

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ACTS RETIREMENT LIFE)
COMMUNITIES,)
)
Claimant-Appellant,)
) C.A. No. N21A-04-001 VLM
v.)
)
JAMES IGO and)
UNEMPLOYMENT INSURANCE)
APPEAL BOARD,)
)
Employer-Appellees,

ORDER

Submitted: September 20, 2021

Decided: November 17, 2021

*Upon Consideration of Appellant’s Appeal of the Decision of the Unemployment Insurance Appeal Board, **AFFIRMED.***

Anthony N. Delcollo, Esquire, Helene E. Episcopo, Esquire, Offit Kurman, Wilmington, DE. *Attorneys for Appellant Acts Retirement Life Communities.*

Michelle D. Allen, Esquire, Emily Biffen, Esquire, Allen & Associates, Wilmington, DE. *Attorneys for Appellee James Igo.*

Victoria E. Groff, Esquire, Department of Justice, Wilmington, DE. *Attorney for Appellee Delaware Division of Unemployment Insurance.*

MEDINILLA, J.

I. INTRODUCTION

Appellant, ACTS Retirement Life Communities (“Employer”), appeals a decision of the Unemployment Insurance Appeal Board (“Board”) that found James Igo (“Igo”) was qualified for unemployment benefits after Employer failed to appear for a hearing meet its burden of proof. Upon consideration of the arguments, submissions of the parties, and the record in this case, the Court hereby finds as follows:

1. Igo was employed as a full-time security guard for Employer for six years.¹ Employer terminated Igo on September 3, 2019, alleging he falsified company records and engaged in threatening behavior, or in violation of the Employer’s code of conduct.²

2. Following his termination, Igo filed for unemployment benefits.³ On October 11, 2019, the Department of Labor Claims Deputy (“Claims Deputy”) determined Igo was discharged for just cause and was therefore ineligible to receive benefits.⁴ Igo appealed the finding to the Appeals Referee, who reversed the decision, finding Igo was eligible to receive benefits.⁵ Employer then appealed to the Board, which determined Igo was terminated for just cause.⁶

¹ Record, Transcript of Proceedings dated January 26, 2021, at 39.

² Appellant’s Opening Brief, D.I. 15, at 1 [hereinafter Opening Brief].

³ Opening Brief, at 1.

⁴ Record, Dep’t of Labor Notice of Determination dated September 15, 2019, at 95–96.

⁵ Record, Referees Decision dated October 31, 2019, at 146.

⁶ Record, Unemployment Insurance Appeals Board Decision dated December 11, 2019, at 188.

3. On March 5, 2020, Igo appealed the Board's decision to the Superior Court.⁷ On January 5, 2021, another judicial officer of this Court reversed and remanded the Board's decision.⁸ In accord with that ruling, the Board remanded the matter to the Appeal's Referee for a fact-finding hearing.⁹

4. On January 26, 2021, the Appeal's Referee conducted a *de novo* hearing.¹⁰ She further acknowledged that she had not read the decision of the Superior Court prior to the hearing but would review the Court's decision prior to issuing the *de novo* ruling.¹¹

5. Employer did not appear for the hearing¹² and thus did not establish by a preponderance of evidence that Igo was discharged for good cause.¹³ Igo did appear and presented his evidence.¹⁴ On January 27, 2021, the Appeal's Referee found in his favor.¹⁵

⁷ Record, First Notice of Appeal to the Superior Court, at 198.

⁸ See *Igo v. Acts Retirement Life Communities*, 2021 WL 37461, at *2–*5 (Del. Super. Jan. 5, 2021) (finding: (1) the evidence supports the Board's finding that Employer had a reasonable company policy prohibiting the alleged conduct and Igo was aware of the policy; (2) the Board committed legal error where it failed to correct the "Appeal's Referee's error of denying Igo, a self-represented litigant, the opportunity to present hearsay evidence"; (3) the Board committed legal error where it failed to address "whether Igo was entitled to a final warning"; and (4) the record did not contain substantial evidence to support the Board's finding that Igo had falsified the company records).

⁹ Record, Board's Remand to the Appeal's Referee, at 70.

¹⁰ Record, Transcript of Proceedings dated January 26, 2021, at 31–56.

¹¹ *Id.* at 37.

¹² *Id.* at 34.

¹³ Record, Referee Decision dated January 27, 2021, at 24.

¹⁴ Record, Transcript of Proceedings dated January 26, 2021, at 31–56.

¹⁵ Record, Referee Decision dated January 27, 2021, at 24.

6. On February 18, 2021, Employer’s counsel contacted the Board to determine the status on the remand and enter its appearance on behalf of Employer.¹⁶ On February 23, 2021, the Board provided Employer with the Appeal’s Referee decision.¹⁷ That same day, Employer notified the Board that it had never received notice of the hearing¹⁸ and requested an appeal of the decision.¹⁹ The Board held the appeal was untimely, and affirmed the decision of the Appeal’s Referee.²⁰

7. On April 1, 2021, Employer filed a notice of appeal with this Court. Briefs were filed on July 5, July 26, and August 10, 2021. This matter was assigned to this Court on September 20, 2021. This matter is now ripe for decision.

II. STANDARD OF REVIEW

8. On an appeal from the Board, this “[C]ourt must determine whether the findings and conclusions of the Board are free from legal error” and whether they are “supported by substantial evidence in the record.”²¹ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²² The Court does not “weigh the evidence or make determinations

¹⁶ Record, Email from Anthony Delcollo, Esq., dated Feb. 18, 2021, at 30.

¹⁷ Record, Email from Sabrina Ali, at 28.

¹⁸ Record, Email from Anthony Delcollo, Esq., dated Feb. 23, 2021, at 27

¹⁹ Record, Appeal Request Notification, at 26.

²⁰ Record, Corrected Board Decision dated March 12, 2021, at 6–8.

²¹ *Wilson v. Unemployment Ins. Appeal Bd.*, 2011 WL 3243366, at *2 (Del. Super. July 7, 2011) (citing *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del. 1981).

²² *Byrd v. Westaff USA, Inc.*, 2011 WL 3275156, at *1 (Del. Super. July 29, 2011) (quoting *Oceanport Industries, Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

based on credibility or facts.”²³ Absent an abuse of discretion by the Board, this Court will uphold the Board’s determination.²⁴

III. DISCUSSION

9. Employer’s contentions can be summed up in two main arguments: (1) the Board violated Employer’s due process rights when it denied Employer the ability to present evidence; and (2) the Board abused its discretion and committed legal error when it failed to address the Appeals Referee’s lack of consideration of the Superior Court’s remand instructions. The Court addresses each argument in turn:

A. Employer was not Denied Due Process

10. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”²⁵ The formality and procedure required will vary on the nature of the case.²⁶ In terms of a claim before the Board, due process requires that a party receive notice and a hearing.²⁷ When

²³ *Id.* (citing *Johnson v. Chrysler Corp.*, 203 A.2d 64, 66 (Del. 1965)).

²⁴ *See Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

²⁵ *Schweizer v. Board of Adjustments of City of Newark*, 980 A.2d 379, 385-86 (Del. 2009) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 336 (1976)).

²⁶ *Turkey’s Inc. v. Peterson*, 2002 WL 977190, at *5 (Del. Super. May 13, 2002) (citing *Morris v. Southern Metals Processing Co.*, 530 A.2d 673 (Del. 1987)).

²⁷ *PAL of Wilmington. v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008) (citation omitted).

notice is correctly addressed, stamped, and mailed, it is “presumed to have been received by the party to whom it was addressed.”²⁸

11. The Board considered and properly addressed Employer’s first claim regarding the insufficiency of the notices of both the remanded hearing and the Appeal’s Referee decision.²⁹ Employer contends that although Employer’s counsel “was clearly noted in the Court’s decision,”³⁰ no notice of the hearing was received by Employer’s counsel. This argument is equally unpersuasive on appeal.

12. This Court has found that lack of evidence of mailing error by the Board “supports the presumption that properly mailed and addressed mail was received.”³¹ This presumption may be rebutted by the party alleging lack of receipt.³² Here, the Board reviewed Employer’s claim and found “no evidence of [d]epartmental error” and nothing to justify notice was incorrectly addressed.³³ The Board further noted “[t]he Referee’s hearing notice and the Referee’s Decision were sent to Employer’s address on file with the Division,”³⁴ supporting the presumption of receipt by Employer.

²⁸ *Graham*, 2008 WL 2582986, at *4; see also *Windom v. William C. Ungerer, W.C.*, 903 A.2d 276, 282 (Del. 2006).

²⁹ Opening Brief, at 5.

³⁰ Opening Brief, at 6 (citing to *Igo v. Acts Retirement Life Communities*, 2021 WL 37461, at *2 (Del. Super. Jan. 5, 2021)).

³¹ *Graham*, 2008 WL 2582986, at *4.

³² *Id.* at *5.

³³ Record, Corrected Board Decision dated March 12, 2021, at 7.

³⁴ *Id.* at 7 n.8.

13. Additionally, Employer has provided no evidence that he did not receive notice except to state that it was not received by its counsel. Mere denial, without more, is insufficient to rebut the presumption that notice was received.³⁵ This Court has previously established there is no requirement that notice of an agency hearing be sent to counsel for a party.³⁶ Because no such notice is required,³⁷ Employer's argument that its counsel never received notice does nothing to impact the Board's determination. Substantial evidence exists to support the Board's finding that notice was received.

14. Second, the Court is not persuaded by Employer's argument that the Board abused its discretion where it declined to exercise its discretionary powers and refused to grant a hearing. Under 19 *Del. C.* § 3318(c), the decision of the Appeal's Referee "shall be deemed to be final unless within 10 days after the date of notification or mailing of such decision further appeal is initiated."³⁸ In denying Employer's appeal, the Board noted the last day for Employer to file an appeal with the Board was February 6, 2021, and Employer's appeal was filed on February 23, 2021.³⁹

³⁵ See *Straley v. Advance Staffing, Inc.*, 984 A.2d 124, 2009 WL 3451913, at *2 (Del. 2009).

³⁶ *Graham*, 2008 WL 2582986, at *5.

³⁷ See *id.* at *5.

³⁸ 19 *Del. C.* § 3318(c).

³⁹ Record, Corrected Board Decision dated March 12, 2021, at 7.

15. The Board further acknowledged it may exercise discretion under 19 *Del. C.* § 3320 to accept an untimely request in “severe circumstances”⁴⁰ and declined to do so. The Board found Employer had “been given notice and an opportunity to be heard”⁴¹ and properly determined that Employer has not “provided any evidence of any *severe* circumstances sufficient to justify the exercise of the Board’s discretion.”⁴² It is not an abuse of discretion for the Board to decline to hold a hearing.⁴³ The Board’s power to accept an untimely appeal is discretionary. Here, the Board’s decision is supported by substantial evidence.

16. Finally, Employer cites to *Kostyshyn v. Unemployment Insurance Appeal Board*⁴⁴ to suggest that the Board abused its discretion for failing to consider evidence/testimony regarding notice.⁴⁵ This is not persuasive. Our Supreme Court has declined to extend a testimonial evidence requirement, finding that “in the majority of cases, record copy of the notice alone has been found to be adequate proof of mailing.”⁴⁶ The record includes copies of both the notice of the hearing and

⁴⁰ *See id.*

⁴¹ *Id.* at 8.

⁴² *Id.* at 7.

⁴³ *See Straley*, 984 A.2d 124, 2009 WL 3451913, at *2–*3 (affirming Superior Court finding of substantial evidence that notice was received when sent to the address on file where mail was previously received by claimant and the Board did not abuse its discretion in denying a hearing to rebut the presumption).

⁴⁴ 1982 WL 593159 (Del. Super. July 9, 1982).

⁴⁵ Opening Brief, at 7.

⁴⁶ *Straley*, 984 A.2d 124, 2009 WL 3451913, at *2.

the notice of the Appeal's Referee's decision.⁴⁷ The Board's decision that Employer received both the hearing notice and the decision of the Appeal's Referee is supported by substantial evidence.

B. The Board Did Not Abuse its Discretion or Commit Legal Error When it Affirmed the Referee's Decision

17. Employer's last argument is that the Appeal Referee's failure to comply with this Court's instructions on remand requires reversal.⁴⁸ The claimed failure here is that where the Superior Court remanded the case, the Appeals Referee should have considered its ruling and insisted on obtaining evidence from both sides. This argument is also without merit. The Appeal's Referee did consider the Superior Court's decision when she stated at the hearing, "I will also check the Superior Court decision, and I will check with my boss on that and how to proceed before I write my decision."⁴⁹

18. Furthermore, the Board addressed Employer's argument and found it unpersuasive. The Employer's email to the Board arguing that the Appeal's Referee conducted an overly broad fact-finding hearing⁵⁰ was acknowledged by the Board.⁵¹

⁴⁷ See Record, Notice of Hearing dated Jan. 13, 2021, at 72; Record, Notice of Referee's Decision dated Jan. 27, 2021, at 57.

⁴⁸ Opening Brief, at 9, 11.

⁴⁹ Record, Transcript of Proceedings dated January 26, 2021, at 37.

⁵⁰ See Record, Notice to Appeal Board Email dated February 23, 2021, at 27.

⁵¹ Record, Corrected Board Decision dated March 12, 2021, at 7 n.5.

After giving it due consideration, the Board decided to affirm the Appeal's Referee's decision. Such a decision is properly within the province of the Board.

19. Employer claims unfair treatment where Igo has been "allowed to have a complete, new bite at the apple" due to the *de novo* review by the Appeal's Referee.⁵² Indeed, this is true and procedurally appropriate due to the Superior Court's remand. The parties were given an opportunity to present their evidence. Employer failed to appear. Employer's request for the same "new bite" however is improper and procedurally unsound.

20. The record supports the Board's decision to deny Employer's request for appeal and a new hearing. The Board did not abuse its discretion and there is no error of law. For the foregoing reasons, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Vivian L. Medinilla
Judge

⁵² See Reply Brief of Appellant ACTS Retirement-Life Communities, D.I. 22, at 7.