IN THE SUPREME COURT OF THE STATE OF DELAWARE

GRACE L. NORCISA,	§	
	§	
Appellant Below,	§	No. 579, 2013
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
DEPARTMENT OF HEALTH AND	§	in and for Kent County
SOCIAL SERVICES, and THE MERIT	§	C.A. No. K13A-03-001
EMPLOYEE RELATIONS BOARD,	§	
	§	
Appellees Below,	§	
Appellees.	§	

Submitted: February 28, 2014
Decided: March 25, 2014

Before **HOLLAND**, **BERGER** and **RIDGELY**, Justices

ORDER

This 25th day of March 2014, upon consideration of the parties' briefs and the record below,[1] it appears to the Court that:

(1) The appellant, Grace Norcisa, filed this appeal from a Superior Court order affirming the decision of the Merit Employee Relations Board ("MERB" or "the Board"), which upheld the decision of Norcisa's

[1] The appellee also filed a motion to strike arguments and documents filed by appellant in conjunction with her reply brief. Appellant did not respond to the motion to strike. It is clear that appellant raises arguments and includes documents not considered by the MERB or the Superior Court. This Court will not consider arguments and evidence that were not considered by the trial court or administrative tribunal in the first instance. *Turner v. State*, 5 A.3d 612, 615 (Del. 2010). Accordingly, the Court does not consider appellee's new arguments or documents in this appeal.

employer, the Department of Health and Social Services ("DHSS"), to terminate Norcisa's employment. Among other things, Norcisa claims that the MERB erred by denying her request to continue the hearing and by rejecting certain documents from inclusion in evidence. Norcisa further claims that the MERB's decision is not based on substantial evidence. We find no merit to the appeal. Accordingly, we affirm.

(2) From 2006 until her termination on January 15, 2010, Norcisa was employed as a lab technician at the Stockley Center in Georgetown, Delaware. The Stockley Center is operated by a division of DHSS and provides rehabilitative training, healthcare, and residential services for patients with developmental disabilities. As a lab technician, Norcisa's responsibilities included drawing blood from patients and submitting the blood samples, along with requests for testing, to an outside facility where the tests would be conducted on the samples. Tests could only be authorized by a physician or nurse; Norcisa could not authorize any tests herself. After an initial test was ordered, a physician could later authorize "add-on tests" to be conducted on the previously submitted blood sample. Add-on tests also required prior authorization from a physician or a nurse before Norcisa could request them. At the time of the event in question, the Stockley Center had no disseminated policy for recording the authorization of add-on tests,

however, it was common practice to authorized the add-on tests in writing. If verbal authorization was given for add-on tests, the authorization would be reduced to writing at a later time.

(3) In July of 2009, one of the facility's patients was SR,[2] who had severe developmental disabilities, suffered from a variety of physical ailments, and was considered medically fragile. SR received treatment from several of the facility's physicians, including Dr. Kelly and Dr. Shoukry. On July 2, 2009, Dr. Shoukry ordered initial testing on blood drawn from SR. On July 13, 2009, Norcisa signed a request for several add-on tests. There was no written record of who authorized the add-on tests, the results of which were negative. On July 13, 2009, Dr. Shoukry ordered that a second round of blood be drawn from SR for further testing. On July 21, 2009, Norcisa signed a request for further add-on testing. These add-on tests could not be conducted because the second blood sample was not large enough. Again, there was no record of who authorized the add-on tests.

(4) In August of 2009, Norcisa had a conversation with Carlene Bond ("Bond"), a registered nurse employed at the Stockley Center, regarding SR's medical treatment. During the conversation, Norcisa allegedly told Bond, "[t]he doctors are missing something with [SR] . . . I

[2] This pseudonym was used by the MERB to protect the patient's privacy.

can't believe they are not being more aggressive in finding out what it is. On the last blood drawn from her, I even added more tests . . . just to check on my own."[3] A few weeks later, Bond reported the alleged conversation to Marie Hitchens, the Nursing Supervisor at the Stockley Center.

(5) Based on Bond's report to Hitchens, DHSS initiated an investigation to determine whether Norcisa in fact had requested unauthorized add-on tests. Norcisa denied the allegations. On December 8, 2009, DHSS sent Norcisa a pre-termination letter informing her that DHSS intended to terminate her employment on the basis of requesting unauthorized add-on tests, which DHSS claimed amounted to misconduct, fraud, misappropriation of Medicare and Medicaid funds, and the practice of medicine without a license. On January 15, 2010, DHSS terminated Norcisa's employment at the Stockley Center.

(6) On January 26, 2010, Norcisa filed a Merit Appeal with the MERB and requested a hearing before the Board as well as a hearing before Human Resources Management ("HRM") in the office of Management and Budget. On April 21, 2010, the HRM officer upheld Norcisa's dismissal, finding just cause for her termination. Norcisa's MERB hearing was

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[3] *Norcisa v. Dep't of Health and Human Serv.*, 2013 WL 5785209 (Del. Super. Sept. 23, 2013).

originally scheduled for November 18, 2010, but was continued numerous times based on requests from both Norcisa and DHSS.

(7) Norcisa's MERB hearing ultimately was held on January 30, 2013. The MERB excluded three of Norcisa's seventeen proffered exhibits. Those documents—a written reprimand for Norcisa's unexcused absences, Norcisa's pre-termination statement, and physician order sheets pertaining to a patient other than SR—were excluded as irrelevant. One of Norcisa's intended witnesses, Dr. Judith Bailey, failed to appear for the hearing despite the issuance of a subpoena. Norcisa's counsel requested another continuance of the hearing. The Board requested a proffer of the witness' testimony. Norcisa's counsel proffered that Dr. Bailey would have testified that verbal orders for add-on tests were not always recorded on physicians' order sheets, and, in her opinion, some of the add-on tests performed on SR's blood samples were appropriate given the patient's medical conditions. Norcisa's counsel further explained that Dr. Bailey would *not* have testified that she was the physician who authorized the add-on tests. The Board, by a vote of 3-2, denied Norcisa's request for a continuance.

(8) DHSS introduced testimony from both Dr. Kelly and Dr. Shoukry, SR's treating physicians. Each testified he did not authorize the add-on tests and would not have authorized the add-on tests because the tests

were not appropriate given SR's medical condition. DHSS also called Nurse Bond who testified about Norcisa's comments that she had requested the add-on tests on her own because she thought the doctors were missing something.

(9) Norcisa testified that she had been verbally authorized to request the add-on tests via telephone but had not written down the verbal authorization because she was never trained to do so. Norcisa also testified that a nurse and a doctor authorized the tests, but she could not recall their names. On cross-examination, counsel for DHSS pointed out that Norcisa's testimony contradicted all of her various earlier statements, which had indicated, alternatively, that she had no idea who authorized the tests, that Dr. Shoukry had authorized the tests, and that Dr. Shoukry *and* Dr. Kelly had authorized the tests.

(10) Following the hearing, the Board issued its decision holding that Norcisa had not met her burden of proving that DHSS did not have just cause to terminate her employment. A majority of the Board also concluded that termination was appropriate to the circumstances.[4] Norcisa then appealed to the Superior Court. The Superior Court found no error of law or abuse of discretion. The Superior Court also found substantial evidence to

[4] One member of the MERB dissented on the ground that the penalty of termination was not appropriate under the circumstances.

support the Board's conclusion that Norcisa had failed to establish that DHSS lacked just cause to terminate her. This appeal followed.

(11) Norcisa raises three reviewable arguments in her opening brief on appeal. First, she contends that the MERB erred by excluding three of her proffered exhibits. Next, she contends the MERB erred in denying her request for a continuance. Finally, she contends that there is no substantial evidence in the record to support the MERB's decision.

(12) In reviewing decisions of the MERB, our role is limited.[5] We review the record "'to determine whether [the MERB] acted within its statutory authority, whether it properly interpreted and applied the applicable law, whether it conducted a fair hearing and whether its decision is based on sufficient substantial evidence and is not arbitrary.'"[6] Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[7] We review questions of law *de novo*.[8] We do not, however, reweigh the evidence, determine issues of credibility, or draw our own factual conclusions.[9] Moreover, we give deference to an administrative

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[5] *Ward v. Dep't of Elections*, 2009 WL 2244413 (Del. July 27, 2009).

[6] *Avallone v. State*, 14 A.3d 566, 570 (Del. 2011) (*quoting Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)).

[7] *Id.* (citations omitted).

[8] *Id.*

[9] *Ward v. Dep't of Elections*, 2009 WL 2244413, at *1.

agency's interpretation of its own rules "in recognition of its expertise in a given field."[10]

(13) When the State terminates a person's employment, the MERB presumes that the State did so properly.[11] Therefore, the discharged employee has the burden of proving that the termination was improper.[12] In this case, Norcisa thus was required to prove that DHSS lacked "just cause" to terminate her employment, as that term is defined in Merit Rule 12.1.[13] Under Rule 12.1 of the Board's Merit Rules, "just cause" requires a showing that (1) the employee has committed the charged offense; (2) the employee has been afforded the due process specified in the Merit Rules; and (3) the penalty is appropriate to the circumstances.[14]

(14) We have carefully reviewed the parties' briefs and the record below. We find that the MERB acted within its statutory authority, properly interpreted and applied the applicable law, and conducted a fair hearing. Moreover, its decision upholding Norcisa's termination is based on sufficient substantial evidence. We also find no error in the MERB's decisions excluding Norcisa's irrelevant exhibits from evidence and denying

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[10] *Id.*

[11] *Avallone v. State*, 14 A.3d at 572.

[12] *Id.*

[13] *Id.* at 569.

[14] *Id.*

her request for a further continuance. We find it manifest that the judgment of the Superior Court should be affirmed on the basis of, and for the reasons set forth in, the Superior Court's well-reasoned decision dated September 23, 2013.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice