IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TUESDAY S. BANNER,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N16A-07-009 DCS
	)	
MERIT EMPLOYEE RELATIONS BOARD and DEPARTMENT OF HEALTH AND SOCIAL SERVICES,	)	
	)	
Appellees.	)	

Submitted: June 29, 2017
Decided: September 29, 2017

On Appeal from the Merit Employee Relations Board
AFFIRMED

This is an appeal from the Merit Employee Relations Board ("Board"). Appellant Tuesday Banner ("Appellant") appeals the Board's June 28, 2016 decision to affirm Appellant's termination by the Department of Health and Social Security ("DHSS"). Upon consideration of the facts, arguments, and legal authority set forth by the parties; statutory and decisional law; and the entire record in this case, the Court hereby finds as follows:

1. DHSS employed Appellant as an administrative specialist in the Division for the Visually Impaired ("DVI") prior to Appellant's termination from DHSS on March 1, 2013.

2. On September 4, 2012, Appellant obtained medical leave from work, and DHSS granted Appellant's request for job-protected leave pursuant to the Family and Medical Leave Act ("FMLA"). Appellant's FMLA coverage began on September 4, 2012 and would last until her FMLA hours were exhausted or until December 5, 2012, whichever came first. Appellant's FMLA coverage was exhausted on November 7, 2012.

3. The Hartford Comprehensive Employee Benefits Co. ("Hartford") granted Appellant Short Term Disability Insurance ("STDI") to be effective from October 5, 2012 through November 13, 2012. Appellant's STDI coverage expired on November 14, 2012.

4. On December 13, 2012, Genelle Fletcher ("Fletcher"), Appellant's immediate supervisor, wrote to Appellant to clarify Appellant's employment status. Fletcher informed Appellant that her absence from work was unauthorized as of November 14, 2012 and advised Appellant to return to work by December 28, 2012. If Appellant was unable to return to work on that day, Fletcher instructed Appellant to obtain approval from Hartford to extend STDI coverage, obtain a leave of absence without pay, or resign the position. Fletcher asked Appellant to contact Fletcher and inform her of Appellant's decision regarding her employment status. In addition, Fletcher notified Appellant that failure to return to work or comply with one of the three options would result in a recommendation for Appellant's termination.

5. Appellant did not report for work on December 28, 2012. Moreover, Appellant did not obtain an extension of STDI coverage, request a leave of absence without pay, or resign the position. As a result, on January 9, 2013, Robert Doyle, the Director of DVI, notified Appellant that he would be recommending her termination.

6. Appellant was terminated on March 1, 2013.

7. Appellant appealed her termination to the Board on April 11, 2013 pursuant to 29 *Del. C.* § 5949. On January 29, 2014, the Board initially dismissed Appellant's appeal for failure to prosecute.

8. On September 28, 2015, this Court reversed the Board's dismissal and remanded the matter to the Board to conduct a hearing.

9. On April 7, 2016, the Board conducted a remand hearing. The Board heard testimony from Fletcher, Abdullah G. Hubbard (Appellant's spiritual advisor), Durea Johann (Appellant's return to work coordinator), and Appellant. The Board reviewed exhibits from both Appellant and Appellees, including: physician notes of Appellant, approval and denial letters from Hartford, Appellant's pre-termination meeting statement, Appellant's termination letter, and the letters that Fletcher sent to Appellant in which Appellant failed to respond.

10. On June 28, 2016, the Board issued a decision upholding Appellant's termination ("Board Decision"). The Board found that Appellant was on

unauthorized leave as of November 14, 2012, that Appellant failed to respond to DVI regarding the status of her employment position, and that Appellant failed to report to work on December 28, 2012. Thus, the Board concluded that Appellant "committed the charged offense of vacating her position with DVI," and that termination was an appropriate penalty.

11. On or about July 28, 2016, Appellant appealed the Board Decision to this Court. DHSS opposes Appellant's appeal.

12. This Court has statutorily conferred jurisdiction over appeals from administrative agencies, including appeals from the Board.[1] In reviewing an appeal of a Merit Employee Relations Board decision, the Court determines whether the Board "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."[2] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] The Court does not "reweigh the evidence, determine issues of credibility, or draw [its] own factual conclusions."[4] Questions

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[1] 29 *Del. C.* § 10142(a).
[2] *Avallone v. Del. Dep't of Health & Soc. Servs.*, 14 A.3d 566, 570 (Del. 2011) (internal quotation marks omitted) (quoting *Hopson v. McGinnes*, 391 A.2d 187, 189 (Del. 1978)). *See also Christman v. Del. Dep't of Health & Soc. Servs.*, 2014 WL 3724215, *2 (Del. July 25, 2014).
[3] *Sweeney v. Del. Dep't of Transp.*, 55 A.3d 337, 341 (Del. 2012).
[4] *Norcisa v. Dep't of Health & Soc. Servs.*, 2014 WL 1258304, at *3 (Del. Mar. 25, 2014).

of law and statutory interpretation are reviewed *de novo*.[5] A Board decision that is supported by substantial evidence and is free from legal error will be affirmed unless the Court finds that the Board has abused its discretion.[6] An abuse of discretion occurs "where [the Board's] decision has exceeded the bounds of reason under the circumstances."[7]

13. Appellant asserts for the first time in this appeal that the Board lacked jurisdiction to adjudicate her dispute. In making this argument, Appellant relies on three (3) Board decisions in which the Board concluded that it lacked jurisdiction over disability related terminations.[8] However, those cases do not apply here. In *Helper*, the employee was terminated after her employer was unable to alter her position to comply with psychologist recommendations.[9] In *Benson* and *LaSorte*, the employees received long-term disability, and therefore no longer qualified as state employees.[10] Thus, those cases involved situations where employees were terminated for disability-related reasons, and the Board lacks jurisdiction over

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[5] *Sweeney*, 55 A.3d at 342.
[6] *Id.* at 341-42. *See also Banner v. State of Del. Emp. Relations Bd.*, 2015 WL 5073740, at *1 (Del. Aug. 26, 2015).
[7] *Sweeney v. Del. Dep't of Transp.*, 55 A.3d at 342.
[8] *LaSorte v. Dep't of Natural Resources and Environmental Control*, No. 10-09-481 (Del. M.E.R.B. Dec. 6, 2010); *Benson v. Delaware Dep't of Transportation*, No. 07-12-407 (Del. M.E.R.B. June 19, 2008); *Helper v. Dep't of Corr.*, No. 07-02-381 (Del. M.E.R.B. Aug. 30, 2007).
[9] *Helper*, No. 07-02-381 at 2.
[10] *LaSorte*, No. 10-09-481 at 2; *Benson*, No. 07-12-407 at 3.

disability terminations.[11] By contrast, Appellant was not terminated because of a disability, but because she was absent from work without authorization and did not communicate with her employer about her employment status. Therefore, the Board did have jurisdiction to adjudicate Appellant's dispute.

14. Appellant also asserts that the Board violated her constitutional rights to due process and equal protection in failing to comply with various statutory provisions. Namely, Appellant asserts that the Board failed to comply with 29 *Del. C.* § 10125(b)(6) ("Section 10125(b)(6)") in the way it conducted the pre-hearing conference in this case. Section 10125(b)(6) merely provides the Board with discretionary authority to hold pre-hearing conferences.[12] Appellant also appears to rely on 29 *Del C.* § 10126(b) ("Section 10126(b)") to assert that she should have been given 20 days to object to the Referee's recommendations at the pre-hearing conference.[13] However, Section 10126(b) does not apply to the type of pre-hearing conference that took place here that was merely meant to simplify the issues for the

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[11] The State Employee Benefits Committee has jurisdiction over disability terminations under the Disability Insurance Program ("DIP") at 29 *Del. C.* § 52A.

[12] 29 *Del. C.* § 10125(b)(6) ("In connection with such hearings, the [Board] or its designated subordinate may be empowered to: … Hold prehearing conferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes and to regulate and expedite the course of the hearing.").

[13] 29 *Del C.* § 10126 ("Section 10126"). Section 10126 provides that if a subordinate presides over "an informal conference or formal hearing," the subordinate will prepare a proposed order for the Board containing a summary of the evidence and recommendations on the findings of fact, conclusions of law, and the decision. Section 10126 further provides that the subordinate's proposed order shall be given to the parties who will have 20 days to object to the recommendations.

full hearing. Therefore, Appellant's reliance on these statutory provisions is misplaced.

15. Additionally, Appellant asserts that the Board violated her rights to due process when the Board denied her request to hold another pre-hearing conference and pre-admit certain evidence. However, under Section 10125(b)(6), the Board's authority to hold pre-hearing conferences is discretionary, and the Board did not abuse its discretion in deciding not to hold an additional pre-hearing conference.[14] Appellant also relies on 19 *Del. C.* § 2348(f) ("Section 2348(f)") to make this argument, but Section 2348(f) applies to hearings before the Industrial Accident Board, not the Merit Employee Relations Board.[15] In addition, the Board considered Appellant's evidence at the hearing, so it was not necessary for the Board to pre-admit any of Appellant's evidence.

16. Lastly, Appellant asserts that her employment status was protected by the DIP, and could therefore not be terminated. In the Board Decision, the Board concluded that Appellant was terminated for "vacating her position" after she failed to report to work and to communicate with her employer regarding her employment

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[14] *See Blue Cross & Blue Shield of Delaware, Inc. v. Elliott*, 479 A.2d 843, 851 (Del. Super. 1984) (finding that the failure to hold a pre-hearing conference is not a "fatal defect" because it is not mandatory).

[15] Additionally, the Court does not read Section 2348(f) to require an agency to hold a pre-hearing conference. Section 2348 merely provides, "Whenever a cause shall be remanded to the Board for a rehearing, all evidence theretofore taken before the Board in a previous hearing or hearings shall become part of the evidence in the hearing upon remand.")

status. Thus, the Board found that valid disciplinary-related reasons, rather than disability-related reasons, supported Appellant's termination. The Court finds relevant evidence that a reasonable mind may accept as adequate to support the Board's conclusion.[16]

17. Accordingly, the Board Decision is supported by substantial evidence, and is free from legal error, and must be affirmed.

NOW, THEREFORE, the June 28, 2016 Board Decision is hereby **AFFIRMED.**

IT IS SO ORDERED.

/s/ Diane Clarke Streett
Diane Clarke Streett, Judge

Original to Prothonotary

cc: Kevin Slattery, Esquire, Deputy Attorney General (via File&ServeXpress)
Tuesday S. Banner, *Pro Se* Appellant (via First Class Mail)

[16] *See Sweeney*, 55 A.3d at 341.