

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY**

<b>HERSCHEL W. VICK, JR.</b>	:	
	:	<b>C.A. No: 11A-10-004 (RBY)</b>
_____ <b>Appellant,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>DELAWARE STATE HOSPITAL FOR THE CHRONICALLY ILL</b>	:	
	:	
<b>Appellee.</b>	:	

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*Submitted: July 9, 2012  
Decided: September 19, 2012*

*Upon Consideration of Appellant's Appeal from  
the Unemployment Insurance Board Appeal*  
**AFFIRMED**

**ORDER**

Herschel W. Vick, Jr., *Pro Se.*

Rae M. Mims, Esq., Deputy Attorney General, Department of Justice, Dover,  
Delaware for Appellee.

Young, J.

### **SUMMARY**

Herschel Vick (“Appellant” or “Claimant”) contests the decision of the Unemployment Insurance Appeal Board (“Board”) which found just cause for his discharge. This decision makes Appellant ineligible for unemployment benefits. Appellant’s claim stems from a series of disciplinary incidents ultimately culminating in his termination by letter dated April 14, 2011. The Board found that the Delaware State Hospital for the Chronically Ill (“Employer”) met its burden of proving that the discharge was for just cause in connection with his work. This decision was primarily based on Appellant’s disciplinary history, testimony from his supervisor, and his own testimony. Because the Board’s decision is based upon substantial evidence, with no indication that an error of law or abuse of discretion is present, the appeal is without merit. The decision of the Board is **AFFIRMED**.

### **FACTS**

Herschel Vick was employed by Delaware State Health and Social Services as a full-time Laundry Room Supervisor at the Delaware Hospital for the Chronically Ill. His employment began February 1, 2009. Appellant’s last day was May 16, 2011 after having exercised his opportunity for a pre-termination hearing.

Appellant has quite a long disciplinary history for someone employed with the organization for less than two years. On October 27, 2010 Appellant was placed on a one day suspension for insubordination. Specifically, for driving a state vehicle without a current or valid license. Then on February 16, 2011, Mr. Vick received a verbal warning relating to cell phone use in the work area. Despite receiving that warning, Appellant was again seen using his cell phone in violation of the Electronic

*Vick v. DHSS*  
*C.A. No.: 11A-10-004 (RBY)*  
*September 19, 2012*

Device Policy on March 15, 2011. Apparently, no action was taken on the violation at the time. On March 21, 2011, Appellant was given a five day suspension for violating timekeeping procedures and for bringing his dog to work. Shortly after he returned from the suspension he received a letter terminating his employment, based on the second cell phone violation.

Shortly after he was discharged Appellant applied for unemployment benefits. After reviewing the file, a Claims Deputy determined that Claimant was eligible for unemployment benefits. His employer appealed this decision. The Appeals Referee affirmed the decision of the Claims Deputy. At that hearing, Employer was represented by a party who did not personally observe the cell phone policy violation, and could not present any first hand testimony. The decision to affirm appears to be completely based on the absence of a witness with first hand knowledge.

Employer appealed to the Unemployment Insurance Appeal Board. The hearing took place on October 11, 2011. At this hearing, Employer presented the testimony of Appellant's supervisor, Robert Hill. Hill was able to testify about his first hand knowledge of the cell phone incidents, resolving at least one major flaw the Referee referenced in her findings. The Board based its final decision on the testimony of Robert Hill, Claimant's disciplinary record (discussed above), the documentary evidence showing that Appellant knew of the electronics policy, and Vick's own testimony. Mr. Vick is appealing the Board's decision.

### **STANDARD OF REVIEW**

For administrative board appeals, this Court is limited to reviewing whether the

*Vick v. DHSS*  
C.A. No.: 11A-10-004 (RBY)  
September 19, 2012

Board's decision is supported by substantial evidence and free from legal errors.<sup>1</sup> Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."<sup>2</sup> It is "more than a scintilla, but less than a preponderance of the evidence."<sup>3</sup> Questions of law will be reviewed *de novo*.<sup>4</sup> 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.<sup>5</sup>

### **DISCUSSION**

Appellant's submission includes several arguments he would like the Court to consider:

(1) The Board did not give much weight to the testimony of Claimant's witness, Ms. Lolita Brown.

(2) Appellant claims employees consistently used cell phones and other personal electronic devices in work areas in violation of the policy, with no consequences.

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<sup>1</sup> 29 Del. C. §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

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

<sup>3</sup> *Id.* (quoting *Cross v. Calfano*, 475 F. Supp. 896, 898 (D. Fla. 1979)).

<sup>4</sup> *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del.1998).

<sup>5</sup> *Carrion v. City of Wilmington*, 2006 WL 3502092, \*3 (Del Super. Dec. 5, 2006).

*Vick v. DHSS*  
*C.A. No.: 11A-10-004 (RBY)*  
*September 19, 2012*

- (3) Appellant claims he did not receive a verbal warning for the behavior at issue.
- (4) Appellant claims Mr. Hill did not actually witness his use of a cell phone.
- (5) Finally, Mr. Vick contends that all of the disciplinary allegations against him were either acts of retaliation or discrimination, by his boss against him because of his sexual preference and in response to Appellant's receipt of hours off work to attend management classes.

None of these arguments provide the Court with any basis to justify a disruption of the Board's decision.

Appellant takes issue with the fact that the Board did not give much weight to the testimony of his witnesses. According to the applicable administrative statute, the Board is entitled to use discretion in determining how to weigh witness testimony and other evidence in reaching a decision.<sup>6</sup> The Board ultimately determined that Claimant's witnesses either did not have personal knowledge of the incident, applicable policies and procedures, or that their testimony did not support the arguments asserted by Claimant.<sup>7</sup> Appeals based upon such discretionary decisions

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<sup>6</sup> 19 Del. C. §1201-4.7.3 ("The admissibility of evidence and determinations of the weight to be given evidence and the credibility of witnesses shall be within the sound discretion of the Board.").

<sup>7</sup> *Vick v. DHSS*, Unemployment Insurance Appeal Board Hearing No: 40781330 (Oct. 28, 2011), at 2.

*Vick v. DHSS*  
*C.A. No.: 11A-10-004 (RBY)*  
*September 19, 2012*

will only be reviewed to check for an abuse of the Board's discretion.<sup>8</sup> There is no question that the Board acted within its discretion. The administrative code explicitly gives the Board authority to use its discretion in the exact manner that Claimant raises as an issue.<sup>9</sup>

Appellant's next three arguments take issue with the factual decisions made by the Board. As mentioned above, the scope of this Court's review on appeal from an administrative board decision is extremely limited. The evidence presented to the Board is clearly enough to meet the substantial evidence standard. Mr. Vick's submission seems to ask this Court to reconsider the same evidence he presented to the Board. If substantial evidence is found to exist, the Court may not re-weigh the evidence or substitute its own judgment for that of the Board.<sup>10</sup> The Board listened carefully to Appellant's evidence. In fact, the Board relied heavily on Mr. Vick's testimony in reaching its decision. These statements included his admission that he was using his phone to show a picture to a co-worker on the occasion in question.<sup>11</sup> While Appellant mentioned that the Electronic Device Policy was not consistently followed or enforced during his employment, he also admitted that whenever a

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<sup>8</sup> *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

<sup>9</sup> 19 Del. C. §1201-4.7.3.

<sup>10</sup> *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 1242 (Del. Super. 1976) (citing *Searles v. Darling*, 83 A.2d 96 (Del. 1951); *Cooch's Bridge Civic Ass'n v. Pencader Corp.*, 254 A.2d 608 (Del. 1969); *Fisher v. Pilcher*, 341 A.2d 713 (Del. 1975)).

<sup>11</sup> Tr. Vick, UIAB Appeal No. 40781330, at 20.

*Vick v. DHSS*  
C.A. No.: 11A-10-004 (RBY)  
September 19, 2012

supervisor was around they all put their cell phones away.<sup>12</sup> If the policy in question was not enforced, there would be no reason to hide cell phone use, as Appellant indicated was the common practice.<sup>13</sup>

Furthermore, when faced with the conflicting testimony of Appellant and Mr. Hill about the incident in question, the Board has discretion to believe whichever version of the events it finds most credible.<sup>14</sup> It is not within the authority of this court to question that decision so long as substantial evidence exists to support it, and no abuse of discretion is found.<sup>15</sup> The Court will only find an abuse of discretion when the administrative board's decision "exceeds the bounds of reason given the circumstances, or where rules of law or practice have been ignored so as to produce injustice."<sup>16</sup>

Appellant's final argument alleges his termination was a result of retaliation and discrimination. It would certainly be unfortunate and improper for an Employer to retaliate or discriminate based upon Appellant's sexual preference. However, Appellant did not provide any evidence to convince the Board that such improper

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<sup>12</sup> Tr. Vick, UIAB Appeal No. 40781330, at 22.

<sup>13</sup> Tr. Vick, UIAB Appeal No. 40781330, at 22; *Vick v. DHSS*, Unemployment Insurance Appeal Board Hearing No: 40781330 (Oct. 28, 2011), at 2.

<sup>14</sup> *Longobardi v. Unemployment Ins. Appeal Bd.*, 287 A.2d 690, 692 (Del. Super. Dec. 21, 1971).

<sup>15</sup> *Id.*

<sup>16</sup> *Bolden v. Kraft Foods*, 898 A.2d. 283 (Table), 2005 WL 3526324, at \*2 (Del. Dec. 21, 2005).

