SUPERIOR COURT OF THE STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2 GEORGETOWN, DE 19947

November 14, 2013

Julianne E. Murray, Esquire Murray Law LLC 107 N. Bedford St. Georgetown, DE 19947 Barry M Willoughby, Esquire Lauren E.M. Russell, Esquire Young Conaway Stargatt & Taylor, LLP 1000 North King Street Wilmington, DE 19801

RE: Ismael Torres, Jr. v. Sussex County Council

and the Unemployment Insurance Appeal Board

C.A. No: S13A-03-004

Date Submitted: July 30, 2013

Dear Counsel:

This is my decision on Ismael Torres's appeal of the Unemployment Insurance Appeal Board's denial of his claim for unemployment benefits. Torres was employed by Sussex County as a Deputy Sheriff. Torres's primary job was to serve legal papers for the Sussex County Courts. Torres used a County vehicle to do his job. Torres's vehicle was equipped with a personal computer that he used to log his daily activities. Torres would record, among other things, when and where he served legal papers. Torres's vehicle was also equipped with a GPS device that automatically recorded his vehicle's location, speed, odometer values, and when the vehicle's motor was turned

on or off. The County equipped approximately 40 of its vehicles with GPS devices. These vehicles were mostly used by employees whose jobs required them to spend a large amount of their work day on the road.

Torres attended a County Council meeting while on duty on March 27, 2012. County policy provides that the Deputy Sheriffs are not to attend County Council meetings while on duty unless they are there on official business. Torres was not at the meeting on official business. However, when Torres submitted his weekly overtime report it included the time he spent at the County Council meeting on March 27, 2012. This prompted the County to investigate Torres's overtime reports. The investigation compared Torres's daily logs to his vehicle's GPS data. This comparison showed that Torres was not working when he claimed to be and that he was inflating his overtime. The County then terminated Torres. Torres then filed a claim for unemployment benefits.

THE BOARD HEARING

Todd Lawson, Hal Godwin, Karen Brewington and Chris Ransom submitted testimony to the Board for the County. Lawson is the County Administrator. Godwin is the Deputy County Administrator. Brewington is the Director of Human

¹ Ransom was the only witness to testify at the hearing before the Board. All of the other witnesses testified at the hearing before the Appeals Referee.

Resources for the County. Ransom works for Network Fleet, a designer and manufacturer of GPS hardware and software and the provider of GPS services to the County. Jeffrey Christopher is the County Sheriff. Christopher submitted testimony to the Appeals Referee for Torres. Torres also submitted testimony to the Appeals Referee.

Lawson testified about the County's fleet of vehicles, the GPS system, the County Council meeting on March 27, Brewington's investigation of Torres's overtime reports, and the County's testing of the GPS device in Torres's vehicle before it terminated Torres. The County has approximately 40 vehicles that are equipped with GPS devices. The County Council decided to install GPS devices in those vehicles used by County employees who spent a significant portion of their work day on the road. This allowed the County to monitor the activities of those employees. The GPS system is provided by Network Fleet, a subsidiary of Verizon. This matter began when Lawson received a request for overtime compensation from Torres for attending the County Council meeting on March 27. The subject of the meeting was the Sheriff's Office. The County Council and the Sheriff were apparently at odds over the Sheriff's proper duties. Lawson thought that Torres's request for overtime was odd because Torres was not at the meeting on official business and thus should not have been compensated for the time he spent there. This

prompted Lawson to direct Brewington to investigate Torres's overtime reports. Brewington's investigation disclosed that Torres was inflating his overtime. Lawson directed Godwin to test Torres's GPS device to see if it was working properly. Godwin's test concluded that it was working properly. Lawson then terminated Torres.

Brewington testified about her investigation of Torres's overtime reports. Brewington examined Torres's reports for the time period from February 27, 2012 to April 27, 2012. Brewington compared Torres's daily log sheets and overtime reports to the GPS reports. Brewington found conflicts and other problems for eight of the days over the two month period of time. For example, in a number of instances, Torres's logs showed that he was out serving papers when the GPS reports showed that his car was still in his driveway at home. The GPS reports also showed that Torres's car had spent a substantial amount of time idling at his home and other locations where his relatives and friends were either living or working. Brewington also testified that the Deputy Sheriff who took Torres's vehicle after he was terminated did not have any problems with the GPS device in it and that the County did not have any other vehicles with problems with their GPS devices or batteries or alternators. Brewington's investigation also discovered that Torres had received over \$6,000 in overtime, which was substantially more than every other deputy, and that

he had wrongly claimed \$785 in overtime.

Godwin testified about the County's fleet of vehicles and the test he conducted on Torres's GPS device before Lawson terminated Torres. Godwin manages the County's fleet of vehicles. On April 30, 2012, Godwin and Torres drove around in Torres's vehicle, going to many of the places that Torres visited regularly. Godwin drove and recorded the places visited, time of visit, and speed of the vehicle. Torres acknowledged that Godwin's log was accurate, but refused to sign it. After finishing the test drive, Godwin compared his log to the GPS report for the test drive. He told the Board that his log and GPS report were accurate to within a few feet and one mile per hour. Godwin and Brewington did a second test on a different deputy's vehicle on May 11, 2012. The results were the same. Godwin told the Board that no other County employees had complained about the GPS devices in their vehicles. Godwin also told the Board that Network Fleet had examined the GPS system and concluded that it was working properly.

Ransom testified about the background of Network Fleet, how GPS systems work, and about some of the specific issues raised by Torres. Network Fleet has GPS devices in 2,500 cars for the State of Delaware, 100 for New Castle County, 700 for Del-Dot, and 200 for the Delaware River and Bay Authority. Ransom testified that the GPS device is connected to the vehicle's engine computer. The GPS device

gathers information on the vehicle's speed and odometer values, which are then transmitted by satellite. When a vehicle is turned on, the GPS device gathers a date and time stamp from the satellite and logs the vehicle's location. When a vehicle is turned off, the GPS device logs that information as well. Ransom testified that the GPS device reports its location every two minutes. As for location accuracy, Ransom testified that the GPS device is precise down to a 15-20 meter area. Ransom testified about "GPS drift." This is a situation where the location of the vehicle can change up to 15-20 feet without the vehicle ever actually moving. Since the GPS device is connected to the engine computer, the speed the engine shows is the speed that is reported. The speed is then sampled inside the two minute reporting period. Ransom testified that less than one percent of the GPS devices fail. Ransom also testified that if a GPS device fails, the GPS device will not continue to record information. After reviewing all of the GPS data, Ransom testified that he had no doubt that the GPS device in Torres's vehicle was providing accurate information.

Christopher offered explanations for why Torres might have so much overtime.

Christopher told the Board that Torres, as a new deputy, needed a lot of training.

Christopher added that Torres served legal papers for Family Court, which had many time-sensitive legal papers that had to be served with little notice, and that Torres was also responsible for a large geographic area. Christopher also added that he thought

the GPS reports were wrong because he had checked with some people, including the Bridgeville Police Chief, and verified that Torres was where he said he was on his daily logs. Christopher told the Board that he thought the County was trying to terminate Torres because he was in a dispute with the County over his authority and that this was a way to get at him.

Torres offered some explanations for the various things uncovered by Brewington's investigation. Torres's vehicle had a lot of idling time because he had to leave it idling so that he could work on his computer without running down the vehicle's battery. Torres also explained that he had a lot of overtime for the same reasons Christopher discussed. Torres said he took his vehicle to a friend's place to be fixed because he was having problems with either the battery or alternator. Torres did acknowledge that he understood that he was not to appear at County Council meetings in uniform unless he was on official business.

The Board found that the GPS device in Torres's vehicle was reliable and that Torres's effort to wrongly claim overtime compensation constituted "just cause" for his termination and that he was therefore disqualified from the receipt of unemployment benefits. Torres then filed this appeal.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited

appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, this Court is limited to a determination of whether there is substantial evidence in the record sufficient to support the Board's findings, and that such findings are free from legal error.² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³ The Board's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."⁴ The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁵ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁶ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁷

DISCUSSION

 $^{^2}$ Unemployment Ins. Appeals Board of the Dept. of Labor v. Duncan, 337 A.2d 308, 309 (Del. 1975).

³ Oceanport Ind. v. Wilmington Stevedores, 636 A.2d 892, 899 (Del. 1994); Battista v. Chrysler Corp., 517 A.2d 295, 297 (Del. Super. 1986), app. dism., 515 A.2d 397 (Del. 1986).

⁴ Geegan v. Unemployment Compensation Commission, 76 A.2d 116, 117 (Del. Super. 1950).

⁵ Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965).

⁶ 29 *Del. C.* § 10142(d).

⁷ Dallachiesa v. General Motors Corp., 140 A.2d 137 (Del. Super. 1958).

Torres argues that (1) the Board's finding that the GPS reports were reliable is not supported by substantial evidence, (2) the Board did not consider evidence favorable to Torres, (3) the County did not support the GPS reports with other evidence, (4) the Board's finding is a mere conclusion that is not supported by the evidence, and (5) the County did not consult with Sheriff Christopher before terminating Torres as allegedly required by the County Code. The Court's role in reviewing an appeal is to determine if the Board's decision is based upon substantial evidence and free from legal error. It is not, as Torres argues, to weigh the evidence and reach an independent decision. According to 19 Del. C. § 3314(2), a claimant is not eligible for benefits when he or she is terminated from employment for "just cause." "Just cause" has been defined by this Court as a "wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's standard of conduct."8 A wilful or wanton act requires the employee to be "conscious of [her] conduct or recklessly indifferent to its consequences." An action of an employee showing dishonesty and untrustworthiness justifies a dismissal for just cause. 10 Further, "the credibility of witnesses, the weight to be given their

⁸ Abex Corp. v. Todd, 235 A.2d 271, 272 (Del. Super. 1967).

⁹ Coleman v. Department of Labor, 288 A.2d 285, 288 (Del. Super. 1972).

¹⁰ See *Barisa v. Charitable Research Foundation, Inc.*, 287 A.2d 679 (Del. Super. 1972).

testimony, and the inferences to be drawn therefrom are for the Board's determination." Hearsay is admissible in administrative hearings. 12

Torres was discharged for misappropriation of overtime, falsification of documentation and abuse of County time and equipment. The primary evidence against Torres was the GPS reports and his daily log sheets. The daily logs are activity logs that Torres filled out during the course of his work day. The logs show the type of paperwork to be delivered, the location of the delivery, the person on whom the delivery is attempted, and the time of the delivery. The County's investigation into Torres's overtime reports found discrepancies between Torres's logs and the GPS reports. The investigation also found that Torres's vehicle was idling for long periods of time while it was sitting in his driveway at home and other places.

Torres tried to explain the discrepancies by arguing that the GPS reports were simply wrong. Torres tried to explain the excessive idling time in his driveway by stating that he had to work from the computer in his vehicle because there was only one computer in his office and that he had to keep his vehicle running because he did not want to run the battery down. Torres tried to explain the time spent at a friend's

¹¹ Behr v. Unemployment Insurance Appeal Board, 1995 WL 109026, at *2 (Del. Super. Feb. 7, 1995).

¹² Jordan v. Town of Milton, 2012 WL 5494667 (Del. Super. Oct. 31, 2012).

place by stating that he took his vehicle there to get the alternator repaired. Torres also argued that the GPS device on his car was faulty because it recorded some unusual readings. The Board found all of Torres's arguments unpersuasive, reasoning that they simply could not be reconciled with the GPS reports.

Torres's best argument was that the GPS device in his car was faulty because it recorded some unusual readings. Torres pointed out that it recorded his vehicle being in two different spots without the vehicle actually moving. This is known as "GPS drift." Torres also pointed out that it was reporting a speed reading even though his vehicle's motor was turned off. However, Ransom explained these unusual readings to the Board's satisfaction. Ransom was able to explain "GPS drift." This occurs when the GPS device records a vehicle at one spot at one two minute interval and then at another spot fifteen to twenty feet away two minutes later even though it had not moved and was registering a zero speed. Ransom testified that the location registered by the satellites is not meant to be precise down to the meter, but down to an area of 5, 10 or 15 meters.¹³ Another unusual reading that Torres pointed out dealt with the GPS report showing his car going a certain speed, but the ignition registering the motor being turned off. Ransom explained this too. He testified that "we're reading speed directly from the engine computer. The same

¹³ Board Hearing Transcript at 12.

speed that the driver is seeing when they are looking at the dashboard. So we're sending that back to our data center saying at this time this was the speed. We're also sampling speed inside the two minutes I talked about very frequently. So in this case six or seven times every two minutes we're sampling that speed and the speed that comes back we're saying hey this was your maximum speed during the last two minutes, here is what your maximum speed was."14 This explains that when the car motor is turned off and the speed comes back as something other than zero, it is because it is an average of the speed from the previous two minutes. As for calibration, Ransom testified that when the car is turned on, the GPS device receives a time and date stamp and it triangulates itself based off of the satellites in the sky. Ransom finished his testimony, stating that the GPS data was accurate and consistent with a perfectly working device. Based on this testimony, the Board found that the GPS reports were reliable and held that the County had met its burden in establishing that Torres was discharged for "just cause."

I have reviewed the record and concluded that the Board's finding that Torres was discharged for "just cause" is based upon substantial evidence in the record. All of Torres's arguments, except for the one regarding the allegation that the County had to consult with Sheriff Christopher before terminating Torres, are resolved by this

¹⁴ Board Hearing Transcript at 13.

standard. Ransom was able to interpret the GPS reports and explain the apparent discrepancies to the Board's satisfaction. The evidence indicates that the GPS reports were reliable. I also note that Godwin conducted a test on the GPS device in Torres's vehicle with Torres and found that it was working properly. Godwin also conducted a second test on another deputy's vehicle and found that the GPS system in that vehicle was working properly too.

The Board did consider the testimony offered by Torres and Christopher. However, the Board rejected it. This is well within the Board's discretion. The County had no obligation, as Torres argues, to support the GPS evidence with other evidence. Given that Torres, like some other County employees, was almost always on the road and unsupervised, it is not surprising that the GPS reports were the only evidence of his wrongdoing. Indeed, this is exactly why the County Council decided to equip its vehicles with GPS devices. It is the only effective way of monitoring employees who spend most of their work day on the road. I am satisfied that the County met its burden of proof. It is simply impossible to reconcile Torres's daily logs with the GPS reports. Given this, the only logical conclusion, despite Torres's argument to the contrary, is that Torres falsified his daily logs, causing the County to

¹⁵ Behr v. Unemployment Insurance Appeal Board, 1995 WL 109026, at *2 (Del. Super. Feb. 7, 1995).

pay him for overtime he was not entitled to receive.¹⁶ This amounts to willful and wanton misconduct in violation of his employer's interest, his duties, and his expected standard of conduct. The Board's decision is based upon substantial evidence in the record and free from legal error.¹⁷

CONCLUSION

The Unemployment Insurance Appeal Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal cc: UIAB

¹⁶ Theft from an employer is "disregardful of the standards of behavior which an employer rightfully expects from an employee [and] may be found to be willful misconduct." *Harmon v. Unemployment Compensation Board of Review*, 444 A.2d 806, 807 (Pa.Cmwthl. 1982).

Torres's argument that the County Code required the County to consult with Sheriff Christopher before terminating him is irrelevant in a claim for unemployment benefits before the Board. See Sussex County Code §29-15. Furthermore, 9 *Del. C.* §§3300 places the responsibility of issuing and determining unemployment benefits under the Department of Labor.