IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

GRACE L. NORCISA,	:	C.A. No. K13A-03-001WLW
Appellant,	:	
v.	:	
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, and the MERIT EMPLOYEE RELATIONS BOARD,	:	
Appellees.	:	

Submitted: July 1, 2013
Decided: September 23, 2013

ORDER

Upon an Appeal from the Decision of the
Merit Employee Relations Board.
Affirmed.

Grace L. Norcisa, *pro se*

Kevin R. Slattery, Esquire of the Department of Justice, Wilmington, Delaware; attorney for the Department of Health and Social Services.

W. Michael Tupman, Esquire of the Department of Justice, Dover, Delaware; attorney for the Merit Employee Relations Board.

WITHAM, R.J.

ISSUE

The issue before the Court is whether the Grievant-Below's appeal from the decision of the Merit Employee Relations Board should be granted.

FACTS AND PROCEDURE

This is a *pro se* appeal by the Grievant-Below, Grace Norcisa (hereinafter "Norcisa") from the decision of the Merit Employee Relations Board (hereinafter "the MERB" or "the Board") upholding the termination of Norcisa's employment with Delaware Health and Social Services (hereinafter "DHSS").

Norcisa was employed as a Lab Technician III at the Stockley Center in Georgetown, Delaware from 2006 until her termination on January 15, 2010. The Stockley Center is operated by the Division of Developmental Disabilities Services, a division of DHSS, and provides rehabilitative training, healthcare, and residential services for patients with developmental disabilities. As a Lab Technician, Norcisa's responsibilities included drawing blood from patients and submitting the blood samples along with requests for testing to an outside facility, where the tests would be conducted on the samples. Tests could only be authorized by a physician or nurse; Norcisa could not authorize any tests herself. After an initial test was ordered, a physician could later authorize "add-on tests" to be conducted on the previously drawn blood sample. These add-on tests also required the authorization of a physician or nurse before Norcisa could request them. At the time of the events in question, the Stockley Center had no disseminated policy for recording the authorization of add-on tests. However, it was common practice to authorize add-on tests in writing. If the add-on test was verbally authorized, the verbal authorization

would generally be reduced to writing at a later time.

In July of 2009, Norcisa was the sole Lab Technician employed at the Stockley Center. One of the facility's patients at the time was S.R.[1], who was inflicted with severe developmental disabilities, as well as a number of physical ailments including a digestive disorder and cellulitis. S.R. received treatment from several of the facility's physicians, including Dr. Thomas Kelly (hereinafter "Dr. Kelly"), the part-time Medical Director of the Stockley Center, and Dr. Emad Shoukry (hereinafter "Dr. Shoukry"), a staff physician. On July 2, Dr. Shoukry ordered initial testing on blood drawn from S.R. On July 13, Norcisa signed a request for several add-on tests to be conducted on the sample. There was no written record of who authorized the tests, the results of which were all negative. On July 13, Dr. Shoukry ordered more blood drawn from S.R. for further testing. On July 21, Norcisa signed a request for further add-on testing. These tests could not be conducted because the blood sample was not large enough. Again, there was no record of who authorized the add-on tests.

In August of 2009, Norcisa spoke with Carlene Bond (hereinafter "Bond"), a registered nurse employed at the Stockley Center, about S.R. Norcisa allegedly told Bond "[t]he doctors are missing something with [S.R.]. . . .I can't believe they are not being more aggressive in finding out what it is. On the last blood drawn from her, I

[1] In its Order, the Board declined to disclose the patient's name in the interests of safeguarding the patient's privacy. This Court will retain the abbreviation used by the Board in referring to this patient.

even added more tests. . .just to check on my own."[2] Bond did not immediately report to supervisors what Norcisa allegedly told her, but six weeks later, during a conversation with Nursing Supervisor Marie Hitchens (hereinafter "Hitchens"), Bond recalled Norcisa's comments and relayed them to Hitchens.

Based on Bond's report to Hitchens, DHSS initiated an investigation of whether Norcisa had in fact requested unauthorized add-on tests. Norcisa denied the allegations. On December 8, 2009, DHSS sent Norcisa a pre-termination letter informing Norcisa that DHSS intended to terminate Norcisa's employment on the basis of requesting the unauthorized add-on tests, which DHSS claimed amounted to misconduct and fraud, misappropriation of Medicare and Medicaid funds, and the practice of medicine without a license. On January 15, 2010, DHSS terminated Norcisa's employment at the Stockley Center.

On January 26, 2010, Norcisa filed a Merit Appeal with the MERB, and requested a hearing before the Board as well as a hearing before Human Resource Management (hereinafter "HRM") in the Office of Management and Budget. On April 21, 2010, the HRM hearing officer upheld Norcisa's dismissal, finding just cause for her termination. Norcisa's MERB hearing was originally scheduled for November 18, 2010, but DHSS requested a continuance based on Norcisa's request for documents, which required extensive redaction in order to comply with the Health Insurance Portability and Accountability Act. The MERB hearing was rescheduled for January 20, 2011, but Norcisa requested a continuance on the grounds that she

[2] *Norcisa v. Dep't of Health and Social Serv.*, MERB Docket No. 10-01-464, at 6 (Feb. 11, 2013) (hereinafter "MERB Order").

had not received her requested documents from DHSS. The hearing was continued again to April 27, 2011, but on April 15, 2011, the parties requested the hearing be cancelled on the grounds that they had reached a settlement. Both Norcisa and DHSS filed cross-motions to enforce the settlement agreement in June of 2012, but on July 17, 2012, Norcisa withdrew her motion and asked the MERB for a hearing on the merits. DHSS renewed its motion to enforce the settlement agreement, which the Board denied on July 24, 2012. The hearing was scheduled for August 29, 2012, but was continued yet again due to another request for documents by Norcisa.

Norcisa's hearing was ultimately held on January 30, 2013–over three years from when the events leading to Norcisa's termination occurred. The MERB excluded three of Norcisa's proffered exhibits on the grounds of relevance and lack of evidentiary value: a written reprimand for an unexcused absence; Norcisa's pre-termination statement; and physician order sheets pertaining to a patient other than S.R. DHSS called six witnesses: Dr. Kelly; Dr. Shoukry; Bond; Hitchens; DHSS investigator Jerry Passwaters (hereinafter "Passwaters"); and Charlotte Brown (hereinafter "Brown"), Director of Residential Services for the Stockley Center. Norcisa testified on her own behalf. Norcisa also intended to call Dr. Judith Bailey (hereinafter "Dr. Bailey") to testify on Norcisa's behalf, but Dr. Bailey failed to appear for the hearing, despite the issuance of a subpoena. Norcisa's counsel explained to the Board that Dr. Bailey would have testified that verbal orders for add-on tests were not always recorded on a physician's order sheet, and that some of the add-on tests performed on S.R.'s blood samples were appropriate given S.R.'s medical condition. Dr. Bailey would not have testified that she was the doctor who

authorized the add-on tests, because Dr. Bailey was not one of S.R.'s treating physicians at the time. By a vote of 3-2, the Board held that Dr. Bailey's proffered testimony would not be necessary to reach a decision on Norcisa's case, and thus conducted the hearing without her.[3]

Dr. Kelly and Dr. Shoukry both testified that they had not authorized the add-on tests, that the tests were not appropriate based on S.R.'s medical condition, and that they would not have authorized the tests. Bond testified as to Norcisa's comments pertaining to S.R. Norcisa testified that she had been verbally authorized to request the add-on tests via telephone, and had not written down the verbal authorization because she was never trained to and was not aware that was Stockley Center policy. Norcisa testified that a nurse and a doctor authorized the tests, but could not recall their names. On cross-examination, counsel for DHSS pointed out that this contradicted Norcisa's earlier statement to Passwaters that she had no idea who had authorized the tests. This testimony also contradicted statements made by Norcisa to Brown during Norcisa's pre-termination meeting: Norcisa told Brown that Dr. Shoukry had authorized the tests, then changed her story soon afterwards and told Brown that both Dr. Shoukry and Dr. Kelly had authorized the tests.

A majority of the Board held that DHSS had just cause to terminate Norcisa's employment.[4] The majority of the Board found that, of the offenses DHSS alleged Norcisa had committed in the 2009 pre-termination letter, DHSS had established that

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[3] *Id.* at 2-3.

[4] *Id.* at 8.

Norcisa requested add-on tests without a physician's authorization.[5] The Board concluded that, while the evidence presented by DHSS was not conclusive as to whether Norcisa had in fact requested the unauthorized tests, Norcisa bore the burden of proof to establish that DHSS did not have just cause to terminate her employment, and Norcisa failed to meet this burden.[6]

Norcisa has now filed the instant appeal with this Court. Norcisa has filed her appeal *pro se*, and has attached to her brief several "exhibits" which were never presented to the Board. By Order dated June 28, 2013 this Court granted DHSS's Motion to Strike those documents.

STANDARD OF REVIEW

As with appeals from all administrative agencies, when a decision of the MERB is appealed, this Court's scope of review is limited to "correcting errors of law and determining whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law."[7] Errors of law by the agency are reviewed *de novo*.[8] Substantial evidence equates to "such relevant evidence as a

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[5] *Id.* at 7.

[6] *Id.* at 8.

[7] *DeMarie v. Delaware Dep't of Transp.*, 2002 WL 1042088, at *1 (Del. Super. Ct. May 24, 2002) (citing *Tulou v. Raytheon Serv. Co.,* 659 A.2d 796, 802 (Del. Super. Ct. 1995)).

[8] *Avallone v. State/Dep't of Health and Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011) (citing *Person-Gaines v. Pepco Holdings, Inc.,* 981 A.2d 1159, 1161 (Del. 2009)).

reasonable mind might accept as adequate to support a conclusion."[9] This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[10] If there is substantial evidence and no error of law, the agency's decision must be affirmed.[11]

DISCUSSION

Norcisa's argument on appeal can best be distilled down to the following: the Board made several legal errors in the course of the hearing, and there is no substantial evidence to support the Board's conclusion that DHSS had just cause to terminate Norcisa's employment.

I. The Board committed no legal error

Of the alleged errors, two warrant discussion: first, Norcisa argues that the Board erred by excluding several exhibits Norcisa intended to use in her hearing; second, Norcisa contends that the Board wrongfully refused to allow Norcisa to call Dr. Bailey as a witness on Norcisa's behalf. Reviewing these allegations *de novo*, this Court must conclude that neither allegation amounts to legal error. As to the Board's exclusion of Norcisa's exhibits, two of the proffered documents–a written reprimand of Norcisa for an unexcused absence, and order sheets pertaining to patients unrelated to the allegations against Norcisa–were rightfully excluded on the

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

[10] *Collins v. Giant Food, Inc.*, 1999 WL 1442024, *3 (Del. Super. Ct. Oct. 13, 1999) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[11] *DeMarie*, 2002 WL 1042088, at*1.

grounds of irrelevance.

As to the Board's decision that Dr. Bailey's testimony was not required, the Board explained in its Order that because Dr. Bailey was not S.R.'s treating physician, her proffered testimony that verbal authorizations had been made in the past without being recorded did not prove that such authorization had been made in Norcisa's case.[12] Further, an examination of the hearing transcript reveals that the members of the MERB required Norcisa's counsel to give a detailed proffer of Dr. Bailey's testimony, and actively questioned Norcisa's attorney as to the details of the planned testimony. This questioning revealed that Dr. Bailey would not have testified that she had authorized the add-on tests; she could not have, since she was not S.R.'s treating physician. The proffered reasons for Dr. Bailey's testimony–to show that verbal authorizations have not been recorded in the past, and to testify that several of the add-on tests may have been appropriate–still did not go to the ultimate issue of whether Norcisa's requests for unauthorized add-on tests amounted to just cause for termination. Accordingly, the Board's decision to not hear the testimony of Dr. Bailey does not amount to legal error.

II. <u>The Board's decision is supported by substantial evidence</u>

Pursuant to 29 *Del. C.* § 5949(b), when a terminated employee appeals her termination to the MERB, "[t]he burden of proof of any such appeal to the Board. . .is on the employee."[13] In *Avallone v. State/Dep't of Health and Soc. Servs.*, the

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[12] *See* MERB Order, at 3.

[13] 29 *Del. C.* § 5949(b).

Delaware Supreme Court clarified this burden by stating: "[t]he discharged employee has the burden of proving that the termination was improper."[14] The *Avallone* Court explained that when termination of state employment is appealed to the MERB, the employee is "required to prove the absence of 'just cause,' as that term [is] defined in Merit Rule 12.1."[15]

The Merit Rules are promulgated by the MERB and establish a "a system of [state] personnel administration based on merit principles. . . ."[16] Merit Rule 12.1 provides that dismissal of a state employee must be supported by "just cause," which is defined by three elements: (1) a showing that the employee has committed the charged offense; (2) due process rights; and (3) the penalty is appropriate based on the circumstances.[17] Stated differently, just cause for termination entails "a legally sufficient reason supported by job related factors that rationally and logically touch upon the employee's competency and ability to perform his duties."[18]

On appeal to this Court, Norcisa merely reiterates the same arguments she made to the Board below: that she received inadequate training, was not aware it was Stockley Center policy to record verbal authorizations of add-on tests, and had in fact

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[14] *Avallone v. State/Dep't of Health and Soc. Servs.*, 14 A.3d 566, 572 (Del. 2011) ("[w]hen the State terminates a person's employment, the MERB presumes that the State did so properly.") (citations omitted).

[15] *Id.*

[16] 29 *Del. C.* § 5902.

[17] *Avallone*, 14 A.3d at 569.

[18] *Vann v. Town of Cheswold*, 945 A.2d 1118, 1122 (Del. 2008).

received verbal authorization, but could not recall from whom. The Board noted that while DHSS did not present conclusive evidence that Norcisa had made the requests for add-on testing without authorization, under *Avallone*, Norcisa bore the burden of establishing the absence of just cause. By failing to meet this burden, the Board upheld Norcisa's dismissal. The Board's analysis is a correct reading of the law under § 5949(b) and the Supreme Court's holding in *Avallone*.

Throughout the proceedings, each of the five members of the MERB made extensive inquiry into the facts underlying the case of the witnesses as well as counsel for both parties. This was no easy task: testimony of witnesses including Dr. Kelly and Hitchens revealed that patients such as S.R. had multiple physicians treating them at once, and in 2009, during the time the events underlying this case, there was a high turn-over rate of physicians at the Stockley Center. More importantly, due to the protracted series of continuances and the failed settlement of the case, more than three years had passed since the events in question originally occurred. Several of the witnesses expressed difficultly in accurately recollecting all of the facts.

Based on the extensive questions asked by the members of the Board as well as comments made by each of the members during the proceedings, it is clear that despite these difficulties with the record, the Board made several key credibility determinations in reaching its decision. The most important of these appear to relate to the following evidence: the testimony of Dr. Kelly and Dr. Shoukry that neither had authorized the add-on tests, and would not have authorized them based on S.R.'s condition; Bond's testimony that Norcisa admitted to Bond that Norcisa ordered more tests of S.R. without authorization; and Norcisa's own testimony in providing at least

three separate contradictory accounts as to who verbally authorized the add-on tests.

As noted *supra*, this Court cannot engage in its own weighing of the evidence or credibility determinations so long as a reasonable mind would find such evidence adequate to support the Board's conclusion, "even if the Court might have, in the first instance, reached an opposite conclusion."[19] It is apparent that the Board, faced with a difficult record, engaged in reasonable and extensive inquiry in reaching an informed decision. Accordingly, this Court finds substantial evidence in support of the Board's conclusion that Norcisa failed to meet her burden of proving the absence of just cause for her termination.

CONCLUSION

In light of the substantial evidence in support of the MERB's decision, as well as the absence of any error of law or abuse of discretion, the decision of the MERB must be, and is, hereby AFFIRMED.

IT IS SO ORDERED.

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

WLW/dmh

[19] *Collins v. Giant Food, Inc.,* 1999 WL 1442024, at *3 (Del. Super. Ct. Oct. 13, 1999) (citations omitted).