

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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RE: ***The Department of Justice of the State of Delaware v. Robin S. Densten, et al.***
C.A. No.: N14A-09-008 RFS

Appellant's Motion to Supplement the Record.
Denied.

Dear Counsel:

Pending before the Court is the Motion to Supplement the Record filed by the appellant, Department of Justice ("DOJ").

In 2005, the appellee, Robin Densten ("Ms. Densten"), became a DOJ Trial Support Specialist. Ms. Densten was responsible for the preparation of audio/visual and other demonstrative exhibits for the DOJ's prosecutors. Given Ms. Densten's position, she was often required to work late hours. In the fall of 2013, Ms. Densten submitted an overtime request that was initially denied because she failed to obtain prior approval in accordance with the DOJ's policy. On September 27, 2013, Ms. Densten submitted her resignation.

On November 15, 2013, Ms. Densten filed a claim for unemployment compensation. A Claims Deputy determined that, pursuant to 19 *Del. C.* § 3314, Ms. Densten left work voluntarily

without good cause; therefore, she was not entitled to unemployment compensation. Ms. Densten filed an appeal, and a hearing was scheduled before an Appeals Referee. At the hearing, Ms. Densten appeared *pro se* and testified. The DOJ presented the testimony of two witnesses, Diane Hasse, the DOJ's Human Resources Director, and Joseph Grubb, Ms. Densten's supervisor. He became Ms. Densten's supervisor upon assuming the position of Chief New Castle County Prosecutor. In a decision dated March, 26, 2015, the Appeals Referee likewise found Ms. Densten was disqualified.

Ms. Densten filed a timely appeal of that decision to the UIAB, and a hearing was scheduled for July 16, 2014. Because of witness unavailability, the DOJ sought a continuance. The UIAB continued the hearing for July 30, 2014. On July 28, 2014, Ms. Densten requested a continuance to better prepare her case. This request was granted, and the hearing was rescheduled for August 13, 2014. The DOJ, again citing witness unavailability, requested another postponement. However, the UIAB essentially informed the DOJ the request would have to be made at the hearing. This was an older case on the docket.

When the DOJ made the request, the UIAB denied it. However, the UIAB limited the scope of Ms. Densten's testimony. Specifically, she could only testify to conversations she had with Ms. Hasse, the DOJ's Human Resource Director, and the only DOJ witness present at the hearing. On September 8, 2014, the UIAB reversed the decision of the Appeals Referee finding that Ms. Densten did have good cause to voluntarily leave work.

The DOJ filed a timely appeal to this Court on September 18, 2014. Thereafter, the DOJ filed a motion with this Court to supplement the record to include documents that were not included in the record that was transmitted by the UIAB for review. Specifically, the DOJ seeks to include five pages of email communications between the DOJ and the UIAB concerning continuance requests. The DOJ also seeks to include a one-page email communication between Ms. Densten and Ms. Hasse dated September 27, 2013. Ms. Densten does not object to the scheduling communications. However, Ms. Densten contends that adding the additional one-page email would be inappropriate.

A motion to reopen and supplement the record is addressed to the discretion of the Court.¹ Generally, the admission of late-submitted evidence is not favored.²

¹ *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010).

² *Id.*

The following factors, applied in judicial proceedings, are pertinent to this administrative law question:

- 1) whether the evidence has come to the moving party's knowledge since the trial,
- 2) whether the exercise of reasonable diligence would have caused the moving party to discover the evidence for use at trial,
- 3) whether the evidence is so material and relevant that it will likely change the outcome,
- 4) whether the evidence is material and not merely cumulative,
- 5) whether the moving party has made a timely motion,
- 6) whether the nonmoving party will be unduly prejudiced, and
- 7) considerations of judicial economy.³

These factors are discussed seriatim.

1) The DOJ's knowledge and ability to discover the one-page email between Ms. Densten and Ms. Hasse.

This email was sent by Ms. Densten to Ms. Hasse on September 27, 2013—the same day as her resignation and before the UIAB hearings. Ms. Densten and Ms. Hasse had meetings and communications about employment procedures. Without limiting the subject matter when a decision on the merits is made, Ms. Hasse addressed Ms. Densten's complaints about her work environment, her "butting of heads" with her supervisor, and her objection to the rejection of compensable time.⁴

The email requests information about an appeals process for the denial of compensatory time. Ms. Densten reported the subject of relief was discussed before September 27 with Ms. Hasse. However, Ms. Densten believed any efforts were futile. The communication may indicate the subject was discussed only on the day of her resignation. Clearly, Ms. Hasse knew about this email. The DOJ had the ability to obtain it when the Department of Labor became involved.

2) Had the DOJ exercised reasonable diligence, they would have discovered the evidence for use at trial.

In its Motion, the DOJ concedes that the one-page email existed before the Department of Labor hearings; however, this email was not used. The DOJ explains that the email "was not introduced below in the proceedings as no one could have anticipated the UIAB's reasoning for

³ *Id.*

⁴ *Robin S. Densten v. Dep't of Justice*, Appeal Docket No. 20929370, at 8:21-23 (Del. U.I.A.B Feb. 17, 2014).

its decision and the single issue it decided to focus upon.”⁵ Also, the DOJ claims the volume of communications sent to Ms. Hasse excuses the lapse. However, the dispute between Ms. Densten and her supervisor had to carry a higher level of interest given the personnel. In litigation, Ms. Hasse was a witness, and all communications, especially those on the day Ms. Densten resigned, were important. Other communications were found and introduced. The DOJ did not exercise reasonable diligence.

3) The evidence is not so material and relevant that it would likely change the outcome.

The email basically contradicts Ms. Densten’s testimony concerning the timing of her requests about getting relief. This affects her credibility on whether or not she reasonably pursued administrative remedies.⁶ Again, part of the record suggests that Ms. Densten spoke with Ms. Hasse about the subject beforehand. The proffered evidence is another attack on Ms. Densten’s credibility beyond points made before the Referee and Deputy. The DOJ enjoyed success at the first two stages of the tripartite administrative process without this evidence.

4) The evidence is not material.

The proffered use questions Ms. Densten’s credibility and does not make a difference.

5) The DOJ has made a timely motion.

The DOJ’s Motion to Supplement the Record was timely.

6) Ms. Densten will likely be prejudiced if the DOJ is allowed to supplement the record with the one-page email.

Allowing this evidence at this juncture will prejudice Ms. Densten. Specifically, Ms. Densten would have no opportunity to respond to the information contained therein.⁷ Ms. Densten is entitled to the regular course of appellate review without undue delay from a situation entirely beyond her control.

⁵ DOJ’s Br. in Supp. of Supplementing the R. at *2 ¶ 4.

⁶ See *Thompson v. Christiana Care Health Systems*, 25 A.3d 778, 783 (Del. 2011) (holding that to establish good cause under 19 Del. C. § 3314, an employee must first exhaust all reasonable alternatives to resolve the issues).

⁷ See *Pope*, 2010 WL 3075296, at *2 (“Benda may be unduly prejudiced if the 2009 10-K is introduced without giving Benda an opportunity to respond to the new information.”).

7) The DOJ's request is a strain on judicial economy.

Ms. Densten filed her claim with the Department of Labor on November 15, 2013. The hearing before the UIAB was held on August 13, 2014. At this date, if supplemented, the case would be remanded to the Board. Credibility determinations are made below. The Court is charged with managing its docket and has limited time to adjudicate its appellate and general jurisdiction cases.

Finally, under the totality of the circumstances, considerations of fairness and justice should be applied.⁸ On balance, the scales weigh against the DOJ, and its Motion to Supplement the Record is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office

⁸ *Id.* at *2.