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

DAVID PENNY,	:	
	:	**C.A. No: 12A-08-003 (RBY)**
Appellant,	:	
	:	
v.	:	
	:	
DELMARVA CLEANING & MAINTENANCE, INC.,	:	
	:	
	:	
Appellee.	:	

Submitted: January 18, 2013
Decided: April 8, 2013

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

ORDER

David Penny, *pro se*.

Noel E. Primos, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Appellee.

Young, J.

SUMMARY

Appellant David Penny ("Appellant" or "Penny") was employed full time as a housekeeper by Delmarva Cleaning & Maintenance, Inc. ("DMC") from September 24, 2005 to February 23, 2012. DCM provides cleaning services for Dover Downs. Penny was terminated by DCM for 1) being out of his assigned area; and 2) approaching a customer to request a tip, while out of his assigned area. Penny had a history of employment related misconduct, documented by write-ups and memoranda of meetings and oral warnings. Prior to the February 2012 incident, Penny was involved in an altercation with a co-employee. As a result of the altercation, Appellant was suspended for three days. At the time, he also was informed that additional violations would result in termination. Penny filed for unemployment benefits after his discharge in February 2012. The initial review by the Claims Deputy resulted in Penny's being found ineligible due to termination for just cause. Penny appealed that decision. A hearing was held before an Appeals Referee that ultimately resulted in the reversal of the Deputy's decision. DCM appealed the Referee's decision to the Unemployment Insurance Appeals Board (the "Board"). The Board held a hearing at which both sides were present. After the hearing, the Board issued a decision reversing the Referee's finding that Penny was eligible for unemployment benefits. Penny's appeal of the Board's decision is the issue before this Court. A review of the record and briefs of the parties demonstrates that the Board's decision was based on substantial evidence, not improperly based on hearsay, and did not involve legal error. The decision of the Unemployment Insurance Appeals Board is **AFFIRMED**.

FACTS

David Penny had been a full time employee of Delmarva Cleaning & Maintenance, Inc. since September 2005. DCM had a contract to provide cleaning services for Dover Downs. Penny worked as a housekeeper under that contract. His primary duties involved cleaning up trash, spills and other debris in his assigned area of the casino. Penny's employment was terminated February 23, 2012, as a result of a customer's complaint alleging that Penny approached him, soliciting a tip. The customer claimed that this was not the first time Penny had solicited him for tips. In fact, he claimed that Penny had repeatedly asked both the customer and his wife for tips, resulting in their being very upset. The customer described the person who had been pressing him to personnel, who confirmed the identity of the housekeeper in question as David Penny. In addition to the claims of customer's complaint, Penny was also found to be violating policy, because he was outside of his assigned section at the time.

Before the February 2012 incident that resulted in Appellant's being terminated, Penny had already received multiple warnings regarding conduct of a similar nature. DCM follows a progressive discipline policy for employee misconduct. Though the handbook lists this policy as applying only to attendance violations, the record indicates that it is applied "laterally" to other violations of company policy. At the time of the February incident, David Penny was aware that any future violations of company policy would result in his termination.

According to the record, Penny was given an oral warning for making some kind of "malicious comments" regarding his company or fellow employees to

customers on June 15, 2010. On September 21, 2010 Penny's supervisor, Stephen Bennett, wrote a note memorializing a second oral warning given to Penny for standing behind customers, talking to them while they were playing casino games. Penny's next violation was written up by Bennett on October 29, 2010. This report was the result of Penny's improperly carrying out his duties within his section. After the formal step, Gary Sherwood ("Sherwood"), DCM's Controller, brought Penny into the office to speak with him about time management and being willing to ask for help if things got too busy. This meeting occurred on November 8, 2010.

On the evening of June 24 or 25, 2011 David Penny was involved in an altercation with a fellow employee. The altercation involved a verbal confrontation which was loud and allegedly at the point of becoming physical. Penny and the other employee were separated before any blows could be thrown. Both employees were sent home for the night. Another of Penny's supervisors, Edmund Edwards, wrote a memorandum to management about the incident, requesting that Penny be suspended for his unacceptable behavior. A few days later, on June 27, Penny was made aware both orally and in writing that he would be suspended for three days as a result of the altercation. He was also informed at this time that any further misconduct would result in his immediate termination. As a result of this February incident, in which a customer complained about Penny, and where Penny was also out of position, he was terminated.

Penny filed a claim for unemployment benefits after his discharge. The Claims Deputy found that Penny's employer terminated him with just cause, disqualifying Penny from receiving unemployment benefits. Appellant appealed the Claims

Deputy's decision. His appeal was heard before an Appeals Referee on April 16, 2010. In addition to Penny, Gary Sherwood, Controller, appeared as Employer's representative. Edmund Edwards, a witness for the employer was also present. After hearing testimony and receiving evidence, the Appeals Referee reversed the Claims Deputy's determination. The Appeals Referee found that the employer failed to present any evidence to the tribunal, other than hearsay, in support of the alleged incident causing termination.

DCM appealed the decision to the Unemployment Insurance Appeals Board. The Board heard the appeal on July 24, 2012. Penny was present at this hearing. Also present at the hearing was Gary Sherwood, this time accompanied by two new witnesses: Cheryl Gearhart and Stephen Bennett ("Bennett"). Sherwood also brought new documents to support the employer's contentions: that DCM was not short handed on the evening of the incident; that Penny was not supposed to be in the section where the incident occurred; and that Penny's assigned sections were not adjacent to the section where he approached the complaining customer.

After hearing testimony, receiving the new evidence, and reviewing the record, the Board reversed the decision of the Appeals Referee. The Board decision thoroughly explains the basis of its decision. First, the employer had now presented direct testimony that Penny was seen in the section, other than the one where he was assigned on the February evening in question. In addition, the two witnesses both testified regarding statements made to them by the disgruntled customer. According to the Board's Opinion, these statements fall under either one of two hearsay exceptions as an excited utterance or present sense impression. The Board found

these statements to be further supported by other evidence presented by the employer to the board including: employment schedule, map of assigned work areas, and the Board's doubts about Penny's credibility in the face of this evidence. The Board concluded that, after a previous final warning about misconduct, Penny violated company policy, resulting in termination with just cause. Before this Court is Penny's appeal of the Board's decision.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence and free from legal errors.[1] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."[2] It is "more than a scintilla, but less than preponderance of the evidence."[3] An abuse of discretion will be found if the board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[4] Questions of law will be reviewed *de novo*.[5] In the absence of an error of law, lack of substantial

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[1] 29 *Del C*. §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

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

[3] *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979).

[4] *Delaware Transit Corp. v. Roane*, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting *Straley v. Advanced Staffing, Inc.,* 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)).

[5] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

evidence or abuse of discretion, the Court will not disturb the decision of the board.[6]

DISCUSSION

The Appellant has filed an appeal of the Board's decision with this Court. Penny begins his submission by denying the allegation that he ever asked anyone for a tip. He also repeats his contention that he was out of his section to assist in another part of the casino because DCM was short handed on the evening in question. He further alleges that he was supposed to be helping in other sections under the circumstances present. Finally, Appellant argues that the Board's decision is improperly based on hearsay evidence.

In response, DCM argues that Penny has failed to demonstrate that the Board's decision is not supported by substantial evidence or constitutes legal error. DCM argues that the Board correctly found the testimony of Gearhart and Bennett regarding the customer's statements to fall under two of the exceptions to the hearsay rule. Appellee further argues that even if the Court determines that the customer's statements do not fall under either hearsay exception, the Board's determination is still based upon substantial evidence, including Penny's lack of credibility.

The first set of arguments raised by the Appellant contains issues of fact and witness credibility. As mentioned above, the scope of this Court's review on appeal from an administrative board is limited. If substantial evidence is found to exist, the Court may not re-weigh the evidence or substitute its own judgment for that of the

[6] *Carrion v. City of Wilmington*, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006).

Board.[7] The issues raised by Appellant's filings pertain to his own belief about why he was fired and what occurred on the evening in question. When faced with the conflicting testimony of Appellant's and DCM's witnesses about the incident in question, the Board has discretion to believe whichever version of the events it finds more credible.[8] This court will not question that decision, so long as substantial evidence exists to support it, and no abuse of discretion is found.[9] The Court will find an abuse of discretion only 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."[10]

In the present case, the Board based its decisions regarding whether Penny was outside his section as well as his general credibility on substantial evidence. DCM provided both documents and testimony directly addressing the issues of whether they were understaffed, and whether Penny had been seen outside his assigned area. Penny attended the hearing, providing testimony in opposition to the contentions of his employer. The Board's decision to find the employer's version of events and evidence

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[7] *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)).

[8] *Longobardi v. Unemployment Ins. Appeal B*d., 287 A.2d 690, 692 (Del. Super. Dec. 21, 1971).

[9] *Id.*

[10] *Bolden v. Kraft Foods*, 898 A.2d. 283 (Table), 2005 WL 3526324, at *2 (Del. Dec. 21, 2005).

more credible is a proper exercise of discretion.

Appellant's other argument regarding the Board's alleged improper reliance on hearsay evidence in reaching a determination merits further consideration.

A hearsay statement is admissible under the present sense impression exception found in D.R.E. 803(1), when the statement satisfies the following requirements[11]:

(1) The declarant must have personally perceived the event described,

(2) The statement must be in the form of an explanation or description, rather than a narrative,

(3) The statement must be made contemporaneously or immediately after the event described.[12]

This exception is based on the theory that this type of spontaneous statement, describing an event, is "trustworthy because the declarant has no time to fabricate the statements and because there is less concern that the statements reflect a defect in the declarant's memory."[13] Independent corroboration of the statement is not required for admission. However, may be necessary in some cases for the purpose of determining whether declarant made the statement within the requisite time frame or that declarant actually personally perceived the event described.[14]

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[11] D.R.E. 803(1)

[12] *Abner v. State*, 757 A.2d 1277, at *1 (Del. June 29, 2000)(TABLE)).

[13] *Warren v. State*, 774 A.2d 246, 252 (Del. 2001).

[14] *Warren*, 774 A.2d at 252.

A hearsay statement can be admitted pursuant to the excited utterance exception to the hearsay rule when three foundational requirements are met: "(1) the excitement of the declarant must have been precipitated by an event; (2) the statement being offered as evidence must have been made during the time period while the excitement of the event was continuing; and (3) the statement must be related to the startling event."[15]

Cheryl Gearhart and Stephen Bennett were DCM's witnesses at the hearing before the Board. Gearhart testified about Declarant Customer's demeanor and statements when he approached her to complain about being harassed for tips by a DCM employee. Gearhart described the Declarant as being so mad that he seemed to want to hit Penny. She also testified that Declarant told her what had happened, noting that it was not the first time the employee had bothered him for money. Bennett was contacted and informed that there was an individual downstairs who was upset and complaining about an employee. Bennett testified that he went downstairs and personally spoke to the Declarant Customer. The Customer repeated the same allegations to Bennett. According to the record, after the incident Bennett wrote up a report and turned it in to his superiors.[16]

Under the circumstances presented, either of the above hearsay exceptions could apply to testimony regarding Declarant's statements. The statements satisfy the requirements for a present sense impression exception. Declarant described to

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[15] *Gannon v. State*, 704 A.2d 272, 274 (Del. 1998)(citing 6 *Wigmore on Evidence* §1750 (Chadbourn rev.1976)).

[16] Decision of Appeal to Referee, Employer's Exhibit 5.

Gearhart and Bennett an event that he personally perceived. His statement was given in the form of a description or explanation. The evidence, including the demeanor of the Declarant, indicated that the statement was given immediately after the incident occurred.

The statements in question also satisfy the requirements for admission as an excited utterance. The Declarant was visibly excited and upset. That excitement was precipitated by the alleged repeated harassment by Penny. Declarant's statement was made during the time period while the excitement caused by the event was still ongoing. The record indicates that at least one witness described the Declarant as extremely upset, and perhaps ready for a fight.[17] The statement in question, describing Penny and what occurred, clearly relate to the event.

As the testimony in question satisfies the requirements for exceptions to the hearsay rule, and because the testimony carried indicia of trust worthiness, it was properly used as part of the basis for the administrative decision.

Moreover, even if the testimony regarding the Customer's statement were considered hearsay not within an exception, that alone would not be reason to reverse the Board's decision. Administrative boards are not bound by the formal rules of evidence.[18] Hearsay evidence may be admitted and considered by a board, "provided that such evidence is not the sole basis of the Board's decision."[19] Assuming

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[17] Transcript of Administrative Hearing at 5, July 24, 2012.

[18] *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del.1995).

[19] *Bethel v. Board of Educ. of Capital School Dist.*, 985 A.2d 389 (Del. Dec. 4, 2009)(TABLE)).

arguendo that the testimony is not excepted from the hearsay rule under D.R.E. 803(1) and/or 803(2), that testimony was not the sole basis for the Board's decision. These statements are further supported by other evidence presented by DCM to the Board.

The Employer offered an employment schedule from the date in question, to refute Penny's testimony that DCM was shorthanded that evening. DCM also presented the Board with a map of the casino floor which demonstrates that Penny's assigned section was not adjacent to the area in which the incident occurred, as he had testified that it was. Finally, the Board has Penny's testimony admitting that he was in the section where the incident occurred, as well as DCM's witness who provided direct testimony that Penny was seen in the area. The evidence presented to the Board casts doubt on Penny's credibility and provides substantial evidence beyond hearsay that the incident occurred as described.

CONCLUSION

For the foregoing reasons, the decision of the Unemployment Insurance Appeals Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
Mr. Penny, *pro se*
Opinion Distribution
File