IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHERYL A. FEENEY-WATHEN,	:	
	:	C.A. No. K13A-10-007 WLW
Appellant,	:	
v.	:	
	:	
BAYHEALTH MEDICAL CENTER and UNEMPLOYMENT INSURANCE APPEALS BOARD,	:	
	:	
	:	
Appellee.	:	

Submitted: April 23, 2014
Decided: May 9, 2014

ORDER

Upon an Appeal from a Decision of the
Unemployment Insurance Appeals Board.
Reversed and Remanded.

Brian T.N. Jordan, Esquire of Jordan Law, LLC, Wilmington, Delaware; attorney for Appellant.

James H. McMackin, III, Esquire and Allyson B. Dirocco, Esquire of Morris James LLP, Wilmington, Delaware; attorneys for Bayhealth Medical Center.

James T. Wakley, Esquire of the Department of Justice, Wilmington, Delaware; attorney for the Unemployment Insurance Appeals Board.

WITHAM, R.J.

Before the Court is Appellant Cheryl Feeney-Wathen's (hereinafter "Appellant") appeal from the decision of the Unemployment Insurance Appeal Board (hereinafter "the Board" or "the UIAB") disqualifying Appellant from receiving unemployment benefits. The Court has carefully considered the record and the filings of Appellant and Appellee Bayhealth Medical Center (hereinafter "Employer"). For the reasons set forth below, the decision of the Board is ***reversed.***

FACTUAL AND PROCEDURAL BACKGROUND

Appellant worked for Employer as a full-time hospital security officer at Employer's Milford facility from May 16, 2011 until May 13, 2013. Employer also operates medical facilities in Dover and Smyrna. Appellant commuted to the Milford location from Appellant's home in Millsboro.

In November of 2012, Appellant went on paid medical leave pursuant to the Family Medical Leave Act. Appellant's leave expired on January 3, 2013. By letter dated February 11, 2013 Appellant's supervisor at the time, Robert Rogers (hereinafter "Rogers") advised Appellant that her medical leave had been exhausted. Rogers informed Appellant that because it was not foreseeable that Appellant could return to work within the next 30 days, Employer would pursue candidates to fill Appellant's position at the Milford facility. Rogers advised Appellant that if her position was filled, Appellant would remain on medical leave as an active employee until May 13, 2013, at which time Appellant would be "administratively separated" from Employer. Rogers' letter further stated that if Appellant's healthcare provider released her to work prior to the May 13 separation date, Appellant would be provided a 30-day grace

period to secure alternate employment within Employer. Rogers informed Appellant that if Appellant did not secure a position at the end of this 30-day period, Appellant would be administratively separated, but would be eligible for rehire.

Appellant was released to return to work on April 17, 2013. Appellant's former position at the Milford facility had been filled. Employer offered Appellant a security officer position at the Smyrna campus, where Appellant could work until a position opened at the Milford campus. Appellant turned down the offer because of the distance of Smyrna from her home in Millsboro. Appellant was subsequently administratively separated on May 13, 2013.

Appellant filed a claim for unemployment benefits on May 19, 2013. By determination dated June 20, 2013, a Claims Deputy with the Department of Labor found that Appellant was not disqualified from receiving benefits because Appellant was terminated without just cause in connection with her work under 19 *Del. C.* § 3314(2). Employer appealed the determination.

A hearing was conducted by the Appeals Referee on August 1, 2013 via telephone. Appellant testified at the hearing, as did several witnesses for Employer. By decision dated August 2, 2013 the Appeals Referee affirmed the Claims Deputy's determination, and found that Appellant's employment was terminated for administrative reasons, which did not amount to just cause for termination. In a footnote, the Appeals Referee noted: "the Department [of Labor] regards a work location that is more than 17.5 miles from the claimant's current work location to be of an unreasonable distance. That is, it may constitute good cause to quit or refuse a

job offer."

Employer appealed the Appeals Referee's decision, and a hearing was held before the Board on October 9, 2013. Radford Garrison (hereinafter "Garrison"), security supervisor for all of Employer's campuses, testified that Appellant had contacted Garrison about a position for when she was released back to work, and Garrison had told Appellant about the Smyrna position. The following exchange then occurred:

> MR. GARRISON: . . .she did not accept the position because she said the drive was too far.
> THE CHAIRMAN: And how many miles difference from her original work? I have down here 17.5 miles.
> MR. GARRISON: That would be correct. . . .

A Board member inquired whether Appellant understood at the time she was hired that the position was for all of Employer's locations, not just the Milford location. Garrison responded:

> MR. GARRISON: We only had two properties at the time [Appellant was hired], there was Kent [in Dover] and Milford and I would have to say yes she did [understand].
> BOARD MEMBER: Okay.
> MR. GARRISON: I mean they are primarily based at one, but you can pull them as needed from one campus to the other.

Following this exchange, Gabrielle Reeves (hereinafter "Reeves"), Employer's employee relations manager, testified as follows:

> . . .all the officers as far as practices been are required to work interchangeably, they tend not to, but they know that is a

> requirement. And had she still been on staff and not out, I mean there was only a Milford is 50 minutes from her home, Kent is an hour15 and Smyrna was not that much more. Kent is an hour 20 and Smyrna was an hour 50. So there was a little more but it wasn't excessive.

Later in the proceeding, Reeves told the Board that there had been approximately ten positions that opened with Employer after that Appellant has not applied for since Appellant originally turned down the Smyrna position, that Employer "really liked" Appellant and "we could have had her working again."

Appellant testified, and told the Board that the Smyrna position was only temporary and would not have been a permanent position. Appellant also testified that she had called various employees of Employer asking about positions after Appellant was released from work restriction on April 17. Appellant could not recall exact dates of when she made these calls. Appellant stated that the only position offered to her was the temporary position at Smyrna, and Appellant turned it down because the drive from her home would have been too far. Appellant further testified that "I don't feel that I'm mentally stable enough to go back in there after what they put me through and the way they treated me." Appellant acknowledged that when she was hired she was informed that Employer could assign Appellant to go to another campus "if it's available or needed...[y]ou can go to another hospital and work if they needed you for that day."

Following Appellant's testimony, Reeves and Garrison testified that the Smyrna position was a permanent position, and would have only been temporary in the sense

that Appellant would work in Smyrna until there was an opening at the Milford campus, at which point Appellant could return to the Milford location. Garrison testified that Appellant had told Garrison that Appellant "couldn't drive that far" and Garrison acknowledged that he did not know at the time how long the "temporary" placement at Smyrna would have been.

By decision dated October 9, 2013, the Board reversed the Appeals Referee's decision. The Board found that "it became apparent [during the hearing] that the Claimant was only terminated after she refused an offer of alternative employment." The Board found that there was "uncontradicted evidence" that Appellant was offered her position back at a different facility. The Board found that Appellant was aware that she was informed at the time of her hiring that Employer could required Appellant to work at facilities other than Milford at a temporary basis.

The Board concluded that because Appellant turned down the offer, Appellant had voluntarily quit her employment under 19 *Del. C.* § 3314(1) and was thus disqualified from receiving unemployment benefits. The Board rejected Appellant's claim that she turned down the offer of work at Smyrna because it was only a temporary position and was too far to drive. The Board, noting Appellant's testimony that she did not feel mentally stable enough to return to work for Employer and Appellant's being "apparently offended" by Rogers' February 11 letter, concluded that it did not find Appellant's reasons for turning down the Smyrna position to be credible. The Board made particular note of the fact that Appellant "was aware that she could be required to work at other facilities as needed." The Board further noted that

Appellant "has offered no credible reason why her refusal to accept Employer's reasonable offer of alternative employment should not be found" to disqualify Appellant from unemployment benefits. The Board's decision makes no mention whatsoever of the Department of Labor policy noted by the Appeals Referee that anything more than 17.5 miles from a current workplace is an unreasonable distance.

The instant appeal followed. Appellant participated in the proceedings below *pro se* but has since retained counsel. Appellant argues that the Board's decision should be reversed for several reasons, including: the Board abused its discretion by ignoring the Department of Labor's established policy that more than 17.5 miles from a current workplace is an unreasonable difference; the Board based its conclusion that Employer made a reasonable offer of alternative employment on the factual misunderstanding that Smyrna was only 17.5 miles from Milford; and Appellant's reasons for turning down the Smyrna offer constituted good cause to voluntarily quit her job. Appellant also argues that the Board's credibility determination regarding Appellant's testimony was based on factual error.

Employer argues that the Board's decision is supported by substantial evidence and is free from legal error. Employer contends that the Board correctly concluded that Appellant voluntarily quit work without good cause pursuant to § 3314(1), and alternatively argues that the record supports concluding that Appellant is disqualified from benefits for refusing to accept an offer of work pursuant to § 3314(3). Employer further argues that the Board's determination that Appellant's testimony was not credible was correctly based on Appellant's testimony that she did not feel mentally

stable to return to work, and thus such credibility determination was within the Board's discretion. Employer contends that the Court need not address Appellant's arguments regarding the drive from her home to the Smyrna location because the Board's credibility determination is conclusive and Appellant admitted she was aware when she was hired that Appellant may be required to work at other facilities besides Milford. Finally, Employer points out–without making any mention of the 17.5 mile policy noted by the Appeals Referee–that the actual distance and drive time to the Smyrna location is not in the record, but contends that the distance between the Dover campus and Smyrna campus is only 11.9 miles.

STANDARD OF REVIEW

When a decision of the UIAB is appealed, this Court's scope of review is limited to "determining whether the Board's findings and conclusions are supported by substantial evidence and free from legal error."[1] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] The Board acts as fact-finder and is free to draw reasonable inferences from testimony; the Board's resolution of conflicting testimony and credibility determinations are conclusive.[3] This Court will not weigh the evidence, determine

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[1] *Sandefur v. Unemployment Ins. App. Bd.*, 1993 WL 389217, at *2 (Del. Super. Aug. 27, 1993) (citations omitted).

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

[3] *Parker-Dodge v. Pet Kare, II*, 2000 WL 33201203, at *2 (Del. Super. Dec. 6, 2000) (citations omitted).

questions of credibility, or make its own factual findings.[4] The Court considers the record in the light most favorable to the prevailing party below.[5] Questions of law are reviewed *de novo* "to determine whether the Board erred in formulating or applying legal concepts."[6] If there is substantial evidence and no error of law, the Board's decision will be affirmed, unless the Board committed an abuse of discretion.[7] An abuse of discretion occurs when the Board "acts arbitrarily or capriciously, or exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[8]

DISCUSSION

Upon a careful review of the record and the parties' submissions, despite the deferential standard of review applied to UIAB decisions, it appears to the Court that the Board: made a credibility determination on an insufficient factual basis; failed to make factual determinations relevant to its statutory analysis; and abused its discretion by ignoring a potentially important Department of Labor policy.

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[4] *Hopkins Const., Inc. v. Unemployment Ins. App. Bd.*, 1998 WL 960713, at *2 (Del. Super. Ct. Dec. 17, 1998) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[5] *Smith v. Placers, Inc.*, 1993 WL 603375, at *2 (Del. Super. Nov. 17, 1993) (citation omitted).

[6] *Gaskill v. BesTemps*, 2013 WL 5785288, at *2 (Del. Super. Oct. 2, 2013) (citing *PAL of Wilmington v. Graham,* 2008 WL 2582986, at *4 (Del. Super. June 18, 2008)).

[7] *See PAL of Wilmington,* 2008 WL 2582986, at *4 (citing *Funk v. Unemployment Ins. App. Bd.,* 591 A.2d 222, 225 (Del. 1991)); *Sikorski v. Boscov's Dept. Store,* 1995 WL 656831, at *1 (Del. Super. Ct. Sept. 22, 1995) (citations omitted).

[8] *PAL of Wilmington*, 2008 WL 2582986, at *1 (citations and internal quotations omitted).

Appellant was not aware that Smyrna could be designated as her primary work location

The Board found that in light of Appellant's testimony that Appellant did not feel mentally stable enough to return to work, Appellant's statement that she did not accept the Smyrna position because it was temporary and too far from her home in Millsboro was not credible. The Board also based its credibility determination on the belief that Appellant was aware that she could be required to work at other facilities of Employer "as needed." This led the Board to conclude that Appellant had offered no credible reason why her refusal of the Smyrna offer should not bar her from receiving benefits.

While credibility determinations by the Board are conclusive, it follows that if there is no substantial evidence supporting such determinations, the Court can reject them. Upon careful review, the Court finds that one of the grounds for the above credibility determination–that Appellant was aware she could be placed at any facility of Employer besides Milford–simply has no basis in fact and is not supported by substantial evidence. Appellant testified she was aware that she could be assigned to another location if she was needed "for the day." A temporary reassignment to another location for a day to fill in for an unavailable employee is wholly distinct from a permanent position at that location for an indefinite period of time. This is corroborated by the testimony of Garrison and Reeves, both of whom testified that employees are primarily based at one location, and working at another location besides the primary location does not happen often. Further, Garrison testified that only the Milford and Dover campuses existed when Appellant was hired–not the Smyrna

campus. Based on this, there is no basis to conclude that when Appellant was hired she was aware that her primary employment location could be switched from Milford to Smyrna at any time, for an indefinite duration of time. Because this finding by the Board is devoid of substantial evidence, the Board's credibility determination is not conclusive.

The Court also finds it troubling that the Board appears to have relied wholly on Appellant's testimony that she did not feel mentally stable enough to work at the Milford location again in rejecting Appellant's proffered reasons for turning down the Smyrna position. As with the Board's erroneous finding that Appellant was aware she could be assigned to other locations, it appears there is an insufficient factual basis for this conclusion as well. A careful review of the record reveals that the Board may be conflating Appellant's reasons for not wanting, at the present time, to reapply for employment with Employer, with Appellant's reasons for turning down the Smyrna offer. Further, Garrison testified that when Appellant turned down the Smyrna position, Appellant told Garrison it was because Smyrna was too far of a drive. Appellant made no mention to Garrison at the time about any mental stability.

Finally, it appears the Board undertook no evaluation whatsoever of Appellant's proffered reasons for turning down the position–namely, that the position was temporary and Smyrna was too far from Millsboro to commute to on a daily basis. There is support in the record for Appellant's argument that the position was temporary–Garrison testified that even though the position itself was permanent, the duration of the position was temporary in that Appellant would work there until a

position in Milford opened. In response to a Board member's inquiry, Garrison responded that he did not know how long "temporary" would be–in other words, Appellant could have been at Smyrna indefinitely. Being reassigned to a location a significant distance from one's home, for an indefinite period of time, could very well be a valid reason for turning down a position.

The Board did not make the necessary factual findings to either reach or reject this conclusion, instead relying on a sweeping credibility determination based on isolated comments by Appellant, one that has little to no basis in fact. This alone warrants reversal, because there is no substantial evidence to support the Board's conclusion that she offered no credible reason for turning down the Smyrna position.

The Board failed to make several factual determinations

Under 19 *Del. C.* § 3314(1), an individual is disqualified from receiving unemployment benefits when that person leaves work voluntarily without good cause attributable to such work.[9] Good cause exists when an employee's "ability to earn a living is jeopardized. . . ."[10] Specifically, good cause must be for reasons connected with the employment and not for personal reasons, and "must be such cause as would justify an individual to voluntarily leave the ranks of the employed and join the ranks

[9] 19 *Del. C.* § 3314(1).

[10] *Thompson v. Christiana Care Health Sys.*, 25 A.3d 778, 784 (Del. 2011) (citing *Ament v. Rosenbluth Int'l*, 2000 WL 1610770, at *2 (Del. Super. Aug 31, 2000)).

of the unemployed."[11]

As noted above, the Board failed to make the necessary factual determinations to conclude whether Appellant's offered reasons for turning down the Smyrna position–that it was temporary and too long of a commute–were valid. Specifically, the Board did not determine what the actual distance was from Milford to Smyrna. Instead, the board merely relied upon Garrison's unsupported assertion that the distance is 17.5 miles. Garrison's statement is belied by Reeves' testimony that Appellant's commute from Millsboro to Milford was 50 minutes, and the commute from Millsboro to Smyrna was 1 hour and 50 minutes. The Board's acceptance of Garrison's testimony that it was only 17.5 miles from Milford to Smyrna is not supported by substantial evidence. The Board should have, but failed to, determine the distance and commute time from Millsboro to Smyrna and from Milford to Smyrna. If the distance from Appellant's home to Smyrna would be unreasonable, particularly for a position of indefinite duration, this could potentially constitute good cause for Appellant to turn down the offer.

Other potentially relevant factual determinations that were not made include: what transpired between the expiration of Appellant's leave on January 3 and the mailing of Rogers' letter on February 11, and the reason for the delay; whether Rogers or any other agent of Employer gave Appellant reason to believe that her position would be held open for her until her physician released her from work restriction;

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[11] *Gaskill v. BesTemps*, 2013 WL 5785288, at *2 (Del. Super. Oct. 2, 2013) (citations omitted).

when Garrison offered Appellant the Smyrna position; whether Garrison or anyone else with Employer took any further steps to place Appellant somewhere else besides the offer of the Smyrna position; when Appellant's old position at the Milford facility was filled; and the reason why, contrary to Rogers' letter, Employer administratively separated Appellant on May 13, rather than 30 days after her release to work on April 17.

The Court assumes without deciding that § 3314(1) was the appropriate statutory provision for the Board to apply. It may very well be that another provision is more appropriate. Employer suggests that § 3314(3), pertaining to refusal of an offer of work, alternatively applies to the instant case. Also, even though the Claims Deputy and the Appeals Referee both applied § 3314(2), pertaining to just cause for termination, the Board never addressed it. This Court has previously applied statutory provisions that were not applied by the Board below when the factual record supported such application.[12] The Court shall not do so here, because of the Board's failure in the instant case to make potentially relevant factual determinations that could be relevant to those statutory analyses as well. On remand, the Board should consider whether Appellant would be disqualified from benefits under either of these provisions.

The Board abused its discretion by failing to address the Department of Labor's reasonable distance policy

The Appeals Referee noted in his decision that the Department of Labor regards

[12] *See id.*

a work location more than 17.5 miles from someone's current work location to be an unreasonable distance that may amount to good cause to refuse a job offer. Neither the Board in its decision nor Employer in its opening brief makes any mention of this policy whatsoever.

As noted *supra*, the Board abuses its discretion when it ignores recognized rules of law or practice as to produce injustice.[13] The Appeals Referee's decision indicates that the Department's 17.5 mile policy is a recognized Department practice in determining the reasonableness of an offer of work. Yet the Board does not address the policy at all in its decision, even though the distance of the commute to Smyrna was Appellant's alleged primary reason for turning down the Smyrna position. The Board should have determined: (1) whether the 17.5 mile policy applies to Appellant's case and (2) whether application of the policy provides Appellant good cause for turning down the Smyrna position. Accordingly, the Board abused its discretion by not addressing the 17.5 mile policy in its decision.

The Board should reach the above determinations on remand. The Court notes that Employer, relying on an internet search, states in its answering brief that the actual distance between the Dover campus and Smyrna campus is 11.9 miles. This is irrelevant. Appellant's "current workplace" would be Milford, not Dover. The fact that Appellant could have been called in to work at the Dover campus on short notice does not make Dover her current work location. Indeed, there is no evidence in the record that Appellant ever worked at the Dover campus. As Appellant notes in her

[13] *PAL of Wilmington*, 2008 WL 2582986, at *1 (citations and internal quotations omitted).

opening brief, and as noted *supra*, agreeing to be available to work interchangeably at an employer's other locations if needed does not mean that the employee is employed at each and every location operated by Employer. Such a conclusion would lead to absurd results. Accordingly, when addressing the 17.5 mile policy on remand, the Board should (if it determines that the policy applies) apply it to the distance between the Milford location and Smyrna location. Finally, as already noted *supra*, it is for the Board to determine what the distance is between Milford and Smyrna.

CONCLUSION

The Board's decision is not supported by substantial evidence, and was premised on a credibility determination that lacked factual foundation. Further, the Board abused its discretion by failing to fully evaluate Appellant's claimed reasons for turning down the Smyrna position and by ignoring a potentially relevant Department of Labor policy. Accordingly, the decision of the Board must be, and is, hereby **REVERSED.** This matter is **REMANDED** to the Board for further findings and analysis in accordance with this Court's opinion.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh