

REGINA POTTER,

C.A. No: 12A-06-006 (RBY)

_____Appellant,

v.

STATE OF DELAWARE

DEPARTMENT OF CORRECTIONS,

Appellee.

Decided: April 8, 2013

ORDER

Young, J.

SUMMARY

Appellant Regina Potter (“Potter” or “Appellant”) was hired by the Delaware Department of Corrections (“DOC” or “Appellee”) in May 2007. She worked as a correctional officer at Plummer Community Corrections Center located in Wilmington, Delaware. On August 20, 2009, the Warden in charge of the facility, Steven Wesley (“Warden”) was informed that Potter had associations with two inmates through Facebook. After confirming that allegation, the Warden sent an e-mail to his staff, initiating a 210 investigation. Before the investigation actually began, Potter submitted her resignation, effective immediately. On September 8, 2009, she filed a claim for unemployment benefits with the Delaware Department of Labor. Her claim was rejected by the Claims Deputy, based on a finding that she had voluntarily quit her job prior to exhausting administrative remedies. That decision was affirmed by the Appeals Referee, who stated that Potter had left work without good cause. Potter appealed her case to the Unemployment Insurance Appeal Board (the “Board”). The Board heard the case in May 2010. On June 18, 2010 the Board issued a decision finding Potter eligible for benefits as she had been constructively discharged without just cause. The DOC appealed the decision to the Superior Court, which issued a decision on the matter in November 2011. The Court ruled that, as a matter of law, the appellant was not constructively discharged. The case was remanded to the Board for a determination of whether Potter had good cause for her voluntary resignation, pursuant to 19 *Del. C.* §3314. The Board subsequently issued a decision, without hearing, finding that Potter had failed to meet her burden of proof that she left her employment for good cause. Potter is appealing the Board’s decision

to this Court. The basis of her appeal is threefold. She alleges that the Board violated her right to due process by deciding not to hold a hearing. Potter also claims that the presence of someone from the Attorney General's Office at that meeting was improper. Finally, Potter argues that the Board's second opinion ignored its factual findings of May 2010, thus claiming that this Court cannot find substantial evidence.

In fact, The case was remanded to the Board to make a determination on a limited issue. The Board already had provided Potter several opportunities to be heard and to present evidence. As a result, there was a fully developed record upon which the Board could reach a decision without holding an additional hearing. The Board's decision is based not only upon substantial evidence, but also upon the guidance provided by this Court's previous opinion in the matter. Additionally, the presence of a person employed by the Attorney General did not improperly impact the Board's conclusion. Finally, substantial evidence existed for the Board's decision. For those reasons, the decision of the Unemployment Insurance Appeal Board is **AFFIRMED**.

FACTS

Regina Potter was hired by the Delaware Department of Corrections on May 31, 2007. Potter worked as a correctional officer at Plummer Community Corrections Center in Wilmington, Delaware. That facility was headed by Warden Steven Wesley. On Thursday, August 20, 2009, Correctional Lieutenant Knight informed the Warden that Potter maintained a relationship with two offenders by way of the social networking website "Facebook." The two offenders in question were on her "Friends" list. The Warden investigated Potter's Facebook page, finding that the Correctional Lieutenant's allegations were accurate. Hence, Potter did have that association with

two men who had been under the supervision of DOC, including one who was under Potter's direct supervision. The next day, Friday, August 21, 2009, the Warden sent an e-mail to staff concerning Potter's Facebook page. He also ordered a "210 investigation" into the issue to check for breaches of DOC policy. On Monday, August 24, 2009, before the investigation began, Potter resigned. Prior to resigning, Potter had consulted with the President of the Correctional Officers Associations of Delaware, Stephen Martelli ("Martelli"). During their meeting, Martelli advised Potter that she had two options: resign or be terminated. His advice was based upon consultation with the Union's lawyer and his own knowledge and experience with previous similar cases. It was apparently the Union's position not to get involved in such cases a matter of protocol. Following that meeting, Potter sent an e-mail to the Warden, stating that she was resigning. Despite that, on September 8, 2009 she filed a claim for unemployment benefits with the Delaware Department of Labor, alleging that she had been forced to resign.

The Claims Deputy rejected Potter's claim for benefits on September 29, 2009, finding that "claimant quit her job without exhausting all administrative remedies." Potter appealed the Claims Deputy's decision to the Appeals Referee. The Appeals Referee affirmed the decision of the Claims Deputy, stating that "[t]he claimant left her work without good cause attributed to her work." Potter appealed that decision to the Unemployment Insurance Appeal Board. The Board's hearing was originally scheduled to occur on April 13, 2010. However, it was continued as a result of the absence of Martelli. The hearing was rescheduled for May 4, 2010. At that time, the Board heard testimony from Potter, Martelli and Janet Durkee. Though subpoenaed,

the Warden did not appear for the hearing due to the recent passing of his wife.

On June 18, 2010, the Board issued its decision, finding that Potter had been constructively discharged, without just cause. The DOC timely appealed the decision to this Court. The Superior Court issued its decision in the matter on November 29, 2011. The Court ruled that, as a matter of law, the appellant was not constructively discharged, and, therefore, had resigned from employment voluntarily. The Court remanded the case to the Board for a determination of whether Potter, the Claimant, had good cause for her voluntary resignation, pursuant to 19 *Del. C.* §3314.¹

The Board issued a decision on May 30, 2012, finding that the Claimant, Potter, had resigned from her employment voluntarily, and had failed to meet her burden of proving that she left her employment for good cause. She was, the Board found, disqualified from receipt of unemployment insurance benefits. Before the Court is Potter's appeal of that decision.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence, and is free from legal error.² Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."³ It is "more than a scintilla, but less than

¹ *Dept. of Correction v. Potter*, 2011 WL5966720, at *3 (Del. Super. Nov. 29, 2011).

² 29 *Del C.* §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

³ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

preponderance of the evidence.”⁴ An abuse of discretion will be found if the board “acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.”⁵ Questions of law will be reviewed *de novo*.⁶ In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the board.⁷

DISCUSSION

Appellant contends that the Board erred in determining that she was disqualified from receipt of benefits. It is her position that the Board abused its discretion, denying her due process rights by reaching a decision after remand without providing notice or an additional opportunity to be heard on the issue. Potter also claims that her rights were further violated as a the Deputy Attorney General who was counsel to the Board was present at the hearing. According to the Appellant, this is an issue because a Deputy Attorney General, though not the same one, was representing her employer in the matter.

Due process requires that the parties be provided the “opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every

⁴ *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

⁵ *Delaware Transit Corp. v. Roane*, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)).

⁶ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

⁷ *Carrion v. City of Wilmington*, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006).

material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends.”⁸ It also requires that the parties be given notice of the of the time, place, and date of the hearing and the subject matter of the proceedings.”⁹ All of that was, as required, provided to Appellant in the May 4, 2010 hearing. As a result of the Court’s November, 2011, opinion, the case was remanded to the Board for a decision on the narrow issue of whether Potter had good cause for her voluntary resignation, pursuant to 19 *Del. C.* §3314. By the time the Board made its May 30, 2012 decision, Potter had already been provided several hearings. The Board determined that the existing record, made up of largely uncontroverted factual evidence, provided all the information it needed to reach the decision requested by this Court. For that reason, the Board chose not to hold an additional hearing. Appellant was well aware of the subject matter of that proceeding based on the Court’s Opinion. Potter has provided no evidence showing that her condition of employment changed from the Friday when the investigation was proposed to the Monday when she resigned. The witness testimony supports this finding, as well as the finding that Martelli and the Warden did not speak to each other regarding Potter’s employment status before her resignation occurred. Potter has also not provided any evidence in support of her contention that she had good cause for voluntarily quitting.

The Appellee provides an answer to Appellant’s concerns about who was

⁸ *Vincent v. Eastern Shore Markets*, 970 A.2d 160, 164 (Del. 2009).

⁹ *Id.*

present at the Board's meeting after remand. According to Appellee no one from its side was present at the hearing either. Potter's concerns about a Deputy Attorney General being an issue are without merit. The Deputy Attorney General who was present at the meeting was counsel to the Board. That was an entirely different person from the representative of the Attorney General's Office who represented the DOC. There is absolutely no evidence, nor any reason to believe, that any representative of the DOC communicated with any member of the Board regarding this matter on remand.

Appellant also questions the "discrepancy" between the Board's analysis in 2010 and 2012. As the Appellee aptly states, any such alleged discrepancy in the Board's analysis is based on the Superior Court's November 2011 decision in this matter. To put it more simply, the Court found, as a matter of law, that the Board's June 8, 2010 decision was based on incorrect analysis. As a result of the Court's decision, the Board was required to engage in different analysis (though on the very same evidence) the second time around. For that reason, the opinions issued by the Board were by necessity very different.

It is well-established that "the claimant bears the burden of showing 'good cause' for voluntarily terminating employment."¹⁰ Good cause for quitting a job is defined as "such cause as would justify one in voluntarily leaving the ranks for the employed and joining the ranks of the unemployed."¹¹ In Delaware, the types of

¹⁰ *Longobardi v. Unemployment Ins. Appeal Bd.*, 287 A.2d 690 (Del. Super. 1971).

¹¹ *O'Neal's Bus Service, Inc. v. Employment Security Comm.*, 269 A.2d 247, 249 (Del. Super. 1970).

Potter v. Dept. of Corrections
C.A. No.: 12A-06-006 (RBY)
April 8, 2013

changes to employment generally constituting good cause for voluntary quitting include: a substantial reduction in an employee's wages or hours; or a substantial deviation in working conditions from the original agreement of hire to the employee's detriment.¹² The Board held that Potter did not present any evidence that would demonstrate her situation constituted good cause. After review of the parties' submissions and the record, this Court finds that the Board's decision is supported by substantial evidence and free from legal error.

CONCLUSION

For the foregoing reasons the decision of the Unemployment Insurance Appeal Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBV/lmc
oc: Prothonotary
cc: Counsel
Opinion Distribution
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¹² See *Hopkins Const., Inc. v. Delaware Unemployment Ins. Appeal Bd.*, 1998 WL 960713 (Del. Super. Dec. 17, 1998); *Ingleside Homes, Inc. v. Gladden*, 2003 WL 22048205 (Del. Super. Aug. 27, 2003).