IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TRINA M. STANFORD,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N10A-12-009 CLS
	)	
MERIT EMPLOYEE RELATIONS BOARD, and DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	
	)	
Appellees.	)	

Date Submitted: August 5, 2011
Date Decided: November 30, 2011

On Appeal from the Decision of the Merit Employee Relations Board.
AFFIRMED.

ORDER

Perry F. Goldlust, Esq., 702 King Street, Suite 600, P.O. Box 1675, Wilmington, DE 19899. Attorney for Appellant, Trina Stanford.

Kevin R. Slattery, Esq., Delaware Department of Justice, State Office Building, 820 N. French Street, Wilmington, DE 19801. Attorney for Appellee, Delaware Department of Health and Social Services.

Scott, J.

Introduction

Before this Court is the Appellant's appeal from the decision of the Merit Employee Relations Board ("Board"). The Court has reviewed the parties' submissions. For the reasons that follow, the decision of the Board is **AFFIRMED**.

Background

This appeal arises from Appellant's, Trina Stanford ("Appellant" or "Stanford") employment with the Division of Child Support Enforcement ("DCSE"), an agency of the Department of Health and Social Services ("DHSS").

The Appellant was employed by the DCSE as an Accounting Specialist from November 5, 2001, until her termination on October 5, 2009. She worked in a unit that processed child support payments. Her job duties included financial instrument verification and posting the financial instrument to the proper account. Financial instrument verification required Stanford to determine if the financial document was properly completed so it could be deposited. After determining that the document was properly completed, Stanford was responsible for posting the payments to the correct case using two identifiers (the non-custodial parents name, social security number, or case number).

As an Accounting Specialist, it was imperative that the child support payments were property encoded and posted to the proper account. If these

processes were not completed properly, the parties involved were burdened. Specifically, custodial parents and their children did not receive needed child support payments and the non-custodial parent did not receive credit for the payments made. Additionally, if the incorrect entered amount could not be recovered, the State bore the financial loss.

According to the State of Delaware Employee Performance Plan for Account Specialist implemented on February 22, 2002,[1] Stanford was required to "[e]xpeditiously process child support payments, assuring accuracy, so that the posing of the [p]ayment and subsequent disbursement is correct, and in accordance with federal and state [g]uidelines." [2] Federal regulations required DCSE to process child support payments within two business days. Meeting this Federal requirement enabled DSCE to have Federal financial participation in the child support program, which provides for about 66% of administration costs. The ultimate goal in this position was to correctly identify and post every payment with a low margin of error.

The Performance Plan had additional policies for the employees, including a break policy for all staff.[3] Appellant signed this plan on February 20, 2002.

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[1] The Performance Plan stated the date or time period covered was, "February 22, 2002[,] to continuous." R. at 317.
[2] R. at 317.
[3] The Division of Child Support Enforcement authorizes a break for staff who conforms to the guidelines as outlined below:
* Staff is to notify the supervisor when taking a break (sign/out sheet at supervisor's discretion).

The performance in the payment processing department is measured against the unit average. The statistic changes every month because the error rate depends on how many payments were processed. The error rate is then reflected in the number of financial instruments that were posed, not by a quota.

Stanford received three performance reviews that occurred prior to the performance review from January 4, 2008, until May 29, 2008. The Board only considered the performance reviews after the review from January 4, 2008, until May 29, 2008. Stanford's supervisor, Kelli Stepler ("Ms. Stepler") gave Stanford an unsatisfactory performance review for the period of January 4, 2008, until May 29, 2008. Attached to the performance review was a breakdown of eighteen errors by Stanford such as posting bad checks and posting checks to the incorrect account. Mr. Stepler indicated that Stanford offered possible explanations and solutions on ways to avoid future errors but Stanford did not implement these solutions. The performance review indicated that Stanford's ability to self-correct

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* Staff must limit their time to only one break in the morning and one in the afternoon.
* Each break is not to exceed ten (10) minutes.
* Breaks must be taken between the hours of 9:30 a.m. – 11:30 a.m. and 1:30 p.m. – 3:30 p.m.
* Breaks cannot be added to lunchtime or the beginning or end of the day.
* Breaks are limited to the number of staff at one time (to be determined by supervisor).
* All smoke breaks must be at designated areas only (to be determined by site manager).
* There are no exceptions and this policy is effective immediately.

and her poor performance was unacceptable, resulting in the unsatisfactory evaluation.[4]

On June 16, 2008, Stanford received a written reprimand for her "continued failure to follow proper payment processing procedures and for [her] disregard of accepting accountability for processing these payments."[5] The letter noted that for the year of 2006, Stanford's total error margin was .15% while the unit average was .051%. From February 13, 2007, until May 31, 2007, Stanford's error margin was .080%. On December 31, 2007, Stanford's error rate was .085%. Some of these errors were discovered at a later date.

Ms. Stepler gave Stanford an unsatisfactory performance review from June 16, 2008, until February 6, 2009. The review indicated the following: (1) Stanford has severe deficiencies in producing accurate results even with supervisory counseling and has repeatedly not followed proper procedure when posting payments;[6] (2) Stanford has severe deficiencies in following the State of Delaware

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[4] R. at 333. The performance review also stated: "[s]ince counseling has occurred numerous times in the past and this is not a training issue, Ms. Stanford's errors will be reviewed with her, as they are discovered, on a weekly basis. Ms. Stanford's performance will be re-evaluated in 30 days to determine further disciplinary action."

[5] R. at 343.

[6] Four examples demonstrating Stanford's propensity not to follow proper procedures are indicated

policy for signing out when leaving the building;[7] and (3) Stanford has severe deficiencies in her ability to communicate effectively with management and peers.[8]

Stanford received another written reprimand on October 14, 2008 for failure to follow the State of Delaware policy for signing out. The letter indicates that since January 4, 2008, Stanford has been reprimanded six times about following this policy. Despite the prior reprimands about company policy, Stanford again violated the policy on October 9, 2008. The written reprimand was continual non-compliance with the sign out procedures.[9]

Prior to February 2009, the child support processing was paper-based system where checks were "batched" for processing.[10] In February 2009, DSCE implemented an image based system known as RAPID ("Rapid"). With Rapid, additional information was presented to the account specialist by pre-identification. The Rapid system made payment processing less difficult and more efficient.

Rapid did not affect Stanford's work performance. She continued to struggle with accuracy even though she was given several opportunities to improve. These opportunities included on the job training and individualized assistance from her supervisors. Stanford completed three training sessions on

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[7] The letter cites to 5 specific examples of not complying with the State of Delaware policy for signing out when leaving the building.
[8] The letter cites to 3 specific examples of this.
[9] The letter states: "[f]uture incidents of insubordination or other misconduct may result in disciplinary action up to, and including dismissal." R. at 428.
[10] R. at 53.

November 18, November 21, and December 9, 2008, for a total amount of 12 training hours.

Between April 2, 2009 and August 13, 2009, Ms. Stepler sent Stanford 17 e-mails attaching checks that were improperly processed. Some of the checks were not signed, some were encoded for the improper amount and others were posted to the wrong account. On August 27, 2009, Hope LaChance ("Ms. LaChance"), the Fiscal Administrative Officer for DCSE sent Stanford a letter proposing her dismissal as an Accounting Specialist at DCSE. The letter indicated that there were a total of 43 errors during the performance review period of June 16, 2008 until February 6, 2009. Again, from February 10, 2009 until June 16, 2009, sixteen specific errors were cited on the termination letter. According to Ms. LaChance, every effort was made to help Stanford improve her job performance. Her responsibilities were significantly reduced, she was offered training opportunities and she met regularly with her supervisor. Even with all of this help, Stanford's job performance continued to be unsatisfactory. Stanford was permitted to request a pre-termination meeting to offer any reasons why dismissal may not be justified or too severe of a penalty.

Stanford's pre-termination hearing was held on September 23, 2009. At the meeting, Stanford did not present any information suggesting that the dismissal was not justified under the circumstances or too severe. Based on this, Stanford

was officially terminated from DSCE by letter dated October 5, 2009, for all the reasons stated in Ms. LaChance's letter. In addition to what was indicated in the termination letters, several other factors were considered in Stanford's termination. A decision to terminate Stanford meant that DSCE could not hire anyone else to fill that position. Based on the amount of time that was focused on helping Stanford, "it became clear that it best benefitted the unit to dismiss her, rather than to put all of those resources into one individual."[11]

Stanford filed a grievance after she was terminated from DSCE. The grievance was denied on November 25, 2009, after a hearing on October 27, 2009.

Stanford then appealed to the Board, which held in a 4-1 vote that DHSS had just cause to terminate Stanford from her position as Accounting Specialist. The Board held that Merit Rule 12.8 does not preclude evidence of an employee's unsatisfactory job performance more than two years prior to the notice of intent to terminate. However, the Board acknowledges that if Merit Rule 12.8 does apply, the June 16, 2008, letter of reprimand was within two years of the date of the notice of intent to terminate Stanford (August 27, 2009). The Board did not rely on Stanford's 2006 and 2007 performance reviews and instead, only made its determination based on the 2008 and 2009 performance reviews.

Stanford appealed to this Court and DHSS responded to the appeal.

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[11] R. at 59.

Issues on Appeal

In Appellant's opening brief filed on July 7, 2011, she claims: (1) the Board committed legal error when they ruled that Merit Rule 12.8 did not apply, that the production standards that were in place were inadequate, and there should have been progressive discipline in this case; and (2) there was not substantial evidence in the record supporting Stanford's just cause for termination.

DHSS argues that the Board did not commit legal error in denying benefits to Appellant, that there is substantial evidence in the record to support the Board's findings of fact and Appellant presents no grounds for reversal of the Board's decision.

Standard of Review

In reviewing decisions of the Board, this Court's role is limited. The record is reviewed to ensure the Board's decision is supported by substantial evidence to justify the Board's findings of fact and conclusions of law, and is free from legal error.[12] "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the prevailing party below, resolving all doubts in its favor."[13] Questions of law are reviewed *de novo*.[14] However, this Court will not reweigh evidence, determine the credibility of the witnesses, or

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[12] *Gibson v. Merit Employee Relations Bd.*, 2011 WL 1376278, at *2 (Del. Apr. 12, 2011).
[13] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Ct. Aug. 16, 1991) (citation omitted).
[14] *Ward v. Department of Elections*, 2009 WL 2244413, at *1 (Del. Super. Ct. July 27, 2009).

make its own factual findings and conclusions.[15] Instead, this Court must merely determine if the evidence is legally adequate to support the Board's factual findings.[16] Furthermore, "[j]udicial deference is usually given to an administrative agency's construction of its own rules in recognition of its expertise in a given field."[17] Thus, an appellate court will only reverse an agency's interpretation of the rules of the interpretation is "clearly wrong."[18]

Discussion

As a preliminary matter, appellant argues that she was not afforded proper due process because the hearings officers relied on their prior experiences which constitute relying on documents outside the record. This argument is meritless. In *Withrow v. Larkin*,[19] the United States Supreme Court held that a party asserting unconstitutional bias because an administrative agency exercises both adjudicative and investigative duties must overcome a presumption of honesty and integrity in those serving as adjudicators. Here, Stanford has not overcome the presumption of honesty and integrity in those serving as adjudicators. Thus, it was not a violation of Stanford's due process rights for the Board to rely on their prior experiences in evaluating this case.

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[15] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *see also* 29 *Del. C.* § 10142(d).
[16] *Id.*
[17] *Ward*, 2009 WL 2244413, at *1 (*citing Div. of Soc. Servs. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981)).
[18] *Burns*, 438 A.2d at 1229.
[19] 421 U.S. 35 (1975).

I. The Board Did Not Commit Legal Error In Concluding That Stanford Was Terminated With Just Cause.

The Board Properly Applied the Just Cause Standard.

The Board properly determined that just cause existed to terminate Stanford based on unsatisfactory job performance. In *Vann v. Cheswold*[20] the Supreme Court of Delaware held that just cause in this context means, "a legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee's competency and ability to perform his duties."[21] Thus, the Board did not commit legal error in concluding that the *Vann* standard applied to termination based on unsatisfactory job performance.

The Board Did Not Commit Legal Error In Their Interpretation of Merit Rule 12.8.

Merit Rule 12.8 states, "[a]dverse documentation shall not be cited by agencies in any action involving a similar subsequent offense after 2 years, except if employees raise their past work record as a defense or mitigating factor."[22] The Board concluded in their opinion dated November 29, 2010, that Merit Rule 12.8 did not preclude evidence of Stanford's job performance more than two years prior to the notice of intent to terminate. While the Board should not interpret a rule that seems unambiguous, it appears that the Board did not consider the 2006 and 2007

[20] 945 A.2d 1118 (Del. 2008).
[21] *Id.* at 1122.
[22] M.R. 12.8.

performance reviews. Only the 2008 and 2009 performance reviews were considered in determining there was substantial evidence in the record to conclude that DHSS had just cause to terminate Stanford for unsatisfactory performance. Therefore, the Board did not commit legal error in their interpretation of Merit Rule 12.8 because performance reviews involving similar subsequent errors after two years were not considered in their determination.

The Board Properly Considered the 2002 Performance Plan.

The Board did not commit legal error in concluding that the production standards in place on February 22, 2002, were adequate. The 2002 performance plan for and Accounting Specialist specifies the requirements of the job. The Accounting Specialist was responsible for accurately and expeditiously processing the payments in accordance with the Federal standards. The Board properly used the 2002 performance plan as a guide. The plan was effective beginning on February 22, 2002. There is no indication that the plan was modified or altered since its implementation in 2002. The regulations do not discuss how many transactions should be processed in one day because the number of checks changed on a day to day basis. The 2002 plan adequately put employees on notice of their job responsibilities.

The implementation of Rapid had no effect on the performance standards, as the employees still had the same duties. The only change was that Rapid made

payment processing more efficient and easier for the employees. Therefore, because the Performance Plan was not altered by DSCE and Rapid did not change the job description of an Accounting Specialist, the Board was correct to rely on it after February 2009.

Additionally, Appellant argues that a 100% error-free check processing standard is not realistic and is arbitrary and capricious. However, in the position of Accounting Specialist, multiple errors are a detriment to families relying on child support, on the non-custodial parent and on the State of Delaware. The employees were not held to a 100% error-free check processing standard and instead, were compared to the department average based on the amount of checks processed. Thus, the low error rate was just the goal and employees were compared to one another when calculating the individual error rate.

Performance-Based Termination Did Not Require Progressive Discipline.

The Board did not commit legal error when they held that the use of performance-based termination did not require progressive discipline. While there is no Delaware case law on point, the New Jersey Appellate Court has addressed this issue. In *Klusaritz v. Cape May County*,[23] the Board applied progressive discipline to a Certified Public Accountant who had no prior suspensions and did not receive formal notice on its dissatisfaction with his work and identification of

[23] 903 A.2d 1095 (N.J. Super. Ct. App. Div. 2006).

the nature of the dissatisfaction. The Court reversed the Board and held that the Board's application of progressive discipline was misplaced and contrary to public interest. Specifically, appellant's numerous errors were a detriment to the office, and his inability to perform his job duties added additional expense to the government.

Here, unlike *Kluzaritz*, Stanford was given formal notice of her errors and suggestions of how to remedy them. Nevertheless, a suspension would not have made Stanford competent to perform her job and instead gives the perception that incompetency and inefficiency are tolerated in the workplace. Thus, the Board did not commit legal error in their application of progressive discipline.

II. The Decision of the Board is Supported by Substantial Evidence.

Stanford alludes to an argument in her opening brief about the Board's consideration of the State's Unemployment Referee's decision and Stanford's Family and Medical Leave Act documentation. These arguments fall under the category of evidentiary matters.[24] "In dealing with evidentiary matters on appeal, this Court does not stand as the trier of fact and will not weigh witness credibility and, therefore, it cannot substitute its own opinion for that of the [Board's] if there is sufficient evidence to support the [Board's] decision . . ."[25]

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[24] *See Lopicko v. De Dep't of Servs. for Children*, 2003 WL 21976409, at *3 (Del. Super. Ct. Aug. 15, 2003).
[25] *Id.*

The decision of the Board is supported by substantial evidence in the record. Evidence is substantial when a reasonable person would think the evidence presented was adequate to support the conclusion.[26] In determining whether substantial evidence exists to support the Board's decision, this Court must view the record in the light most favorable to the prevailing party.[27]

Here, there is substantial evidence in the record supporting just cause for termination. The testimony of Midge Holland, Hope LaChance and Kelly Stepler before the Board establish that Stanford's numerous and repeated processing and posting errors was a "legally sufficient reason supported by job-related factors that rationally and logically touch upon the employee's competency and ability to perform [her] duties."[28] The voluminous record is replete with examples of Stanford's errors and her supervisors numerous, unsuccessful attempts to correct those errors.

There is substantial evidence in the record to support the Board's decision which is free from legal error. Therefore, the Board's decision that DHSS had just cause to terminate Stanford is **AFFIRMED**.

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[26] *Oceanport Ind. v. Wilmington Stevedores.*, 636 A.2d 892, 899 (Del. 1994).
[27] *Brommel v. Chrysler, LLC*, 2001 WL 4513086, at *3 (Del. Super. Ct. Oct. 28, 2010) (*citing E.I. DuPont De Nemours & Co. v. Fanpel*, 859 A.2d 1042, 1046-47 (Del. Super. Jan. 30, 2004).
[28] *Vann*, 945 A.2d at 1118.

Conclusion

Based on the forgoing, the decision of the Board is **AFFIRMED.**

IT IS SO ORDERED.

/s/calvin l. scott
Judge Calvin L. Scott, Jr.