IN THE SUPREME COURT OF THE STATE OF DELAWARE

REGINA POTTER,	§	
	§	No. 237, 2013
Claimant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	Kent County
	§	
STATE OF DELAWARE	§	C.A. No. K10A-06-009
DEPARTMENT OF CORRECTION,	§	C.A. No. K12A-06-006
	§	
Employer Below,	§	
Appellee,	§	
	§	
and the UNEMPLOYMENT	§	
INSURANCE APPEAL BOARD,	§	
	§	
Appellee.	§	

Submitted: September 4, 2013
Decided: November 13, 2013

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 13th day of November 2013, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Claimant-below Regina L. Potter ("Potter") appeals from two Superior Court orders. The first order, issued in 2011, reversed an Unemployment Insurance Appeal Board ("Board") decision that because Potter had been constructively discharged by her employer, the Delaware Department of Correction ("DOC"), she was entitled to unemployment benefits. On remand, the

Board found that Potter had voluntarily resigned from her employment without good cause, and denied her benefits. In April 2013, the Superior Court affirmed that Board decision. Potter appeals from both Superior Court orders. We find that Potter's claims have no merit and affirm.

2. In August 2009, it was discovered that Potter, a Correctional Officer at the Plummer Community Corrections Center, had two DOC offenders listed as "friends" on her Facebook page. On Friday, August 21, 2009, Warden Steven Wesley sent an e-mail to DOC staff initiating a "210" disciplinary investigation into whether Potter's conduct violated DOC policies.

3. At the beginning of the investigation, Stephen Martelli, the president of the Correctional Officers Association of Delaware (the correctional officers' union), spoke with Potter about her situation. Martelli consulted the union's lawyer about the probable outcome of Potter's case, examined the content of Potter's Facebook page, and concluded that Potter's was a "non-win" case. Martelli then advised Potter that her best option was to resign; otherwise she would be terminated. Martelli did not speak with the Warden about the case before giving Potter this advice.

4. On Monday, August 24, 2009 (before the completion of the disciplinary investigation), Potter sent her resignation to the Warden by e-mail, which stated: "Following the advice of my union representative *in regards to your*

recommendation; I, Regina Potter am resigning . . . ."[1] Potter later testified that Martelli had told her that, instead of transferring her to another facility, the Warden wanted Potter to resign. Both the Warden and Martelli denied that they had had any conversations, either about transfer or resignation, before Potter submitted her resignation.

5. In September 2009, Potter submitted a claim for unemployment benefits to the Delaware Department of Labor. Her claim was denied, first by the Claims Deputy and then by the Appeals Referee.[2] Both concluded that Potter had voluntarily quit her employment without good cause. Potter then appealed the Referee's decision to the Board. The Board held a hearing in May 2010, during which Martelli testified. The DOC submitted DOC Policy 9.12 as evidence that administrative remedies had been available to Potter, which she failed to pursue before resigning. In a June 2010 decision, the Board determined that Potter had been constructively discharged from the DOC because Martelli's advice offered her no "reasonable alternative."[3]

6. The DOC appealed to the Superior Court, which, in a November 29, 2011 order, found as a matter of law that, because Martelli was not an agent of the

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[1] Italics added.

[2] The Appeals Referee held a hearing on November 5, 2009 before issuing its decision.

[3] *Potter v. Delaware Dep't of Corr.*, UIAB Appeal Docket No. 40112662 (June 18, 2010), at 9.

DOC, Potter had not been pressured by her employer to resign. Accordingly, Potter was not constructively discharged.[4] The court remanded the case to the Board for "a determination of whether the Claimant had good cause for her voluntary resignation."[5] On remand the Board, without conducting a hearing, found that Potter did not have good cause for her voluntary resignation.[6] The Superior Court affirmed that decision in an April 8, 2013 order.[7] This appeal followed.

7. We review a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by directly examining the decision of the agency,[8] to determine whether the decision is supported by substantial evidence and is free from legal errors.[9] Claims that the agency committed errors of law are reviewed *de novo*.[10] Absent an error of law, we review an agency decision for abuse of

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[4] *Delaware Dep't of Corr. v. Potter*, Del. Super., C.A. No. K10A-06-009, Witham, J. (Nov. 29, 2011), at 5 ("Therefore, the Board's constructive discharge analysis fails as a matter of law.").

[5] *Id*. at 8.

[6] *Potter v. Delaware Dep't of Corr.*, UIAB Appeal Docket No. 40112662 (June 15, 2012), at 3.

[7] *Potter v. Delaware Dep't of Corr.*, Del. Super., C.A. No. 12A-06-006, Young, J. (Apr. 8, 2013), at 9.

[8] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380 (Del. 1999).

[9] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (citing *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del. Super. Ct. Mar. 24, 2008)).

[10] *Id.*

discretion.[11] The agency will be found to have abused its discretion only if its decision "exceeded the bounds of reason in view of the circumstances."[12]

8. Preliminarily, the DOC claims that the issues raised on this appeal are time barred because Potter did not challenge the November 2011 order within 30 days. We have previously held that, "[c]learly, an order of remand by the Superior Court to [an Administrative Board] is an interlocutory and not a final order."[13] Had Potter sought to appeal the November order, we would have dismissed the appeal as interlocutory.[14] Accordingly, this appeal is not time barred.

9. Potter first claims the Superior Court erred in its November 2011 order by overturning the Board's finding that Potter was constructively discharged. We find that this claim has no merit. Constructive discharge may include a resignation that is induced by pressure from an *employer*.[15] The record here, however, shows that Potter chose to resign based on the advice of Martelli, her union president.

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[11] *Id.*

[12] *Id.* (quoting *Stanley*, 2008 WL 2410212, at *2).

[13] *Taylor v. Collins and Ryan, Inc.*, 440 A.2d 990, 990 (Del. 1981) (citing *Cicamore v. Alloy Surfaces Co.*, 244 A.2d 278 (Del. 1968); *McClelland v. General Motors Corp.*, 214 A.2d 847 (Del. 1965)). "We interpret *Taylor* as applying to all remands except remands for 'purely ministerial' functions." *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 104 n.3 (Del. 1982) (citing *McClelland v. General Motors Corp.*, 214 A.2d 847, 848 (Del. 1965)).

[14] *See e.g.*, *A & J Builders, Inc. v. McKirby*, 2009 WL 2972916, at *1 (Del. Sept. 14, 2009) (Holland, J.); *New Castle Cty. Dep't of Fin. v. 1001 Jefferson Plaza P'ship*, 1994 WL 632635, at *1 (Del. Nov. 7, 1994) (Holland, J.).

[15] *Anchor Motor Freight, Inc. v. Unempl't Ins. Appeal Bd. of Delaware*, 325 A.2d 374, 376 (Del. Super. Ct. 1974).

Martelli was not an agent of the DOC, and Martelli's advice was not based on any communications with the Warden. Therefore, Martelli's advice cannot be imputed to the DOC. Because the DOC did not pressure Potter to resign,[16] and the Board's conclusion that Potter was constructively discharged was not supported by substantial evidence, the Superior Court did not err by reversing and remanding the case.

10. Potter's second claim is that the Superior Court erred by affirming the Board's 2012 decision. Potter argues that the Board's 2012 decision contradicted its 2010 decision, and, therefore, should not have been upheld. The Superior Court addressed that claim in its April 2013 order, explaining that:

> [T]he Court found, as a matter of law, that the Board's June [1]8, 2010 decision was based on incorrect analysis. As a result of the Court's decision, the Board was required to engage in different analysis (though on the very same evidence) the second time around. For that reason, the opinions issued by the Board were by necessity very different.[17]

That reasoning is correct. The Superior Court's November 2011 order required the Board to determine whether Potter had "good cause" for her voluntary

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[16] *Cf. Id.* at 375-76 (affirming a Board finding that claimant was pressured to quit when her *employer* threatened to withhold paychecks and altered her work schedule).

[17] *Potter v. Del. Dep't of Corr.*, Del. Super., C.A. No. 12A-06-006, Young, J. (Apr. 8, 2013), at 8.

resignation.[18] In its second decision, the Board, based on the evidence of record, found that Potter did not have good cause for her resignation. The Superior Court did not err by upholding that Board decision.

12. Finally, Potter claims that her due process rights were violated because a Deputy Attorney General was present during a closed Board meeting on remand. The Deputy Attorney General who was present at the meeting was serving as counsel to the Board, and was not the same Deputy who represented the DOC.[19] Potter argues that because the Attorney General's office represents the DOC, no representative from that office, even the Board's counsel, should have been present without Potter or her counsel also present.[20] The presence of a Deputy Attorney General acting as the Board's counsel, wholly apart from the DOC's separate

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[18] It is well established that the claimant bears the burden of showing "good cause" for voluntarily terminating employment. *Lorah v. Home Helpers, Inc.*, 2011 WL 2112739, at *2 (Del. May 26, 2011) (citing *Longobardi v. Unempl't Ins. Appeal Bd.*, 287 A.2d 690, 692 (Del. Super. Ct. 1971) *aff'd* 293 A.2d 295 (Del. 1972)). "'Good cause' for quitting a job must be such cause as would justify one in voluntarily leaving the ranks of the employed and joining the ranks of the unemployed." *O'Neal's Bus Serv., Inc. v. Empl't Sec. Comm'n*, 269 A.2d 247, 249 (Del. Super. Ct. 1970). In order to demonstrate good cause, an employee must, before quitting, make a good faith effort to resolve any problems with the employer and exhaust available administrative remedies. *Ingleside Homes, Inc. v. Gladden*, 2003 WL 22048205, at *7 (Del. Super. Ct. Aug. 27, 2003).

[19] *Potter v. Del. Dep't of Corr.*, Del. Super., C.A. No. 12A-06-006, Young, J. (Apr. 8, 2013), at 8.

[20] Due process requires that parties be given "the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends. Further, due process requires that the notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings." *Vincent v. Eastern Shore Markets*, 970 A.2d 160, 164 (Del. 2009) (footnote omitted).

representation, did not violate Potter's right to due process. Potter presents no evidence that the DOC's counsel was involved in the Board's decision or that there was any communication between counsel for the Board and the DOC during the Board's decision-making process. Therefore, this claim is without merit as well.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice