IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BONITA GIANDONATO,	)	
	)	
Appellant,	)	
	)	
V.	)	
	)	
The INN AT MONTCHANIN and the UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	C.A. No: N11A-05-006 JRS
	)	
	)	
Appellees.	)	

Date Submitted: October 25, 2011
Date Decided: January 25, 2012

Upon Consideration of
Appeal From the Unemployment Insurance Appeal Board.
REVERSED and **REMANDED.**

O R D E R

This 25th day of January, 2012, upon consideration of the *pro se* appeal of Bonita Giandonato ("Ms. Giandonato") from the decision of the Unemployment Insurance Appeal Board ("the Board"), denying her claim for unemployment benefits against her former employer, The Inn at Montchanin ("the Inn"), it appears to the Court that:

1. Ms. Giandonato was hired by the Inn as an aesthetician with some possible front desk work on June 3, 2010, and worked there until the date of her discharge on September 6, 2010.[1] At the time of hire, Ms. Giandonato possessed a temporary Pennsylvania aesthetician license and informed the Inn that she was in the process of taking board examinations to earn a permanent license.[2] Ms. Giandonato subsequently failed to pass the permanent licensure examination on August 17, 2010, and her temporary license expired on September 7, 2010.[3] Based on the fact that Ms. Giandonato would not have an active license to work as an aesthetician on September 7, 2010, the Inn terminated Ms. Giandonato's employment on September 6, 2010, the day before her temporary license was to expire.[4]

2. On December 13, 2010, Ms. Giandonato filed a claim for unemployment benefits in connection with her discharge from employment at the Inn.[5] The Claims

---

[1] Record ("R.") at 24. An "[a]esthetician," as that term is defined under Delaware law, is "a person who practices the cleansing, stimulating, manipulating and beautifying of skin, with hands or mechanical or electrical apparatus or appliances, removes superfluous hair and gives treatments to keep skin healthy and attractive." 24 *Del. C.* § 5124. "An aesthetician is not authorized to prescribe medication or provide medical treatments in the same manner as a dermatologist." *Id.*

[2] R. at 24.

[3] *Id.*

[4] *Id.*

[5] R. at 5. Ms. Giandonato indicated to the Delaware Department of Labor ("DOL") that she was terminated after her second unsuccessful attempt to pass the board examination, but no other evidence was entered into the Record to support this statement. *Id.*

Deputy at the DOL made an initial determination, without considering the position of the Inn, that Ms. Giandonato was discharged without just cause and, therefore, eligible to receive unemployment benefits.[6] This determination was based solely on information provided by Ms. Giandonato because the DOL had not received timely information from the Inn regarding the circumstances of Ms. Giandonato's separation from employment.[7] The Inn appealed this initial determination on the procedural grounds that its response regarding separation information was, in fact, timely and that its position should have been heard and considered by the Claims Deputy.[8] After a hearing on this issue, the Appeals Referee found that the Inn "provided credible testimony indicating that it submitted the required separation information to the [DOL] prior to the requested response date."[9]

3. On March 8, 2011, the parties presented testimony at a DOL hearing regarding the merits of Ms. Giandonato's underlying claim for unemployment benefits and whether or not the Inn's discharge of Ms. Giandonato was for "just

---

[6] *Id.* Sub-section (2) of 19 *Del. C.* § 3314 ("[d]isqualification for benefits") provides, generally, that an individual who was discharged for "just cause" in connection with that individual's work is disqualified from receiving unemployment benefits.

[7] R. at 5. 19 *Del. C.* § 3317(b) prohibits a former employer that fails to return a completed separation notice (within seven days of the date of mailing by the DOL) from arguing that the claimant should be disqualified from receiving unemployment benefits.

[8] R. at 6-7.

[9] R. at 11.

cause."[10] In making its decision, the Appeals Referee explained, without noted authority, that "[e]mployees whose positions are contingent on their maintaining valid licensure, such as drivers and security guards, may be discharged with just cause upon the loss of such licensure."[11] The Appeals Referee found that Ms. Giandonato's employment was contingent upon a valid aesthetician license, that "[t]he expiration of Claimant's license violated Employer's interest in having legally authorized employees, and [that] Employer cannot be expected to hold Claimant's position open for an indefinite period . . . ."[12] Accordingly, the Appeals Referee reversed the initial determination of the Claims Deputy and concluded that the Inn had "established by a preponderance of the evidence that it discharged Claimant from employment with just cause in connection with her work."[13] Ms. Giandonato was, therefore, disqualified from receiving unemployment benefits pursuant to 19 *Del. C.* § 3314(2).[14]

---

[10] R. at 27-37.

[11] R. at 25.

[12] *Id.*

[13] *Id.*

[14] R. at 25. As mentioned by the Appeals Referee, 19 *Del. C.* § 3314(2) specifically provides that an individual is disqualified from receiving unemployment benefits "[f]or the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 (continued...)

4. Ms. Giandonato appealed the Appeals Referee's decision to the Board and argued that the Inn could not argue that it discharged her with good cause after it initially hired her without "all the required [licensure] and paperwork," a decision that led to her eventual discharge.[15] Within her Appeal Request Notification, Ms. Giandonato admitted that she was unable to pass the licensing examination for a permanent Pennsylvania license while employed at the Inn. At that point, Ms. Giandonato and the Inn discussed Delaware's licensing requirements and, according to Ms. Giandonato, both acknowledged that Delaware did not allow aestheticians with temporary Pennsylvania licenses to work in Delaware as aestheticians.[16] They discussed possible solutions to bring her within compliance of the licensing requirements to no avail.[17] Nonetheless, Ms. Giandonato continued to work at the Inn

---

[14](...continued)
subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount."

[15] R. at 37-38. "[W]hat it comes down to is The Spa at Montchanin Village should never have hired me, as I was not legal for employment from the beginning. . . . I do feel that it should also be the employers' responsibility to know if their applicant has all the required licensors [sic] and paperwork needed for the job at hand." *Id.* at 38.

[16] R. at 38. *See also* 24 *Del. C.* § 5123 *et seq*. (eff. June 26, 2010) (providing no regulations for out-of-state temporary licenses); 24 *Del. C.* § 5131 *et seq*., 73 Del. Laws 2001, ch. 158 § 32 (eff. July 10, 2001) (same). Based on this fact, Ms. Giandonato had never been legally working as an aesthetician at the Inn.

[17] R. at 38. Ms. Giandonato also explained in her Appeal Request Notification that in June 2010 Delaware no longer entertained reciprocity with Pennsylvania without having acquired five years of experience in another jurisdiction. *See* 24 *Del. C.* § 5131 (effective on June 26, 2010).

with her temporary Pennsylvania license until she was informed of her discharge.[18]

5. On April 13, 2011, Ms. Giandonato testified before the Board in connection with her *pro se* appeal.[19] When the Board asked her to state the reasons for her disagreement with the Appeals Referee's decision, Ms. Giandonato testified that, based on her own research, she "found that [she] was not legally allowed to be working [at the Inn] from the get go because Delaware does not allow you to work on a temporary Pennsylvania license"[20] and that "this was a new career [ ] so [she] wasn't aware of that either."[21] Ms. Giandonato admitted in her testimony, however, that "[she] should have researched it more [her]self as well."[22] She explained that she did not conduct this research, which would have allowed her to make an informed decision whether to accept the Inn's offer of employment, because she "just expected the employer to know more than [she] did about what was legally correct and what paperwork [she] actually needed."[23]

6. The Board affirmed the Appeals Referee's determination that

---

[18] R. at 38.

[19] R. at 44-48. The Inn did not appear at the Board's hearing.

[20] R. at 47.

[21] *Id.*

[22] *Id.*

[23] *See* R. at 47-48.

disqualified Ms. Giandonato from the receipt of unemployment benefits.[24] The Board found that Ms. Giandonato "provided no new relevant evidence for the Board's consideration" and incorporated the findings of fact and conclusions of law previously reached by the Appeals Referee in rendering its decision.[25]

7. Ms. Giandonato appears before this Court *pro se* as she did before the Appeals Referee and the Board. She appeals the decision of the Board on the grounds that the Inn discharged her without just cause as a matter of substantial evidence presented to the Board and as a matter of law.[26] Specifically, Ms. Giandonato contends that the Inn should have known about Delaware's licensure requirements at the time she applied with the Inn and, as a result, the Inn should have known that Ms. Giandonato did not meet the requirements at the time of hiring.[27] Ms. Giandonato, essentially, suggests that the Inn's discharge could not have been with just cause because the discharge was based on facts the Inn should have known and considered upon hiring.[28] Neither the Inn nor the Board filed opposition briefs and

---

[24] R. at 40-41.

[25] R. at 41.

[26] *See* R. at 52-53.

[27] R. at 52.

[28] *Id.* Ms. Giandonato also contends that she was unaware that her employment with the Inn would "mess up" the unemployment benefits she had purportedly been receiving prior to her work with the (continued...)

both rest upon the record before the Court.

8. In affirming the Appeals Referee's decision, the Board incorporated the findings of fact and conclusions of law made by the Referee; accordingly, the Court will also review the Appeals Referee's findings of fact and conclusions of law.[29] On appeal from the Board, the Superior Court's review is limited to determining whether the Board's decision was supported by substantial evidence and free from legal error.[30] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[31] The Court considers the record in the light most favorable to the prevailing party before the Board.[32] The

---

[28](...continued)
Inn. *Id.* To the extent Ms. Giandonato requests this Court to consider her eligibility for unemployment benefits stemming from employment with an entity other than the Inn, it is not within this Court's jurisdiction to do so. *See Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976) ("Upon appeal from a denial of unemployment benefits, the Superior Court is limited to consideration of the record which was before the administrative agency."). For the same reason, the Court will not consider allegations of Ms. Giandonato that could be construed as claims of negligent hiring or illegal administration of cosmetology. *Id.*

[29] *See Boughton v. Dep't of Labor*, 300 A.2d 25, 26 (Del. Super. 1972) (noting that when the Board adopts the findings of an Appeals Referee, a reviewing court "relies [also] upon the Referee's determination[s]"); *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *1 (Del. Super. June 6, 2003) (considering the Appeals Referee's findings of fact and conclusions of law adopted by the Board).

[30] *Unemployment Ins. Appeal Bd. v. Duncan*, 621 A.2d 340, 342 (Del. 1993).

[31] *Histed v. E.I. duPont Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[32] *See Thompson v. Unemployment Ins. Appeal Bd.*, 25 A.3d 778, 782 (Del. 2011) (citing *Pochvatilla v. United States Postal Serv.*, 1997 WL 524062, at *2 (Del. Super. June 9, 1997)).

Court does not weigh evidence, assess credibility, or make independent factual findings.[33] It is solely within the purview of the Board to judge credibility and resolve conflicts in testimony.[34]

9. Ms. Giandonato was denied unemployment benefits under the provisions of 19 *Del. C.* § 3314(2), which provides that "[a]n individual shall be disqualified for benefits for the week in which the individual was discharged from the individual's work with *just cause* in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks . . . ."[35] In a discharge case, the employer has the burden of proving by a preponderance of the evidence that the individual was discharged for "just cause."[36] As explained by both the Appeals Referee and Board, "just cause," within the meaning of the statute, has generally been defined as a "wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's expected

---

[33] *Thompson*, 25 A.3d at 782 (quoting *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006)).

[34] *Straley v. Advance Staffing, Inc.*, 2009 WL 3451913, at *3 (Del. Supr. Oct. 29, 2009) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.1965)).

[35] *See* 19 *Del. C.* § 3314(2) (emphasis supplied); R. at 24.

[36] *MRPC Financial Mgmt. LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. June 20, 2003); *Bishop v. Trexler*, 2005 WL 272936, at *1 (Del. Super. Jan. 28, 2005); R. at 41.

standard of conduct."[37] "Just cause" does not necessarily require a "bad motive, ill design, or malice;"[38] rather "[w]ilful or wanton conduct is that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance."[39] Furthermore, "just cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination."[40]

10. Based upon that legal framework, coupled with the finding that "[e]mployees whose positions are contingent on their maintaining valid licensure, such as drivers and security guards, may be discharged with just cause upon the loss of such licensure,"[41] the Appeals Referee and Board found that "[c]laimant's employment . . . was contingent on possessing a valid aesthetician license" and, without a license, the employer's "interest in having legally authorized employees"

---

[37] R. at 25, 41; *Coleman v. Dep't of Labor*, 288 A.2d 285, 287 (Del. Super. 1972) (referring to the definition as laid out in *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967)).

[38] *Coleman*, 288 A.2d at 288; R. at 25.

[39] *MRPC*, 2003 WL 21517977, at *4; R. at 41.

[40] R. at 41 (quoting *Pinghera v. Creative Home Solutions, Inc.*, 2002 WL 31814887, at *2 (Del. Super. Nov. 14, 2002)).

[41] R. at 25. The Appeals Referee supplied no authority for this finding.

was violated.[42]

11. The blanket application of the Appeals Referee's definition of "just cause" to all cases in which an employee fails to possess a required license constitutes legal error. As the Appeals Referee and Board found, under Delaware law, "just cause" is generally based on the employer's proof of the claimant's "wilful or wanton" act.[43] Delaware courts have not, however, broadly held that failure to possess a license constitutes a "wilful or wanton" act *per se*. Instead, this Court has previously recognized that failure of an employee to be properly licensed to perform work within the course and scope of employment *may* constitute just cause for termination *under certain circumstances*.[44] The cases that have considered "just cause" based on a "wilful and wanton" act in the context of licensure, "in relevant part focused . . . on an evaluation of the employee's efforts in preparing for the particular licensing

---

[42] R. at 25.

[43] R. at 25, 41.

[44] *See, e.g.*, *Kelly v. Precious Moments Educ. and Comm. Center*, 2011 WL 6400634, at *2 (Del. Super. Nov. 30, 2011) (holding that "failure to successfully complete the class because of missed classes and failure to make up missed work, after being put on notice that successful completion of the class was a necessary condition of continued employment and after being given a reasonable opportunity to complete the course" constituted just cause); *Brown v. Schaeffer*, 1993 WL 390497, at *1-2 (Del. Super. Sept. 16, 1993) (affirming the Board's conclusion that "[a]ppellant's failure to procure x-ray certification [three times], as required by the State of Delaware [after notice of potential termination], constituted wilful misconduct"); *Chase v. Greggo & Ferrara*, 1982 WL 172840, at *1 (Del. Super. Sept. 23, 1982) (affirming the Referee's determination that since claimant's driver's license was taken due to a DUI offense it was the result of the claimant's own conduct and his discharge was with just cause).

procedure involved in terms of whether it amounted to wanton and willful conduct and therefore just cause."[45] The court has also considered other factors including whether notice was given of the consequences of failure and the length of opportunity the employee had to comply with the employer's standards.[46] For example, in *Kelly v. Precious Moments Education and Community Center*,[47] the claimant was hired without necessary certifications, which she attempted to acquire while working but did not complete within a year. The court affirmed the Board's decision that the employer's discharge was with just cause because the court was:

> [S]atisfied that [claimant's] failure to successfully complete the class because of missed classes and failure to make up missed work, after being put on notice that successful completion of the class was a necessary condition of continued employment and after being given a reasonable opportunity [of nearly a year] to complete the course, constitute[d] just cause for termination.[48]

---

[45] *Dep't of Justice v. Coltoff*, 1994 WL 680097, at *3 (Del. Super. Oct. 14, 1994). *See also, e.g.*, *Pearson v. Francis Kelly & Sons, Inc.*, 1993 WL 189523, at *4 (Del. Super. May 13, 1993) (mentioning in dicta that "[i]t could be argued wilful when an employee does not prepare himself or herself to be licensed, as required by law, to be allowed to continue work").

[46] *See, e.g.*, *Kelly v. Precious Moments*, 2011 WL 6400634, at *2 (looking at the reasons for failure, the notice of consequences and the reasonable opportunity given to claimant to complete the requirement); *Majaya*, 2003 WL 21350542, at *5 (considering the fact that claimant consciously decided to work on an extracurricular assignment, as opposed to her employer's work, knowing explicitly that a failure to timely complete her employer's work would result in her dismissal).

[47] 2011 WL 6400634, at *2 (Del. Super. Nov. 30, 2011).

[48] *Id.*

Similarly, in *Brown v. Schaeffer*,[49] the court affirmed the Board's decision that the claimant's "failure to procure x-ray certification, as required by the State of Delaware, constituted wilful misconduct."[50] The record before the court in that case indicated that the claimant failed the certification test three times; she refused tutorial help from her employer; she failed to enroll in a review course for the exam; and was unable to obtain temporary certification from the Department of Radiology.[51] Conversely, in *Department of Justice v. Coltoff*,[52] the court upheld the Board's affirmation of the Appeals Referee's decision that the claimant's "good faith attempt to pass" the Delaware bar examination twice, and her failure to do so, could not be considered wilful or wanton misconduct under the facts.[53] The court noted that "[w]here a conscientious employee is not able to perform to the satisfaction of his employer due to a limited physical or mental capacity, inexperience, or lack of coordination, and is thereby discharged, he is nevertheless entitled to unemployment compensation."[54]

---

[49] 1993 WL 390497, at *2 (Del. Super. Sept. 16, 1993).

[50] *Id.*

[51] *Id.* at *2.

[52] 1994 WL 680097, at *4 (Del. Super. Oct. 14, 1994).

[53] *Id.* at *1.

[54] *Id.* at *4 (citing *Starkey v. Unemployment Ins. App. Bd.*, 340 A.2d 165 (1975)).

Consequently, the claimant's termination was not discharged for just cause.[55]

12. In contrast to the proper legal analysis evident in these cases, neither the Appeals Referee nor the Board provided any factual or legal support for their findings that Ms. Giandonato's conduct in failing to obtain licensure constituted a "wilful or wanton act."[56] Specifically, neither the Appeals Referee nor the Board explained how Ms. Giandonato's inability to secure licensure rose to the level of "conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance." Indeed, as discussed below, the Board disregarded as irrelevant facts that would have helped facilitate its proper determination of the "just cause" issue.[57]

13. First, the record contains no evidence of the efforts taken by Ms. Giandonato in preparing for the Pennsylvania licensure examination or for renewing her temporary license. Consequently, the Board could not (and did not) consider whether her actions in taking the examination and attempting to obtain her

---

[55] *Id.*

[56] *See* R. at 25, 41.

[57] R. at 41. When reviewing an administrative appeal, the Court must "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." *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

aesthetician's license were "wilful or wanton."[58]

14. Second, the record does not provide substantial evidence to support the Appeals Referee's conclusion of law that "[c]laimant's employment . . . was contingent on possessing a valid [a]esthetician license."[59] Although a valid license is required by the State of Delaware to practice as an aesthetician,[60] and the Inn allegedly terminated Ms. Giandonato for failing to have an active license,[61] the Appeals Referee made no effort to determine whether the Inn's decision to hire Ms. Giandonato was expressly conditioned upon her having a valid aesthetician license, or whether the Inn had established any standard of conduct that would require its aestheticians to obtain a license within any particular time frame, or that it required its "front desk" employees to obtain a license at all.[62] Under Delaware law, in fact,

---

[58] *See generally* R. 1-54.

[59] R. at 25.

[60] *See* 24 *Del. C.* § 5125, *redesignated and amended from* 24 *Del. C.* § 5133 by 77 Del. Laws 2009, ch. 65, § 1 (eff. June 26, 2010).

[61] R. at 24, 31.

[62] R. at 32 ("THE REFEREE: Okay did you ask her if she was licensed when you hired her? [THE INN]: I was not at the interview so I cannot state that."); R. at 32-33 ("MS. GIANDONATO: My statement is, I went and applied for the position as an [a]esthetician and possib[y] [sic] for a desk person. . . . [Y]es I did present my license, it was a temporary license for Pennsylvania."); R. at 33 ("THE REFEREE: When you interviewed for the position what were you told regarding whether or not you had be to licensed for the job. MS. GIANDONATO: When I was interviewed, I did make the manager aware that I was in the process of taking my boards. . . . But also when I was hired I was also told that to make sure that I . . . could possibly work the front desk as well.").

Ms. Giandonato's temporary Pennsylvania license was never valid for her work as an aesthetician in Delaware[63] and her permanent Pennsylvania license would not have been valid for another year had she passed the Pennsylvania examination and gained reciprocity.[64] Based on the record established, it was not reasonable for the Appeals Referee to conclude that the expiration of the claimant's temporary license somehow violated the "[e]mployer's interest in having legally authorized employees."

15. Third, there is little indication in the record from which one could reasonably conclude that Ms. Giandonato was given notice of the consequences of failing to pass the licensure examination. Ms. Giandonato testified before the Appeals Referee that she presented the Inn's manager with her temporary Pennsylvania license at hire. For its part, the Inn (through its representative) could not say what had been asked of or relayed to Ms. Giandonato about her position, nor could the Inn explain what licenses were required of a Delaware aesthetician in

---

[63] R. at 38 ("The Spa manager questioned [Ms. Giandonato] on [her] license . . . [after she failed the Pennsylvania examination] stating 'she realized I could not work in DE on a PA temp. license.'"). *See also* 24 *Del. C.* § 5123 *et seq*. (eff. June 26, 2010) (providing no regulations for out-of-state temporary licenses); 24 *Del. C.* § 5131 *et seq*., 73 Del. Laws 2001, ch. 158 § 32 (eff. July 10, 2001) (same).

[64] *See* 24 *Del. C.* § 5109, 73 Del. Laws 2001, ch. 158 § 14 (eff. July 10, 2001) (providing the requirements of reciprocity under the Board of Cosmetology and Barbering: "[a]n individual with a license from a state with less stringent requirements than those of this State may obtain a license through reciprocity if the individual can prove to the satisfaction of the Board that the individual has worked in another jurisdiction(s) in the field . . . for a period of 1 year before application in this State."). The law, after June 26, 2010, required five years of experience for an aesthetician's reciprocity with Delaware. *See* 24 *Del. C.* § 5131 (eff. June 26, 2010).

general.[65] Ms. Giandonato provided evidence, although considered irrelevant by the Board, that she had a discussion with the Inn's Spa Manager about her inadequate licensure *after she failed* the Pennsylvania examination and that they discussed ways to address the licensing issue.[66] There is no evidence in the record that the Inn said anything to Ms. Giandonato about what would happen in the event her efforts to secure a license were not successful. There is also no evidence that Ms. Giandonato received any notice or final warning that her job was in jeopardy[67] - - a requirement as properly stated in the Board's conclusions of law.[68] In fact, she continued to work at the Inn while she had the temporary Pennsylvania license until the day of

---

[65] R. at 32 ("THE REFEREE: Okay did you ask her if she was licensed when you hired her? ['The Inn']: I was not at the interview so I cannot state that. I'm assuming she said she had finished school and was in the process of gaining a license."); R. at 34 ("THE REFEREE: [I]s it possible to have an [a]esthetician working without a license? [THE INN]: I believe in the State of Delaware you can be an apprentice but you have to have a license in order to get. [sic] Do you know what I'm saying? There seems to be a, I'm not exactly sure. I know you have to have gone to school and have a certain number of hours and then I think you have to apprentice under somebody. But as she [Ms. Giandonato]said, if you've got your license in a different state, if it doesn't transfer then you have to go through whatever their process is. And I believe you are not supposed to be practicing unless you are a licensed [a]esthetician."). *See also* R. at 38 (stating in her Appeal Request Notification that "I was honest and truthful with the fact that I only had a temporary PA license and was in the process of taking my PA Boards").

[66] R. at 38.

[67] R. at 33-34 ("REFEREE: Okay and how were you told that you[r] employment was terminated? MS. GIANDONATO: I went to work that day and was told that because of my licensure and how the timeliness of it, how long it would take me to switch everything that they'd have to let me go. And nothing was mentioned about the front desk at that time.").

[68] R. at 41 (citing *Pinghera*, 2002 WL 31814887, at *2 ("[J]ust cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination.")).

termination.[69]

16. Fourth and finally, neither the Appeals Referee nor the Board examined whether the two months that Ms. Giandonato had to pass the Pennsylvania examination constituted a "reasonable opportunity" for her to come into compliance with the Inn's requirements, which were elusive to say the least.[70]

17. The Court does not purport to have presented an exhaustive list of factors that must be considered in every licensure case. The Court has merely highlighted certain aspects of the Appeals Referee's decision to illustrate that something more than an employee's inability to secure a license is required to rise to the level of "wilful and wanton" conduct as required to support a termination "for just cause" under Delaware law.[71]

---

[69] R. at 38.

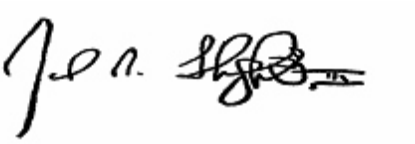
[70] *See Kelly v. Precious Moments*, 2011 WL 6400634, at *2 (noting that a time frame of a year was a "reasonable opportunity"); *Dep't of Justice v. Coltoff*, 1994 WL 680097, at *3 (discussing the efforts taken by the claimant under Supreme Court Rule 55 giving her two attempts at passing the Delaware bar examination); *Brown v. Schaeffer*, 1993 WL 390497, at *2 (noting that the claimant had failed to pass her certification test three times).

[71] Delaware's interpretation of "just cause" stems from *Abex Corp. v. Todd*, 235 A.2d at 272, and its "wilful or wanton" language. No party to this litigation has suggested that the Court broaden the definition of "just cause" and as a result, the Court will not consider such an argument *sua sponte*. The Court finds it important to note, however, as did the Court in *Dep't of Justice v. Coltoff*, that where employment is contingent upon an agreement to obtain a license or certification (not yet supported by substantial evidence in this case), the failure to do so would seem to make "the character of the conduct" irrelevant. 1994 WL 680097, at *3 n.5. "Consequently, it would not be impossible to envision a good faith argument that when an individual is terminated . . .[based on an agreement and without any legal capacity to continue work], the action was based upon 'just cause.'" (continued...)

18. "A reviewing court must have confidence that not only are an administrative body's findings firmly supported by substantial evidence, but that the fact finder has applied the appropriate standards in reaching the ultimate determination."[72] The record before the Court does not instill such confidence. Simply stated, the Board did not properly apply Delaware's "just cause" standard to the very limited evidence that was presented regarding the circumstances surrounding Ms. Giandonato's hiring and termination.

19. Based on the foregoing, the decision of the Board must be **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

Original to Prothonotary

cc: Katisha D. Fortune, Esquire

---

[71](...continued)
Id. The Inn failed to carry its burden to establish "just cause" in this case, however, as it presented no evidence that Ms. Giandonato's employment with the Inn (in all capacities) was clearly and expressly conditioned upon licensure or that she failed to take reasonable steps to secure licensure.

[72] *United Propane, Inc. v. Sowers-Vescovi*, at *6 (Del. Super. Jan. 14, 2000) (quoting *Future Ford Sales, Inc. v. Public Service Comm'n*, 654 A.2d 837, 845 (Del. 1995)).