

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DELAWARE DEPARTMENT OF)
SERVICES FOR CHILDREN,)
YOUTH, AND THEIR FAMILIES,)
DIVISION OF YOUTH)
REHABILITATIVE SERVICES,)

Appellant,)

v.)

RENEE BIRNEY)

Appellee.)

C.A. NO. N21A-12-008 PAW)

Submitted: August 23, 2022
Decided: November 21, 2022

*Upon Appeal from the Merit Employee Relations Board. **AFFIRMED.***

MEMORANDUM OPINION AND ORDER

Zi-Xiang Shen, Esq., Delaware Department of Justice, Attorney for Employer-Below/Appellant, Delaware Department of Services for Children, Youth, and their Families, Division of Youth Rehabilitative Services.

Renee Birney, *pro se*, Employee-Below/Appellee

I. Introduction

The Delaware Department of Services for Children, Youth, and their Families (“DSCYF”), Division of Youth Rehabilitative Services (“DYRS”) filed this appeal of the Merit Employee Relations Board’s (“MERB”) decision dated December 2, 2021, granting Renee Birney’s (“Birney”) grievance that her responsibilities fall outside her merit classification of Family Services Program Support Supervisor (“Support Supervisor”) and properly come within the higher merit classification of Family Services Program Support Manager (“Support Manager”). Appellant argues the MERB deprived Appellant of a fair hearing by adopting and relying on the findings it reached in the Brabson hearing. Appellant further argues that the Birney decision should be reversed for legal errors committed in the MERB’s decision on Brabson’s grievance. For the reasons set forth below, the MERB’s decision is **AFFIRMED**.

II. Factual and Procedural History¹

Birney is employed by the Community Services Unit of the DYRS in the Support Supervisor merit classification.² She performs her duties under the operating title of Regional Manager, with a badge and business cards exhibiting that

¹ The factual and procedural history set forth in this Court’s opinion affirming the MERB’s decision and order granting Ryan Brabson’s grievance is incorporated herein.

² R002 (MERB Decision and Order at 2, dated December 2, 2021, hereinafter “MERB Decision”).

title.³ As a Regional Manager, she reports directly to the Chief of Community Services.⁴

After granting Brabson's grievance the MERB gave Birney a choice: Birney could rely on the findings of fact made in the course of granting Brabson's grievance, or Birney could present additional evidence to support her grievance.⁵ Birney chose to rely on the findings made in Brabson's grievance, and the MERB, based on those findings, voted to grant Birney's grievance.⁶ Appellant did not raise any objection to this procedure.⁷

III. Parties Contentions

In addition to relying on the arguments made in its appeal of the MERB's decision and order granting Brabson's grievance, Appellant also argues that allowing Birney to rely on the factual findings made in Brabson's hearing, without allowing for presentation of any additional evidence, deprived Appellant of a fair hearing.⁸

Birney argues the MERB committed no error of law. Birney relies on the arguments made by Brabson in support of his appeal, and further argues Appellant failed to object to the MERB's decision to rely on the factual findings made in

³ *Id.*

⁴ *Id.*

⁵ R348-349 (Hr'g Tr. at 179-180).

⁶ *Id.*

⁷ *Id.*

⁸ Appellant's Opening Br. at 3-5.

Brabson’s decision, and therefore the issue was not preserved for appeal. Separately, the MERB similarly argues that an argument not first raised with the administrative tribunal cannot be raised for the first time on appeal.⁹

IV. Standard of Review

The Court’s review of a MERB decision is limited. The Court merely determines whether the decision is supported by substantial evidence and is free from legal error.¹⁰ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹¹ The substantial evidence standard requires the court to “search the entire record to determine whether, on the basis of all of the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.”¹² This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.¹³ The Court reviews questions of law *de novo*.¹⁴ If the decision is supported by substantial evidence and free from legal error, then the administrative board’s decision must be affirmed.

⁹ MERB’s Answering Br. at 8.

¹⁰ *Cooper v. Delaware Bd. Of Nursing*, 264 A .3d 214 (Del. Oct. 21, 2021) (TABLE).

¹¹ *Id.*

¹² *Cooper v. Delaware Bd. Of Nursing*, 2021 WL 754306, at *2 (Del. Super. Ct. Feb. 26, 2021) (internal quotations omitted), *aff’d Cooper v. Delaware Bd. of Nursing*, 264 A .3d 214 (Del. Oct. 21, 2021) (TABLE).

¹³ *Id.*

¹⁴ *Finney v. Delaware Dep’t of Transp.*, 2021 WL 321072, at *3 (Del. Super. Ct. Feb. 1, 2021).

In addition, the Court recognizes that evidentiary rulings are within the discretion of the administrative board and will not be reversed absent a clear abuse of discretion.¹⁵ An abuse of discretion occurs when a decision “exceeds the bounds of reason given the circumstances” or the “rules of law or practice have been ignored so as to produce injustice.”¹⁶ If the Court finds that an evidentiary ruling amounts to a clear abuse of discretion, then the Court must “determine whether the mistake constituted significant prejudice so as to have denied the appellant a fair hearing.”¹⁷

V. Discussion

This Court adopts and incorporates the conclusions it reached on the arguments presented in Brabson’s appeal. All that is left for this Court to decide is whether Appellant was deprived a fair hearing by the MERB’s decision to grant Birney’s grievance by relying on the factual findings made in Brabson’s grievance hearing.

This Court agrees with Birney and the MERB that this issue was not properly preserved before the MERB and, therefore, the issue is waived. Although the Board

¹⁵ *Id.* at *4.

¹⁶ *Johnson v. First State Staffing Sols.*, 2020 WL 591776, at *3 (Del. Super. Ct. Feb. 6, 2020) (quoting *Peregoy v. Del. Hospice*, 2011 WL 3812246, at *1 (Del. Super. Ct. Aug. 12, 2011)).

¹⁷ *Warren v. Amstead Indus.*, 2020 WL 4582504, at *3 (Del. Super. Ct. Aug. 10, 2020) (citing *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987)); see also *Hellstern v. Culinary Servs. Grp.*, 2019 WL 460309, at *10 (Del. Super. Ct. Jan. 31, 2019) (quoting *Harper v. State*, 970 A.2d 199, 201 (Del. 2009)) (“If the Court determines that the Board abused its discretion, then the Court must determine ‘whether the error rises to the level of significant prejudice which would act to deny the [appellant] a fair trial.’”).

operates less formally than a court of law and the rules of evidence are not strictly applied, “it is nonetheless an adversarial proceeding where the rules of evidence apply insofar as practicable.”¹⁸ It is settled that when this Court acts “in appellate capacity on an appeal from an administrative board, [it] will not consider issues not raised before the tribunal.”¹⁹

Appellant had ample opportunity to raise an objection to the way the MERB decided to proceed. Appellant could have objected when the MERB gave Birney the option to rely on the factual findings made during the course of Brabson’s grievance hearing. Appellant could have objected in the beginning, when the MERB instructed Brabson it would proceed by hearing his case fully, then using it as precedent for the other two grievants. In not objecting, Appellant did not give the MERB the opportunity to rule whether Appellant would be deprived a fair hearing if the MERB chose to proceed in the way it did.

Appellant asserts that even if this Court finds the issue was not properly preserved, this Court can nonetheless consider the issue in the interests of justice.²⁰ The Court find finds no reason that would warrant reversal on this basis. The MERB concluded the role of Regional Manager within the DYRS had outgrown the Support Supervisor merit classification, and Regional Managers, like Birney, are performing

¹⁸ *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 157-58 (Del. 2006).

¹⁹ *Kim v. DHSS and MERB*, 2016 WL 354867, at *3 (Del. Super. Ct. Jan. 28, 2016).

²⁰ Appellant Reply Br. at 4.

the duties of the Support Manager merit classification. Its decision is supported by substantial evidence, and Appellant had ample opportunity to present countervailing evidence on the role of Regional Managers at DYRS.

VI. Conclusion

Appellant has presented no arguments that would warrant reversal, and this Court will not reverse an administrative board's decision based on an argument not first raised before the board. Accordingly, for the reasons set forth in this opinion and the opinion affirming the MERB's decision and order granting Ryan Brabson's grievance, the MERB's decision and order granting Birney's grievance is

AFFIRMED.

IT IS SO ORDERED.

/s/Patricia A. Winston
Patricia A. Winston, Judge