SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

June 26, 2009

Warren V. Thompson
24787 German Road
Seaford, DE 19973

Wackenhut Corporation
c/o Jon Jay Associates
P.O. Box 6170
Peabody, MA 01961

Re: ***Warren V. Thompson v. Wackenhut Corporation***
C.A. No. 08A-01-002-RFS

Submitted: April 13, 2009

Dear Parties:

This is an appeal from the January 5, 2008 decision of the Unemployment Insurance Appeal Board ("Board") denying benefits to Warren Thompson ("Appellant"). Appellant now appeals the decision of the Board. For the reasons set forth below, the Board's decision is upheld.

BACKGROUND

Appellant had been employed as a trainer in security and related functions, with Wackenhut Corp. ("Appellee") since September 9, 2003. Appellant worked full-time

with a minimum of 40 hours a week. Appellee operates in the Wilmington/Newark area. In November 2006, Appellant went to the employer representative and said that he was due for an annual review. He was not making as much as he had been promised by the previous General Manager. Appellant said that he wanted to stay with Appellee, but that since had had moved to Seaford and increased his mileage to work, it had become too difficult. At the time, Appellant was driving two hours each way to and from work. Appellant was given a review and the initiation of a 10% raise. (Tr. 24, Er. #4).

On March 27, 2007, Appellant told the employer representative that he needed more money to cover his time and travel of about 700 miles per week. The employer representative told Appellant that they would need to start looking for a new trainer, since Appellee needed to have one. Appellant understood this requirement.

After Appellee hired another trainer in April, Appellant thought that there might be a position with Beebe Hospital, which would only require an 80 mile round trip between Seaford and Lewes. Appellant believed that Beebe might become Appellee's client. Mr. Pye, his supervisor, informed Appellant that Appellee might have opportunities for him in Baltimore and southern Delaware. At best, this was nothing more than speculation as to future market conditions. There were no full-time positions in Baltimore or at Beebe.

On April 19, 2007, Appellant submitted his resignation to be effective May 3, 2007. Mr. Pye did not immediately accept the resignation. Appellant went on a scheduled vacation. While on vacation on May 8, 2007, Appellant agreed to work an

overnight shift at Rehoboth. Appellant called Mr. Pye on May 21, 2007, and was asked to do CPR training on May 26. Appellee asked Appellant to return to work as a trainer for a week and then performed part-time work from June 6-8 and June 13-14. On June 18, Appellant worked training a class. From June 22 - July 16, Appellant did not contact Wackenhut. On July 16, he called and was told that there was no work available. On July 30, he was offered full-time work in the northern part of the state as an armed officer at his old pay rate. Shortly thereafter, Appellant informed Mr. Pye that he was filing for unemployment benefits.

A Claims Deputy found that Appellant was a partially employed individual and thus eligible for partial unemployment benefits. On August 17, 2007, an Appeals Referee reversed this decision and found that Appellant was neither unemployed nor partially unemployed. On January 5, 2008, the Unemployment Insurance Appeal Board affirmed the decision of the Appeals Referee and denied benefits to Appellant.

STANDARD OF REVIEW

The review of a decision of the Unemployment Insurance Appeal Board is limited to an examination of the record for errors of law, and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law. *Histed v. E. I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super. 2003) at *1. Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla but less than a preponderance of the evidence. *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988). In conducting its review, this Court is not to engage in the practice of judging witness credibility or weighing the evidence proffered; those functions are reserved exclusively for the Board. *Id.* at 1106.

Questions of law are reviewed de novo. *McDonalds v. Fountain*, 2007 WL 1806163 (Del. Super. 2007) at *1. Absent error of law, the standard of review for a Board's decision is abuse of discretion. *Opportunity Center, Inc. v. Jamison*, 2007 WL 3262211 (Del. Supr. 2007) at *2. The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances." *Willis* at *1.

DISCUSSION

The Board correctly stated the law and issue at page 2 of its decision:

> The issue in this case is whether the claimant is a "partially unemployed individual," within the meaning of Regulation 15.
>
> "Unemployment' exists and an individual is 'unemployed' in any *week* during which the individual performs *no* services and with respect to which *no* wages are payable to the individual. 19 *Del.C.* § 3302(17) (emphasis added). The Department of Labor has the authority to "[m]ake, amend and repeal regulations necessary for the internal administration of the Department or its authorized agents." 19 *Del.C.* § 105(a)(8). "A partially employed individual is one who, during a particular week, (I) earned less than his weekly benefit plus two dollars, (II) was employed by a regular employee [*sic*], (III) worked less than his normal customary full-time hours for such regular employer because of lack of full-time work." Regulation 15(a).

The Board found that Appellant's resignation was to be effective on May 3rd and that Appellee ultimately accepted the resignation. After May 3rd, it determined that a new agreement for part-time employment existed without guaranteed hours. As Appellant no longer had any "normal customary full-time hours," he did not meet the definition of a "partially unemployed individual" and was not eligible for compensation.

In his grounds of appeal and submissions, Appellant argues that there never was a meeting between him and Mr. Pye whereby a formal change was made in his employment status. Mr. Pye's testimony was not available as he was on family leave. There is an abundance of evidence, however, which is sufficient to show a new agreement through the words and deeds of the parties.

These particular points include:

a) another member of management, Anthony Dattoli ("Dattoli"), testified that the resignation was accepted, and that Appellant was paid out for two (2) weeks vacation that had been accrued. (Tr. 39, 80, 87).

b) After May 3rd, the effective date of resignation established by Appellant, Appellant accepted part-time work without guaranteed hours through the time of filing his initial claim on June 11th. (Tr. 33, 78, 79).

c) Because of the considerable distance and time to drive from Seaford to Newark, Appellant lost interest in a full-time position in northern Delaware. Appellant was not getting paid enough. Earlier in his employment, he lived close by but the move to Sussex

County was too much of an additional burden. Appellant communicated his dissatisfaction with Appellee in March and April. Appellee had to find another trainer to take his place so it would not be left in the lurch. Appellant understood this requirement and agreed to cooperate with the transition. (Tr. 38, 81, 86).

d) On August 30th, Appellant signed a conditional offer of employment. (Er. Ex. #3). It was for a custom protection officer position, similar to his previous work. As it reflects, prior to the 30th, Appellant and Appellee had reached an understanding whereby Appellant accepted full-time employment at Valero in Wilmington. Appellant worked for two weeks but then stopped. He sought and was denied vacation pay because none had accrued. His stopping of work is consistent with his prior actions that showed his lack of interest in traveling between the counties. (Tr. 88, 89, 93).

Appellant claims that the Board relied on false testimony. Dattoli's credibility was for the Board to decide. While Appellant claimed Appellee talked about him taking over operations in southern Delaware at a secretary's day lunch, one of the persons present, Diane Henry, denied that such a representation was made. (Tr. 42, 43). This Court is not allowed to judge the credibility of witnesses in appeals such as this one; only the Board may make those determinations which cannot be disturbed on appeal. *Breeding* at 1106.

Appellant acknowledged signing the conditional offer of employment on August 30th and working at Valero for two weeks. Appellant also argues that the offer of full-time employment should not have been considered. However, the evidence is probative

as to how the parties regarded Appellant's employment status beforehand. The Board has the latitude to parse through disputed questions of fact, and the need to consider all pertinent information.

After reviewing the record, there is sufficient testimonial and documentary evidence showing that Appellee ultimately accepted Appellant's resignation, and that a new agreement of part-time employment occurred whereby Appellant was not guaranteed any hours. This changed position was demonstrated by the parties' conduct as outlined above.

CONCLUSION

Considering the foregoing, the decision of the Unemployment Insurance Appeal Board must be affirmed.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary