IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BOBBIE J. PEARSON,	:	
	:	C.A. No. K20A-07-001 WLW
Appellant,	:	
	:	
v.	:	
	:	
FEINDT'S PLUMBING SERVICE, LLC and UNEMPLOYMENT INSURANCE APPEAL BOARD,	:	
	:	
Appellees.	:	

Submitted: February 2, 2021
Decided: April 20, 2021

ORDER

Upon an Appeal from the Decision of the
Unemployment Insurance Appeal Board.
Affirmed.

Bobbie J. Pearson, *pro se*

Eric R. Eric Hacker, Esquire of Morris James, LLP, Georgetown, Delaware; attorney for Feindt's Plumbing Service, LLC.

Daniel C. Mulveny, Esquire and Victoria Counihan, Esquire of the Department of Justice, Civil Division, Wilmington, Delaware; attorneys for the Unemployment Insurance Appeal Board.

WITHAM, R.J.

Before the Court is Employee-below/Petitioner Bobbie Pearson's (hereafter "Petitioner") appeal of the decision of the Unemployment Insurance Appeal Board (hereafter "the UIAB") that disqualified Petitioner from eligibility for unemployment benefits following Petitioner's termination by Employer-below/Respondent, Feindt's Plumbing Service, LLC (hereafter "Respondent"). After reviewing the record below and presentations of the parties, the Court **AFFIRMS** the decision of the UIAB.

Factual and Procedural History

Petitioner was hired by Respondent on November 14, 2019, to act as Respondent's office manager. After what amounted to approximately two months of employment, Respondent terminated Petitioner's employment on January 14, 2020, for poor performance and falsifying time records.[1] Petitioner was denied benefits by the Claims Deputy.[2] Petitioner appealed the Claims Deputy's decision to the Appeals Referee, and a hearing was held on March 10, 2020.[3] The Appeals Referee reversed the Claims Deputy because the Respondent failed to show that Petitioner's actions exhibited the required willful misconduct and wanton behavior necessary to support a claim of termination with just cause.[4]

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[1]Respondent's Answering Brief at 2.

[2]*Id.* at 4.

[3]Record at 224.

[4]Record at 109.

Respondent appealed this decision to the UIAB on March 16, 2020, and a hearing was held before a panel of board members on June 3, 2020.[5] In their decision, the board members found (1) "[t]here is no dispute that Claimant (Petitioner) paid herself for holidays and recorded comp time as Claimant admitted that she did so;" (2) "that the witness Claimant subpoenaed to appear on her behalf emphatically supported Employer's (Respondent) position that Employer did not pay for holidays or allow comp time;" and (3) that the board members found Respondent's and Petitioner's own witness' testimony credible.[6] Based on these three findings the UIAB concluded that Respondent did show sufficient evidence to support a just cause termination and the board members reversed the decision of the Appeals Referee.

The UIAB mailed its decision to Petitioner on June 30, 2020. The decision noted that the decision became final on July 10, 2020.[7] Petitioner filed her petition for appeal of that decision with this Court on July 9, 2020.[8] The parties' briefs were timely filed with this Court.

Parties' Arguments

Petitioner's argument is that the UIAB made an error of fact by discounting evidence which Petitioner confirmed the UIAB possessed. Petitioner further argues

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[5]Record at 229.

[6]Record at 228.

[7]Record at 229.

[8]Record at 231.

that she was unaware of the option to petition the UIAB for a rehearing of the case nor was she ever informed that doing so was a procedural requirement before filing a petition for review with this Court.

Respondent argues that this Court lacks subject matter jurisdiction because Petitioner failed to exhaust all appeal remedies with the UIAB prior to petitioning this Court, thus making the present petition premature. Respondent also argues that Petitioner has failed to show that the UIAB committed legal error or that substantial evidence does not support the Board's decision.

The UIAB, which is named as a defendant in this petition in accordance with 19 Del. C. §3322(b), only argues that Respondent's reading of the applicable statute as to timeliness of appeal to this Court is too narrow. The UIAB urges this Court to adopt its reading of the applicable statute which provides for a much larger period of time in which a petitioner can make an appeal of a UIAB decision.

Standard of Review

This Court's judicial review of final decisions ordered by administrative boards is restricted to determinations of any errors of law or to determinations of support by substantial evidence.[9] Issues of legal error are reviewed de novo, and reviews of substantial evidence will only involve the record presented to the Court "in the light most favorable to the party prevailing below."[10] This Court does not

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[9]*Hockensmith v. Unemployment Ins. Appeal Board*, 2016 WL 2620642 at *2 (Del. Super. Mar. 11, 2016); citing 29 Del. C. §10142(d); see also *Wilson v. Breakers Hotel & Suites*, 2010 WL 2562214 (Del Super June 24, 2010).

[10]*Id.*

second guess the determination of the administrative board nor does it weigh credibility of witnesses or make determinations based on evidence outside the existing record.[11] Absent errors of law or a determination of insufficient evidence, the Court will affirm board decisions unless there is a finding by the Court that the board abused its discretion through acting arbitrarily or capriciously.[12] Lastly, the Court will also review board decisions to determine whether the board "'exceed[ed] the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.'"[13]

Discussion

There are two issues before the Court in this case as presented by the parties. The first is whether substantial evidence supports the determination of the UIAB in reversing the Appeals Referee's decision in favor of the Petitioner. The second is whether the filing of the petition to this Court was in accordance with the statutory language which may demonstrate that the Court lacks subject matter jurisdiction. These issues will be addressed in order.

Substantial Evidence and Errors of Law

In matters of unemployment insurance benefits being denied to an employee, the employer bears the burden of showing before the UIAB that the employee's actions were "willful or wanton" justifying termination or that the employee's

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[11] *Id.*

[12] *Id.*

[13] *Id.*; quoting *PAL of Wilmington v. Graham*, 2008 WL 2582986 at *1 (Del. Super. June 18, 2009).

conduct repeatedly violated "the employer's interest, the employee's duties, or the employee's expected standard of conduct."[14] The employer loses justification to terminate the employee if the conduct is tolerated over a period of time and the employer does not first give warning that such conduct is not tolerated.[15] Board decisions based on substantial evidence presented by the employer will be sufficient to affirm the decision.

As characterized by Respondent, "the instant appeal centers on whether [the Petitioner] improperly paid herself for holidays by recording and applying compensatory time that she claimed to have accumulated."[16] Therefore, it was incumbent upon the Respondent to provide evidence that Petitioner, in fact, "improperly paid herself" for hours not worked. The UIAB's decision explicitly states that "Employer has presented sufficient evidence to show that there was just cause to terminate Claimant."[17] The UIAB based this conclusion on the credible testimony of Respondent and the testimony of Petitioner's own witness.[18] The UIAB relied on documented evidence through electronic mail exchanges and cellular phone text messages where Respondent repeatedly had to clarify and correct

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[14]*Murphy & Landon, P.A. v. Pernic*, 121 A. 3d 1215 at 1222 (Del. 2015); quoting *Avon Prods., Inc. V. Wilson*, 513 A. 2d 1315 at 1317 (Del. 1986).

[15]*Id.*; quoting *Moeller v. Wilmington Savings Fund Society*, 723 A. 2d 1177 at 1179 (Del. 1999).

[16]Respondent's Answering Brief at 2.

[17]Record at 227.

[18]Record at 228.

Petitioner's accounting of time worked.[19] The UIAB found that "[t]here is no dispute that Claimant paid herself for holidays and recorded comp time as Claimant admitted that she did so."[20] The documented evidence, adverse testimony of Petitioner's own witness before the UIAB, and the contradictory testimony given by Petitioner during the hearing all demonstrate that the UIAB's decision is supported by substantial evidence.

Finally, there is no disputing the legal basis on which the UIAB relied in issuing its determination. The UIAB decision accurately depicted the legal requirements to show just cause termination and willful and wanton conduct.[21]

Jurisdiction to Hear This Petition

Title 19 of Delaware Code, section 3322(a), gives this Court jurisdiction to review decisions of the UIAB "only after any party claiming to be aggrieved has exhausted all administrative remedies as provided by this chapter." Respondent advocates that this statute be read to mean that this Court can only review UIAB decisions "10 days after the date of notification or mailing" of the decision to the parties.[22]

Respondent cites *Ortiz v. Adecco USA, Inc.* for the proposition that "[a] Board's decision is final ten days after it is mailed. A party then has ten days to

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[19]Record at 2; see also Record at note 4.

[20]Record at 5.

[21]Record at 4 and 5.

[22]19 Del. C. §3322(a); Respondent's Answering Brief at 9.

appeal the final decision to this court."[23] However, Respondent failed to consider that the facts in *Ortiz* involved an appeal of a Board decision that was filed by the respondent in that case two months after the 10-day cut off.[24]

This Court finds that the proper reading of the statutory time to appeal a UIAB decision is best explained by *Henry v. Department of Labor*. In that case, the Petitioner filed an appeal of a UIAB decision two months after requesting a rehearing with the UIAB. First, the Court found that "[n]o provision in Title 19, Delaware Code, chapter 33 provides the Board with the power to grant a rehearing."[25] A rehearing by the UIAB is one that is an inherent power as an adjudicative body, but it is not a required appellate procedure necessary before petitioning judicial review of a UIAB decision.[26]

Second, the Court in *Henry* rejected a similar reading of 19 Del. C. §3322 that Respondent urges here by saying that the 10-day period after the decision becomes final through notification or mailing is an *extension of time* to appeal and not the beginning of the clock on when to appeal.[27] (Emphasis added.) The Court in *Henry* relied on a case from the Texas Supreme Court that had to answer the same question

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[23]Respondent's Letter, Trans. I.D. 66274964.

[24]*Ortiz v. Adecco USA, Inc.*, 2015 WL 5120986 at *1 (Del. Super. Aug. 11, 2015).

[25]*Henry v. Department of Labor*, 293 A. 2d 578 at 581 (Del. Super. May 15, 1972).

[26]*Id.*

[27]*Id.* at 582.

based on a statute with "sections virtually identical" to the Delaware statute.[28] Citing the Texas case, the *Henry* Court held that petitions for review of administrative decisions before those decisions become final "did not defeat the trial court's jurisdiction of appeal."[29]

Finally, the *Henry* Court noted that petitions to the UIAB for a rehearing before the decision becomes final tolls the running of the appeal period.[30] It stands to reason that, if a petition for rehearing before the decision is final tolls the appeal period, then the appeal period begins to run before the decision becomes final. Here, the UIAB mailed its decision to the parties on June 30, 2020, and the decision specified that the decision was final on July 10, 2020.[31] The Petitioner filed her petition with this Court on July 9, 2020.[32] Because the running of the appeal period began to run before the date that the decision became final, the petition for appeal to this Court was not premature. Thus, this Court has jurisdiction to hear this petition.

Conclusion

The Respondent's assertion that this Court lacks jurisdiction is unfounded; however, the Petitioner failed to show that the UIAB committed a legal error in its decision and that the UIAB's decision was not supported by substantial evidence.

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Record at 229.

[32] Record at 231.

WHEREFORE, as explained in the reasons above, this Court does have subject matter jurisdiction over this petition and **AFFIRMS** the UIAB's decision disqualifying Petitioner from receiving unemployment insurance benefits.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh