant recalled that her discussion with Ms. Johnson and Mr. Bergmann in a hallway at NLU took place on November 29, 2010, rather than November 30, 2010. The claimant explained to them that they had not heard from her because she had contacted NLU's president. After they requested that she resend the e-mail to the president, the claimant explained that it was not an e-mail; it was a five-pound package of material. The claimant anticipated compiling another package and getting it to the president by the end of that week, but did not do so before her discharge on December 6, 2010.

¶ 31 Questioned by NLU's representative, the claimant acknowledged that she had met with Ms. Johnson and Mr. Bergmann on September 28, 2010. She denied becoming difficult, emotional or hostile at that meeting. The claimant reiterated that she did not return the material by October 14, 2010, because she was in the process of filing a complaint against Mr. Bergmann

and Ms. Johnson. She acknowledged that she replied to an October 21, 2010, e-mail from Mr. Bergmann that she would be in contact but did not follow through.

¶ 32 Questioned by the referee, Ysenia Barrera testified that late in November 2010, two people came into the student center looking for the claimant. She did not witness their conversation with the claimant. Questioned by the claimant, Ms. Barrera testified that she was three feet away from where the group was standing. Ms. Barrera did not hear any loud conversation or hear the claimant raise her voice.

¶ 33 Referee's Decision

¶ 34 On March 15, 2010, the referee issued her decision affirming the denial of unemployment benefits to the claimant. The referee found that the claimant's actions in failing to provide the materials requested by Ms. Johnson and Mr. Bergmann in conducting their investigation of the claimant's appeal and failing to resend the material to NLU's president constituted misconduct as set forth in section 602(A) of the Act (820 ILCS 405/602(A) (West 2010)).

¶ 35 The claimant appealed the referee's decision to the Board. On August 22, 2011, the Board issued its decision. The Board held that the referee's decision was supported by the record and the law and affirmed the decision. On September 21, 2011, the claimant filed a *pro se* complaint for administrative review. On January 18, 2012, following a hearing, the circuit court affirmed the Board's decision. The claimant appeals.

¶ 36 ANALYSIS

¶ 37 I. Procedural Violations

¶ 38 The claimant contends that IDES violated the adjudication and appeal provisions of the

Code and the Act.

¶ 39 The Act sets forth the administrative procedures that must be followed by both claimants and employers. *Automated Professional Tax Services, Inc. v. Department of Employment Security*, 244 Ill. App. 3d 485, 487 (1993). When a claim for unemployment benefits is filed, a claims adjudicator makes a finding as to eligibility and notifies the claimant and the employer. 820 ILCS 405/701 (West 2010). If the employer objects to the finding, it can file allegations that the claimant is ineligible. *Automated Professional Tax Services, Inc.*, 244 Ill. App. 3d at 487. A timely protest affords the employer party status and the right to appeal the adjudicator's determination relating to the protest. 56 Ill. Adm. Code 2720.130 (2013). After considering the objections, the adjudicator makes a determination of eligibility. *Automated Professional Tax Services, Inc.*, 244 Ill. App. 3d at 487-88; 820 ILCS 405/702 (West 2010). While the determination may be reconsidered, "[u]nless a case has been remanded to the claims adjudicator by a referee, the Director or the Board of Review, no case can be reconsidered at any time after an appeal has been taken." *Automated Professional Tax Services, Inc.*, 244 Ill. App. 3d at 488; 820 ILCS 405/703 (West 2010).

¶ 40 The claimant maintains that adjudicator Derewjanko did not follow the proper procedures when she reconsidered the December 16, 2010, determination of eligibility for unemployment benefits and determined that the claimant was not eligible for benefits. The claimant argues that adjudicator Derewjanko: (1) violated section 2720.200(a) of the Code by accepting NLU's faxed appeal; (2) violated section 2720.200(b) of the Code by accepting an untimely appeal from NLU; (3) failed to conduct a proper investigation when she reconsidered the December 16, 2010,

determination.

¶ 41 Section 200 of the Code provides that a party may appeal an adjudicator's determination or finding. The appeal must be filed within 30 days after the adjudicator's determination or finding was mailed or hand-delivered to the parties. The appeal should be filed in person at or by mail to the local office where the claim was filed. 56 Ill. Adm. Code 2720.200 (2013).

¶ 42 IDES correctly points out that section 200 applies to appeals to the referee and not to requests for reconsideration of a determination. Moreover, the arbitrator's December 16, 2010, determination provided in pertinent part that, "[i]f you disagree with this determination, you may request a reconsideration/appeal in person, by mail, or by fax." The determination further provided that the request for reconsideration/appeal be filed "within 30 days after this notice was given or mailed to you." In this case, NLU's request was due on January 15, 2011. The claimant points out that the request is stamped January 21, 2011. However, the date the document was faxed appears at the bottom of the request and the date shown is January 14, 2011. Therefore, contrary to the claimant's arguments, NLU's January 14, 2011, faxed request for reconsideration/appeal was proper and timely under the Code.

¶ 43 The claimant contends that in reconsidering the December 16, 2010, determination of eligibility, adjudicator Derewjanko violated section 2720-135(a) and (b) of the Code when she failed to notify the claimant of NLU's appeal and failed to interview her to rebut NLU's evidence;

¶ 44 The claimant's reliance on section 2720.135 is misplaced. That section applies to the investigation of NLU's protest, which resulted in the December 16, 2010, determination. It does not apply to a reconsideration of that determination. See 56 Ill. Adm. Code § 135 (2013).

¶ 45 The claimant argues that adjudicator Derewjanko violated section 2720.160(a) of the Code when she reversed the grant of benefits to the claimant without obtaining additional evidence from NLU. Section 160(a) of the Code provides that an adjudicator "shall reconsider an original Finding or Determination at the written request of a party or upon the receipt of new information relating to the original issues ***." 56 Ill. Adm. Code §2720.160(a) (2013). In this case, NLU's January 14, 2011, letter stating that the claimant had been discharged for misconduct and asking that the documents previously submitted be reviewed, fulfilled the requirement of a written request for reconsideration and therefore, NLU was not required to provide new information for a reconsideration of the December 16, 2010, determination.

¶ 46 Next, the claimant argues that adjudicator Derewjanko violated section 2720.250 of the Code when she did not adequately consider the rules of evidence. However, section 2720.250 applies to hearings before the referee, not to determinations or the reconsideration of a determination by an adjudicator. See 56 Ill. Adm. Code §2720.250.

¶ 47 Next, the claimant argues that adjudicator Derewjanko improperly reconsidered the December 16, 2010, determination of eligibility for benefits. She maintains that NLU appealed the December 16, 2010, determination rather than requested a reconsideration.

¶ 48 The Act provides that once an appeal is taken, the adjudicator's determination can not be reconsidered. 820 ILCS 405/703 (West 2010). The December 16, 2010, determination provided that if a party disagreed with the determination, it could request a reconsideration/appeal. It further provided that "[i]f your request results in an appeal" a hearing would be held before the referee. In this case, IDES treated NLU's letter as a request for reconsideration under section

2720.160, rather than an appeal under section 2720.200. The claimant failed to object to the reconsideration of the December 16, 2010, determination on the grounds that reconsideration was barred because NLU had appealed under section 2720.200. We conclude that IDES's treatment of NLU's request as one for reconsideration rather than a section 2720.200 appeal, which would have barred further reconsideration, was proper in this case.

¶ 49 Finally, in support of her argument that adjudicator Derewjanko did not follow the proper procedure in reconsidering the December 16, 2010, determination of eligibility, the claimant relies on an April 1, 2011, letter from Sylvana Rendon, of the local IDES office. The letter, which is not on IDES's letterhead and which is dated after the issuance of the referee's decision, was included by the claimant as part of an additional submission to the Board. The Board declined to consider the additional submission, in part, because there was no explanation as to why the evidence could not have been submitted to the referee. Therefore, we also decline to consider the letter.

¶ 50 The claimant then contends that numerous procedural errors by the referee deprived her of a fair hearing. She argues that the referee violated section 2720.245 in that she: failed to address the issues for review specified on the notice of telephone hearing; failed to control the hearing; failed to examine the witnesses first and allowed NLU's representative to initiate and conduct all the questioning of the witnesses; allowed NLU's representative to disrupt the proceedings; and failed to consider or refer to the evidence the claimant submitted to her prior to the hearing. See 56 Ill. Adm. Code 2720.245(a),(b), (c) (2013). We disagree.

¶ 51 The notice of telephone hearing specified the issues for the hearing before the referee as:

(1) whether the appeal from the adjudicator's determination was filed within the 30-day time limit; (2) whether NLU filed a timely notice of possible ineligibility; and (3) why the claimant was discharged for misconduct in the work place. Prior to commencing the hearing, the referee addressed the first and second issues, finding that NLU had timely protested the claim for benefits and that claimant's appeal from the adjudicator's January 25, 2011, determination was also timely. The hearing addressed the third issue, the claimant's alleged misconduct leading to her discharge from NLU.

¶ 52 The record of the hearing established that the referee maintained control of the hearing at all times. The referee began the proceedings by having the participants identify themselves. She then set forth the order in which the witnesses would be questioned and stated that she would be questioning the witnesses after the parties. The claimant was given an opportunity to object to the procedure but failed to do so. The making of objections and the referee's response to them was not the kind of disruptive behavior that denied the plaintiff a fair hearing under the Code. The claimant was also advised that she could add any information relevant to the issues. At the end of the hearing, the referee asked if the claimant had any questions of the referee; the claimant responded that she did not.

¶ 53 We conclude that the claimant's allegations of procedural error are without merit.

¶ 54 II. Misconduct

¶ 55 Section 602(A) of the Act provides in pertinent part as follows:

> "An individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work *** For purposes of this subsection,

> the term 'misconduct' means the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." 820 ILCS 405/602(A) (West 2010).

¶ 56 The claimant was discharged by NLU for insubordination and an uncooperative attitude in connection with the investigation of her appeal. Based on the law and the evidence, the Board found that the claimant was discharged for misconduct and ineligible for unemployment benefits.

A. *Standard of Review*

¶ 57 In administrative cases, we review the decision of the Board, rather than the circuit court or the referee. *Phistry v. Department of Employment Security*, 405 Ill. App. 3d 604, 607 (2010). The standard of review applicable to an agency's decision depends on whether the question presented is one of law or fact. *Czajka v. Department of Employment Security*, 387 Ill. App. 3d 168, 172 (2088). A claimant's discharge from employment for misconduct presents a mixed question of law and fact and is subject to the clearly erroneous standard of review. *Abbott Industries, Inc. v. Department of Employment Security*, 2011 IL App (2d) 100610, ¶ 16. A judgment is clearly erroneous only where the reviewing court, on the entire record, is firmly convinced that the agency's decision was a mistake. *Abbott Industries, Inc.*, 2011 IL App (2d) 100610, ¶ 15.

¶ 58 B. *Discussion*

¶ 59 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 other explicit instructions from the employer." *Phistry*, 405 Ill. App. 3d at 607. These three elements must be proven to establish misconduct under the Act. *Manning v. Department of Employment Security*, 365 Ill. App. 3d 553, 557 (2006). "Willful conduct is a conscious act made in violation of company rules, when the employee knows it is against the rules." *Czajka*, 387 Ill. App. 3d at 176. "Standards of behavior that an employer has a right to expect constitute a reasonable rule or policy." *Manning*, 365 Ill. App. 3d at 557. We may find the existence of a reasonable rule or policy " 'by a commonsense realization that certain conduct intentionally and substantially disregards an employer's interest.' " *Manning*, 365 Ill. App. 3d at 557 (quoting *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998).

¶ 60 An employee's failure to abide by an employer's reasonable rules may justify termination. *Abbott Industries, Inc.*, 2011 IL App (2d) 100610, ¶ 25. "The Act requires a different legal standard to be applied to the separate question of whether a terminated employee is eligible to receive unemployment benefits." *Abbott Industries, Inc.*, 2011 IL App (2d) 100610, ¶ 25. "[T]o disqualify an employee from receiving unemployment compensation, an employer must satisfy a higher burden than merely proving that an employee should have been discharged." *Czajka*, 387 Ill. App. 3d at 176. The focus is on whether the claimant deliberately and willfully violated the employer's reasonable rule or policy. *Czajka*, 387 Ill. App. 3d at 174.

¶ 61 In light of the claimant's admissions that she did not comply with Ms. Johnson's and Mr. Bergmann's requests for documents and meetings and her acknowledgment that she may have

appeared uncooperative, there was an evidentiary basis for the Board to find that the claimant was insubordinate and uncooperative in the investigation of her appeal, thus violating NLU's code of conduct. Moreover, NLU had every right to expect that, as its employee, the claimant would comply with the requests of other employees working on behalf of NLU and to cooperate with an investigation that she herself had requested. We find these rules clearly reasonable. Nonetheless, we are firmly convinced from the evidence that the claimant's violations were not willful and deliberate.

¶ 62 Prior to her dealings with Ms. Johnson and Mr. Bergmann, the claimant had stellar performance reviews and was recognized for her ability for maintaining quality even when her responsibilities exceed the capabilities of one person. While her initial grievance was determined to be unfounded, the report also stated that the problems the claimant experienced were the result of a lack of communication and the failure of her supervisors to intervene in the problem sooner.

¶ 63 The claimant followed NLU's appeal protocol and initially cooperated with Ms. Johnson's and Mr. Bergmann's efforts to investigate her appeal. However, the meeting on October 6, 2010 took an emotional turn on the part of both Mr. Bergmann and the claimant, necessitating a rescheduling of the meeting. The relationship between the claimant and the investigators then deteriorated. It was at that point that the claimant refused to cooperate further in the investigation.

¶ 64 There is no evidence that during the pendency of the investigation of her appeal, the claimant made a conscious decision to violate NLU's rules against insubordination and its requirement of cooperation. Her refusal to provided documentation and lack of cooperation

stemmed from her intent to file a grievance against Ms. Johnson and Mr. Bergmann in connection with their investigation of her appeal, and to pursue her appeal with unbiased investigators.

¶ 65 This is not the type of deliberate and willful act contemplated by section 604(A) of the Act. Compare *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835 (hospital secretary's violation of the hospital's rule was deliberate and willful where she accessed a patient's records for a non-work related reason knowing that it violated the hospital's rules); *Phistry*, 405 Ill. App. 3d at 608 (claimant's conduct was willful in that she used her position as office manager to make personal purchases on a business credit card without her employer's permission); *Hurst v. Department of Employment Security*, 393 Ill. App. 3d 323, 329 (2009) (the claimant's disregard of a work rule was willful where the evidence established that he was aware that he was required to report his arrest for driving while intoxicated to his employer but failed to do so).

¶ 66 We conclude that there is no evidentiary support for the Board's finding that the claimant deliberately and willfully violated NLU's code of conduct. We further conclude that there is no evidence that claimant's conduct caused actual harm or could be the cause of future harm to NLU. See *Hurst*, 393 Ill. App. 3d at 329 (harm to the employer may be potential as well as actual).

¶ 67 NLU argues that by pursuing an investigation into the denial of her appeal and then refusing to cooperate with the investigation and failing to comply with the investigators' requests for meetings and documentation, the claimant wasted the time and resources of NLU and its

employees, Ms. Johnson and Mr. Bergmann. In addition, the claimant overreacted emotionally in what was a basic discussion meeting scenario, which made it impossible to work with her. NLU asserts that the claimant's behavior harmed NLU's reputation. It points out that the claimant's position brought her in contact with NLU students, one of whom witnessed her behavior.

¶ 68 According to the testimony of Ms. Johnson, the claimant's emotional overreaction during communications and discussions, contributed to the hostile atmosphere of their meetings. However, Ms. Johnson acknowledged that, at the October 6, 2010, meeting, Mr. Bergmann as well as the claimant displayed frustration at the meeting causing it be rescheduled. There is no dispute that the claimant did not supply the requested documentation to Ms. Johnson and Mr. Bergmann, which NLU claimed wasted their time. After the claimant's lack of cooperation became obvious towards the end of October 2010, the investigation was stalled, and the two-month investigation was closed at the end of November 2010. It does not appear from the evidence that Ms. Johnson and Mr. Bergmann were prevented from carrying out other duties because of their involvement in the investigation of the claimant's appeal or that the e-mails or other attempts to contact the claimant took time away from their other duties. While "wasting" the employer's or fellow employees' time can cause harm in certain situations, we are not convinced that actual harm was established in this case.

¶ 69 As to the assertion that the claimant's conduct harmed NLU's reputation, there was no evidence that NLU students witnessed any scenes involving emotional overreaction by the claimant or any acts of insubordination or refusals by her to cooperate with NLU or its

employees. Ms. Berrera, a student at NLU, did observe the claimant and two other individuals, presumably Ms. Johnson and Mr. Bergmann, conversing and did not witness any emotional overreaction on the part of the claimant.

¶ 70 We do not find any evidence that the claimant's conduct had the potential to cause future harm to NLU. In *Hurst*, the employee's failure to report his arrest for driving while intoxicated potentially exposed employer to liability if the employee caused an accident while driving for the employer without a valid license. *Hurst*, 393 Ill. App. 3d at 329. In this case, there was no evidence that the claimant's conduct threatened NLU with potential tort liability or financial losses. The claimant's conduct did not involve potential safety hazards. The claimant's refusal to cooperate with Ms. Johnson and Mr. Bergmann was not accompanied by abusive or bad language, and her failure to comply with a request for documentation did not constitute defiance of a direct order by a supervisor. See *Hurst*, 393 Ill. App. 3d at 329 (collected cases).

¶ 71 CONCLUSION

¶ 72 While NLU's rules against insubordination and failure to cooperate with an investigation were reasonable, the claimant's conduct did not constitute misconduct under the Act. The evidence failed to establish that claimant deliberately and willfully violated those rules, and her conduct did not result in actual or potential harm to NLU or its employees. The Board's decision that the claimant was discharged for misconduct as defined by the Act was clearly erroneous.

¶ 73 For the foregoing reasons, the judgment of the circuit court affirming the order of the Board is reversed, and the Board's administrative decision is set aside. This cause is remanded to the circuit court with directions that it be further remanded to the Board for additional

proceedings and to determine the amount of unemployment benefits to which the claimant is entitled consistent with this order.

¶ 74 Circuit court reversed; Board's decision set aside; and cause remanded to circuit court with directions.