SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Andrew G. Kerber, Esquire
Deputy Attorney Justice
Delaware Department of Justice
820 North French Street
Wilmington, Delaware 19801
Attorney for Appellant Delaware Transit Corp.

Jeffrey K. Martin, Esquire
Martin & Associates, P.A.
1508 Pennsylvania Avenue, 1-C
Wilmington, Delaware 19806
Attorney for Appellee Kelvin Roane

Katisha D. Fortune, Esquire
Deputy Attorney General
Delaware Department of Justice
820 North French Street
Wilmington, Delaware 19801
Attorney for Appellee Unemployment Insurance Appeal Board

Re: Delaware Transit Corp. v. Kelvin E. Roane & Unemployment Insurance Appeal Board[1]
C.A. No. N10A-01-008 RRC

Submitted: August 3, 2011
Decided: August 24, 2011

On Appeal from a Decision of the Unemployment Insurance Appeal Board.
AFFIRMED.

[1] Although named as an Appellant in this case, the Unemployment Insurance Appeal Board takes no position on the merits of Employee's claim; instead, the Board briefed only the issues relating to Appellant's allegation that the Board violated various procedural rules, failed to remand the case for further hearings, and capriciously disregarded substantial competent evidence. *See* Answ. Br. of Appellee at 2 ("The Board takes no position on the underlying merits of the Claimant's separation from employment.").

Dear Counsel:

INTRODUCTION

Appellant Delaware Transit Corp. ("Employer") filed a Notice of Appeal from a January 3, 2010 decision of the Unemployment Insurance Appeal Board (the "Board") holding that Employer had failed to meet its burden of proof that Employee was terminated for just cause. Employee was terminated based on a fellow employee's allegations of sexual harassment in the workplace, including allegations that Employee disseminated sexually untoward text messages and photographs. The Board held that the Employer's case contained no "physical evidence" supporting the allegations of sexual harassment, instead resting entirely on hearsay evidence. Accordingly, the Board reversed the Appeals Referee's determination that Employee was not entitled to unemployment benefits, and awarded unemployment benefits to Employee.

Although there does appear to be an unexplained delay between the Board's hearing and the issuance of its decision, and the Board decision would have benefitted from more careful attention to detail and choice of language, on balance, this Court finds that the Board's decision was supported by substantial evidence, free from legal error, and was not the product of a capricious disregard of competent evidence. Moreover, this Court holds that the Board is not required as a matter of law to remand a case in which it reverses the Appeals Referee based on a finding that a party bearing the burden of proof has failed to satisfy its burden. Consequently, the decision of the Board is **AFFIRMED.**

FACTS AND PROCEDURAL HISTORY

This case arises from Employee's November May 22, 2009 termination from employment with Employer; Employee was terminated for violation of Employer's Sexual and Other Harassment Policy.[2] In turn, Employee appealed the decision that he was terminated for just cause to the Division of Unemployment Insurance Appeals Referee. The Appeals Referee made the following findings of fact:

[2] Appendix to Employee's Answ. Br. at A-94.

> The claimant worked as a para transit supervisor for Delaware Transit Corporation from October 2007 until May 21, 2009. He earned $18.33 an hour.
>
> On April 30, 2009, the claimant made unwanted and lewd advances to a co-worker, Evelyn [Leake]. These included showing Evelyn a picture of a male torso with an erect penis and making other sexual remarks and sending the claimant two text messages which if interpreted in their context provide evidence that the claimant was continuing his sexual advances.
>
> The employer has a policy against sexual harassment. The claimant signed for the employee handbook and knew or should have known that unwanted sexual advances were grounds for discharge.
>
> Evelyn, from time to time, did send explicit text messages to the claimant. An atmosphere of sexual talk existed at the work place.[3]

The Appeals Referee's "number one thought in this case [was] that [Employee's] testimony was not credible" because Employee's testimony with respect to the text message exchange was inconsistent and conflicting.[4] Although the Appeals Referee acknowledged that there "seem[ed] to be a flavor of sexual talk at the work place," the Appeals Referee also found that Employee nonetheless "crossed the line with this sexually explicit picture, his request for Evelyn [Leake] to take a nude picture and his text messages."[5] Consequently, the Appeals Referee held that Employee had been terminated for just cause and disqualified from receiving unemployment benefits.[6]

Employee appealed this decision to the Board, and a hearing was held on September 30, 2009.[7] At the hearing, Employee testified that he did not produce the alleged explicit photograph, and he denied sending any explicit or pornographic texts.[8] Although Employee had been previously notified that unspecified other employees had also made sexual harassment complaints

---

[3] Decision of Appeals Referee of July 20, 2009 at 3.
[4] *Id.* at 4.
[5] *Id.*
[6] *Id.*
[7] Decision of the Unemployment Insurance Appeal Board of January 3, 2010. Although the Board indicated that it considered the evidence presented to the Appeals Referee, it appears that the hearing before the Appeals Referee was not transcribed until November 6, 2010. Thus, the transcript of the hearing before the Appeals Referee apparently would have been unavailable to the Board prior to rendering its decision.
[8] *Id.* at 1.

about him, he indicated that he was unaware of the identity of the complainants.[9]

Richard Siebel, a representative of Employer, also testified at the Board hearing. Mr. Siebel acknowledged that Employer's work atmosphere sometimes gave rise to "edgy" comments and that there was some "give and take" with regard to the conduct tolerated by Employer.[10] Mr. Siebel did not produce the explicit photograph alleged to have been exhibited by Employee.[11]

Employer also produced Kina Harrigan, another employee, who testified that she witnessed Employee engage in inappropriate sexual behavior on April 27, 2009. Employee objected to this testimony given that he was not given prior notice of this allegation.[12] Finally, Margaret Webb, another witness for Employer, testified that there was a report of inappropriate sexual behavior by Employee in May 2008, but there were no available witnesses to this alleged incident to offer testimony at Employee's pre-termination hearing.[13]

The Board reversed the determination of the Appeals Referee, stating:

> In this case, the Employer has failed to present evidence to show that the Claimant engaged in sexual harassment. The Employer was not able to show the picture. The Employer did not present "Evelyn" as a first hand witness. Since the Employer has no physical evidence that the Claimant sent the picture and no first-hand testimony from the incident that resulted in his termination, the Employer's case rests almost entirely upon hearsay evidence not covered by any exception to the hearsay rule. Therefore, the Board concludes that the Employer has failed to meet its burden of proof and finds that the Claimant was terminated without just cause. The Claimant is not disqualified from receipt of unemployment benefits.[14]

Employer has appealed the decision of the Board to this Court.

---

[9] *Id.*
[10] *Id.* at 2.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 3.

CONTENTIONS OF THE PARTIES

A. Employer's Contentions.

Employer contends that the Board's decision must be reversed for multiple reasons. Employer first asserts that, given the Board's decision that there was no "substantial basis" for the Appeals Referee's determination, 19 Del. C. § 3320(a) required the Board to remand the matter to the Appeals Referee, rather than reverse and award benefits.[15] Employer contends that § 3320(a)'s directive that the Board "shall remand a case to the appeal tribunal to supplement the existing evidence when it is determined to be insufficient to form a substantial basis for a decision" is mandatory and applicable to the Board in this case.[16] In support of this contention, Employer notes that the "extraordinary" scope of review afforded to the board, arguably amounting to "*carte blanche* in reviewing the factual findings of a referee," necessarily implies that the legislature intended the phrase "shall remand a case" as a limitation on the "otherwise extraordinary authority of [the Board]."[17]

Employer next contends that "it is apparent from even a cursory review of the referee's record in this case that [the Board] did not consider the referee's record in making its decision."[18] Employer notes that the transcript of the hearing before the Appeals Referee was not prepared until after the Board hearing, and alleges that "it is the standard practice of [the Board] not to listen to tapes of referee hearings before rendering decisions."[19] Consequently, Employer argues that the Board decision "ignores the Summary of Evidence included in the Referee's decision to such an extent that it is apparent that [the Board] may not have even read the Referee's Decision and if it was in fact read it apparently was forgotten or disregarded."[20] Employer contends that this alleged failure to review the

---

[15] Opening Br. of Employer at 12.
[16] *Id.*
[17] Reply Br. of Employer at 3.
[18] Opening Br. of Employer at 13.
[19] *Id.* at 14 n.1. Employer contends that the Board's failure to listen to the taped proceedings before the Appeals Referee is "likely a problem endemic to [the Board's] process for all appeals of referee's decisions to [the Board]." *Id.* at 14.
[20] *Id.*

record of proceedings before the Appeals Referee violates its due process rights.[21]

With respect to the date of the Board's decision, Employer suggests that the 85 day period between the hearing and the decision "may explain some of the factual errors" made in the Board's decision, errors which were prejudicial to Employer.[22] Employer notes that Board Regulation 6.1 states that "[t]he Board shall render its decision promptly, usually within 14 days of the hearing," and contends that the 85 day period in this case is independently grounds for reversal.

Finally, Employer contends that the Appeals Referee's determination included substantial evidence to support his decision, and that the Board's decision contains "numerous discrepancies against the unquestionable facts in the record."[23] Employer enumerated four alleged factual discrepancies in the Board's decision: 1) the transcript of the hearing before the Board incorrectly identified two of the Board members in attendance at the hearing; 2) the Board's decision incorrectly labeled Employee's counsel's opening statement as testimony by Employee; 3) although the Board's decision indicated that Employer's witness, Richard Seibel, characterized Employer's work atmosphere as "edgy," the transcript of Mr. Seibel's testimony does not reflect this statement; and 4) the Board's decision erroneously indicated that Employer did not present Ms. Leake as a witness before the Appeals Referee, and this statement was "simply wrong on the record," rather than a mere scrivener's error.[24] According to Employer, the Board's decision constituted a "naked judgment of credibility lacking a rational basis"[25] and a "capricious disregard for competent evidence."[26]

Employer notes that the Appeal's Referee's decision references the direct, non-hearsay testimony of Ms. Leake, a firsthand complainant about Employee's sexual harassment; on this point, Employer states that "[h]ow [the Board] missed this first person testimony that is abundantly clear in the record cannot be explained by Delaware Transit"[27] and that Employer's

---

[21] Reply Br. of Employer at 10.
[22] Opening Br. of Employer at 15.
[23] *Id.* at 16.
[24] Reply Br. of Employer at 7-8, 13.
[25] *Id.* at 16.
[26] Opening Br. of Employer at 16.
[27] *Id.* at 18.

inability to produce the alleged explicit photograph was attributable to the fact that Employee allegedly exhibited the photograph to Ms. Leake via Employee's cellular phone; it was not alleged that Employee sent the photograph to Ms. Leake's phone or otherwise disseminated it, and Employee remained the only individual with control over this photograph.[28] To the extent that the Board deemed Ms. Leake's testimony to consist of hearsay, Employer contends that Ms. Leake's testimony as to Employee's allegedly harassing comments fits the definition of non-hearsay, as an admission by a party opponent, and consequently should not have been characterized and treated as hearsay by the Board.[29] As a result, Employer argues that the decision must also be reversed on this basis.

B. Employee's Contentions.

Both Employee and the Board filed answering briefs addressing Employer's contentions.[30] For his part, Employee contends that Employer has misstated the applicability of 19 Del C. § 3320(a); Employee contends that Employer's interpretation of § 3320(a) "would require a remand in *every single case* in which [the Board] reverses the Appeals Referee upon evidentiary findings, which is simply not the law."[31] Employee contends that the relevant language of § 3320(a) applies only when the evidence presented to the Appeals Referee "fails to address essential elements of the dispute," whereas in this case, the Board "disagree[d]" with the Appeals Referee and simply determined that Employer failed to meet its burden of proof.[32] Put differently, "the Appeals Referee simply saw it one way, [the Board] sees it another way."[33]

With respect to Employer's assertion that the Board did not consider the Appeals Referee's decision when rendering its decision, Employee states that "there is *absolutely no evidence* here that [the Board] failed to listen to the tape in question, or properly consider the record below, or properly

---

[28] *Id.* at 17.
[29] Reply Br. of Employer at 12.
[30] However, the Board's brief is limited to the procedural deficiencies alleged by Employer; the Board took no position on the merits of the underlying dispute. *See supra* note 1.
[31] Employee's Answ. Br. at 11.
[32] *Id.* at 12.
[33] *Id.*

perform its statutory duty."[34] Employee contends that Employer has suggested, "*without any corroboration whatsoever*," that it is the Board's standard practice not to listen to the tapes of hearings before the Appeals Referee.[35]

With respect to Employer's contention that the 85 day period between the Board's hearing and its decision resulted in prejudicial factual errors, Employee responds Regulation 6.1 is not mandatory for the Board, as it indicates the decision shall issue "usually within 14 days" of the hearing.[36] Further, Employee argues that this time period is prescribed primarily as a mechanism to protect unemployment claimants, who are in economic need of a prompt determination of their entitlement to benefits.[37] Employee states that Employer's suggestion that the Board's decision was erroneous merely by virtue of the 85 day time period "impugn[s] the ability of [the Board] to do its job properly."[38]

Finally, Employee argues that there was substantial evidence in the record to support the Board's decision. Employee notes that his denial of ever exhibiting the alleged pornographic photograph, Ms. Leake's concession that she herself engaged in "sexual banter," and the general context of the workplace adequately supported the Board's conclusion that Employee was not terminated for just cause.[39] According to Employee, it was fully within the Board's prerogative to review the evidence presented and reach the instant factual findings.[40]

C. The Board's Contentions.

The Board contends that Employer's argument that the Board must remand a case whenever it finds that the evidence does not support the referee's decision is "unique."[41] The Board acknowledges that the term "shall," as used in 19 Del. C. § 3320(a), is generally a mandatory term, but maintains that Employer has misstated the context in which the term appears;

---

[34] *Id.* at 13.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 14.
[38] *Id.*
[39] *Id.* at 14.
[40] *Id.*
[41] The Board's Opening Br. at 5.

the Board notes that phrase "shall remand" immediately precedes the clause "when [the existing evidence] is determined to be insufficient to form a substantial basis for a decision."[42] According to the Board, this language makes the remand decision discretionary, in the judgment of the Board, when it determines that the evidence is insufficient.[43] The Board notes that, in this case, it did not determine that the record was insufficient; rather, the Board concluded that Employer failed to meet its burden.[44] Similarly, the Board notes that there is a longstanding policy of affording the Board broad discretion in the appeal process, and the interpretation advanced by Employer, which would effectively necessitate a remand to the Appeals Referee in every case in which the Board reversed the Appeals Referee, is irreconcilable with this policy.[45]

With regard to Employer's assertion that the Board's review of the record of proceedings before the Appeals Referee was deficient, the Board states that it "specifically acknowledged that it had reviewed the Referee's decision and the record compiled below" and that, "[i]f the Board had before it the Referee's summary of all the material facts presented by the parties at the hearing below, the Board had access to the appropriate universe of information."[46] The Board further argues that Employer never alleged that the Appeals Referee's summary was incomplete, inaccurate, or prejudicial, thereby defeating any argument that the Board's alleged failure to listen to the tape of the proceedings was somehow prejudicial to Employer.[47]

With respect to the 85 day period between the hearing and the issuance of its decision, the Board asserts that Regulation 6.1 does not require the decision be issued within a specified time.[48] The Board further notes that the 85 day period would not affect the standard of review applicable for appeals to this Court, and there is no authority for Employer's position that an alleged violation of Regulation of 6.1 is, standing alone, sufficient grounds for reversal.[49]

---

[42] *Id.* at 6.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 7.
[46] *Id.* at 8.
[47] *Id.* at 9.
[48] *Id.* at 10.
[49] *Id.*

Finally, the Board contends that it did not ignore substantial evidence in reaching its decision.[50] The Board argues that Employee's specific denial of making the alleged harassing statements was juxtaposed with the fact that Employer was "unable to provide *any* evidence to corroborate the testimony offered by its key witnesses, Evelyn Leake and Keena Harrington."[51] The Board acknowledged that it was permitted to admit hearsay evidence, but noted that it could not base its decision solely on hearsay evidence.[52] The Board asserts that, "in the face of the Claimant's denial of the conduct at issue and the lack of corroborative evidence, there could be no finding that the Employer had met its burden of proof or persuasion by a preponderance of substantial evidence."[53] To the extent that Employer alleged that the Board did not accord the proper weight to each witnesses testimony, the Board notes that it has discretion to assess the credibility of the witnesses and weigh the evidence presented.[54]

STANDARD OF REVIEW

This Court's review of an Unemployment Insurance Appeal Board decision is defined by statute. Pursuant to 19 Del. C. § 3323(a), "the findings of the Unemployment Insurance Appeal Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law." The scope of this Court's review "is limited to a determination of whether there was substantial evidence sufficient to support the findings" of the Board;[55] substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[56] Consequently, this Court will not disturb the Board's determination absent an abuse of the Board's discretion.[57] An

---

[50] *Id.* at 11.
[51] *Id.*
[52] *Id.* at 14.
[53] *Id.* at 11-12.
[54] *Id.* at 12.
[55] *Unemployment Ins. Appeals Bd. v. Duncan*, 337 A.2d 308, 309 (Del 1975).
[56] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[57] *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991) ("The scope of review for any court considering an action of the Board is whether the Board abused its discretion."); *see also City of Newark v. Unemployment Ins. Appeals Bd.*, 802 A.2d 318, 323 (Del. Super. Ct. 2002) ("If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.") (citation omitted).

abuse of discretion will be found only if "the Board 'acts arbitrarily or capriciously' or 'exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.'"[58]

As applied to the instant case, when the party bearing the burden of proof fails to convince the Board below, "the resulting findings of fact can be overturned by the court 'only for errors of law, inconsistencies, or capricious disregard for competent evidence.'"[59] Even if the Court might have held differently in the first instance, it must affirm a decision of the Board if the decision was supported by substantial evidence.[60] Similarly, denial of a party's due process rights "occurs where the exercise of power by an administrative officer or body is arbitrary or capricious."[61]

DISCUSSION

A. 19 Del. C. § 3320(a) Did Not Require the Board to Remand this Case to the Appeals Referee.

This Court rejects Employer's suggested interpretation of 19 Del. C. § 3320(a) reads:

> The Unemployment Insurance Appeal Board [UIAB] may on its own motion, affirm, modify, or reverse any decision of an appeal tribunal on the basis of the evidence previously submitted to the appeal tribunal or it may permit any of the parties to such decision to initiate further appeal before it. The UIAB shall remand a case to the appeal tribunal to supplement the existing evidence when it is determined to be insufficient to form a substantial basis for a decision. Appeals to the UIAB may be made by the parties to a disputed unemployment insurance claim, as well as by the claims

[58] *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at * 2 (Del. Super.) (citations omitted).
[59] *Wilson v. Unemployment Ins. Appeal Bd.*, 2011 WL 3243366, at *2 (Del. Super.) (quoting *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. Ct. 1979)).
[60] *See, e.g., T.A.H. First, Inc. v. Wescott*, 2004 WL 2827879, at *3 (Del. Super.) ("The Court must affirm the decision of an agency if the decision is supported by substantial evidence even if the Court might have, in the first instance, reached an opposite conclusion.") (citation omitted).
[61] *Ridings*, 407 A.2d at 240 (citations omitted).

> deputy whose decision is modified or reversed by an appeals tribunal. The UIAB shall promptly notify all interested parties of its findings and decision.

In construing § 3320(a), this Court is guided by the "golden rule" of interpretation: when interpreting a statutory provision, the "unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[62]

On its face, this section bestows a very broad scope of review on the Board. Indeed, the Board is free to "affirm, modify, or reverse" the decision below "on the basis of the evidence previously submitted." With respect to the provision stating the Board "shall remand" the case, this is triggered only "when it is determined to be insufficient to form a substantial basis for a decision." Critically, it does not state that the case "shall" be remanded when it is determined that a party has failed to carry its burden of proof or persuasion; instead, the case is to be remanded only when "it is determined" that the existing evidence is insufficient. The Board is well situated to evaluate the evidence presented, and it would make little sense to vest broad discretion in the Board to affirm, modify, or reverse decisions below on the basis of the evidence, only to simultaneously require that, if the Board finds that a party has failed to carry its burden of proof, the Board necessarily must offer that party a "second bite at the apple" to produce evidence.[63] Indeed, the Board has a separate regulation that specifically allows it to remand a matter "at any time and for any purpose in its sole discretion;"[64] it would make little sense to vest the Board with such broad discretion to address each in accord with its own facts and circumstances, whether by reversal, modification, affirmance, or remand, only to require the Board to remand cases when it exercises that discretion in such a way that differs with the Appeals Referee on the question of whether a party has met its burden of proof.[65]

---

[62] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985) (citing 2A. Sutherland, STATUTES AND STATUTORY CONSTRUCTION § 45.12 (4th ed. 1984)).

[63] In this context, the term "second bite at the apple" essentially indicates that "the first bite was not successful, yet, through some windfall, a new opportunity is awarded." *Adams v. Delaware Harness Racing Comm.*, 2010 WL 201208, at *5 (Del. Super.).

[64] Unemployment Insurance Appeal Board Regulation 5.0 ("The Board may remand any case to the Hearing Officer at any time and for any purpose at its sole discretion.").

[65] The Court also notes the difficulties and costs to judicial and administrative economy that such a rule would engender; given that Employer's interpretation of § 3320(a) would

When construing this language in context,[66] it is apparent that the phrase "when it is determined" is a further grant of discretion upon the Board. That is, in those cases where the Board determines that the available evidence is "insufficient" for it to "form a substantial basis for a decision," then the Board "shall" remand the case. On the other hand, if the Board does not "determine[]" that the evidence is insufficient, it is free to "affirm, modify, or reverse" the decision below. The Board did in fact reverse the Appeals Referee's determination, which *ipso facto* confirms that the Board did was satisfied that there was sufficient evidence to form a "substantial basis" for its decision. To hold otherwise would be to impose a *per se* rule that the Board must remand a case whenever it holds that a party bearing the burden of proof has failed to meet the burden; this would effectively nullify the Board's express authority to "affirm, modify, or reverse" a decision "on the basis of the evidence previously submitted." In turn, given that statutes should be construed "in a way that gives effect to all of their provisions" and that, "[i]f possible, arguably conflicting provisions should be harmonized," Employer's proffered interpretation must be rejected.[67]

---

only be triggered when the party bearing the burden of proof prevailed before the Appeals Referee and the Appeals Referee's decision was reversed due to failure to meet the burden of proof, on remand, the Appeals Referee would simply be presented with the Appellee's efforts to bolster the conclusion that the Appeals Referee previously reached. This Court cannot discern a sound policy reason for pronouncing a *per se* rule that, when the Board determines a party has failed to carry its burden of proof before the Appeals Referee, that party should nonetheless be entitled, as a matter of right, to a remand of the case and the accompanying "second bite at the apple;" indeed, the general judicial policy favoring certainty and finality in the adjudicative and review processes militates strongly against such an interpretation. *Cf. Accu-Fire Fabrication, Inc. v. Corrozi-Fountainview, LLC,* 2009 WL 930006, at *2 (Del. Super.) (stating that a party's fail[ure] to develop arguments in the first instance, a motion for reargument is not a means to obtain a 'second bite at the apple.'"); *State v. Kirk*, 2007 WL 1446671, at *4 (Del. Super.) (noting that a criminal defendant "does not get a second bite at the apple simply because he has now found a more credible expert to perform the same tests that his own expert had performed in preparation for trial."); *J.L. v. Barnes*, 2011 WL 3300702 (Del. Super.) (noting that, in the context of claim splitting by a plaintiff, "the Court will not countenance Plaintiff 'taking two bites at the apple.'") (citation omitted); *Hamm v. DCSE*, 1995 WL 775184, at *7 (Del. Fam.) (noting that "the system. . .is not designed to afford litigants 'two bites of the apple.'").

[66] 1 Del. C. § 303 ("Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.").

[67] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010) (citations omitted).

Interpreting the phrase "when it is determined" as a further grant of discretion to the Board to determine when it deems the evidence insufficient to reach a decision is consistent with the general context of § 3320(a), which explicitly seeks to confer broad discretion on the Board, and harmonizes any alleged internal conflict to the section and provides effect to all provisions of § 3320(a). This result is reasonable and consistent with the overall tenor of § 3320(a), while Employer's interpretation would effectively deprive the Board of the discretion to reverse or modify decisions on sufficiency of the evidence grounds, notwithstanding a clear statutory grant of authority to affirm, modify, or reverse such decisions. Given the choice between a "reasonable" and "unreasonable" interpretation of a statute, this Court will adopt the reasonable interpretation of the statute. It follows that the Board was not required to remand the case to the Appeals Referee.

B. The Board's Decision Was Free From Legal Error, Supported by Substantial Evidence, and Did Not Deprive Employer of Due Process.

Pursuant to 19 Del. C. § 3314,[68] an employee will be disqualified from receiving unemployment benefits if the employee was discharged for "just cause." A violation of an employer's policy or rule, "particularly where the employee received prior notice of the rule through a company handbook or other documentation," constitutes "just cause."[69] The employer bears the burden, by a preponderance of the evidence, of establishing just cause for termination.[70]

In this case, Employer alleges that Employee violated its policy against sexual harassment, and it is undisputed that Employee received and acknowledged this policy. Nonetheless, Employer was obliged to carry its burden, by a preponderance of the evidence, of establishing its contentions before the Board. This Court has reviewed the instant record and Employer's contentions; while it is true that there are some factual discrepancies or misstatements in the Board's decision, it remains that the Board received the Appeals Referee's factual summary and conducted its own hearing on

---

[68] "An individual shall be disqualified for benefits: . . . For 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. . . ."). § 3314(2).
[69] *Toribio v. Peninsula United Methodist Homes, Inc.*, 2008 WL 153871, at *2 (Del. Super.).
[70] *See, e.g., id.*

Employee's appeal. At this hearing, Employer was offered the choice of making a statement or standing on the record, and Employer elected to offer the testimony of Keena Harrigan.[71] Significantly, at the hearing, the Board inquired as to the procedure Employer followed in investigating the allegations of Ms. Harrigan, and it was determined that, during the course of Employer's investigation of Ms. Harrigan's allegations, Employee did not have an opportunity to learn the exact nature of the allegations nor to ask any questions of Ms. Harrigan.[72] This must be viewed in light of Employer's testimony (via its representative, Mr. Seibel) that the alleged incident with Ms. Harrigan was a substantial factor in Employer's decision to terminate Employee:

> Mr. Roane was in addition to the incident with Ms. Leake, we had an incident with Ms. Harrigan here. . .the very nature of the incident coupled with what happened with Ms. Leake was grounds for us proposing termination. I felt that-we felt that the two incidents combined, whereas the penalty might have been somewhat less severe than the industrial equivalent of capital punishment, when combined these two incidents, we felt that termination was the only outcome.[73]

Ms. Harrigan then testified that Employee would make "little comments" that were "uncomfortable," but also that she "didn't really think anything of it."[74] She stated that, at certain times when she was inserting her time card through the window, Employee would "rub her hand," and that, on one occasion, he "rubbed up behind" her.[75] Thereafter, Employee testified that it was the "first [he was] hearing of" the incidents alleged by Ms. Harrigan, and that he in fact had not known of Ms. Harrigan's identity as a complainant against him.[76]

With respect to Ms. Leake's testimony before the Appeals Referee, she essentially stated that Employee had "crossed the line from joking to making [her] uncomfortable" and that certain messages she received from Employee

---

[71] Appendix to Employee's Answ. Br. at 71 (The Chairman: "Employer, you may make a statement or stand on the record. That is your decision []." Mr. Seibel: "Richard Seibel for Delaware Transit Corporation. I have one witness that was not available at the referee hearing.").
[72] *Id.* at 78-79.
[73] *Id.* at 73.
[74] *Id.* at 81.
[75] *Id.*
[76] *Id.* at 83.

made her feel "offended" and "uncomfortable."[77] Despite this, Ms. Leake conceded that she forwarded jokes and messages, including those that were "sexual in nature," because it was "the nature of the job and we do that."[78]

It is "the exclusive purview of [the Board] to judge witness credibility and resolve conflicts in testimony."[79] As stated, Employer contends that the only reasonable explanation for the Board's holding was that it failed to listen to the recording of the proceeding before the Appeals Referee, as this recording contained Ms. Leake's testimony about the allegations against Employee.[80] However, this is inconsequential to the ultimate determination of the Board, as the Board's decision is sufficiently supported by the Appeals Referee's Summary of Evidence. This Court has previously observed that the Board members' acknowledgement that the Board was "familiar with the entire record" is sufficient, and, to the extent the Board does not reconcile or address all inconsistencies between its findings and those of the Appeals Referee, "there is no requirement that the Board specifically compare its findings to those of the Referee, or explain why the Referee's findings were unacceptable."[81]

---

[77] *Id.* at 19.

[78] *Id.* at 21-22. For his part, Employee denied ever sending sexual text messages to Ms. Leake. *Id.* at 49 (Q. "You sent her sexual text messages? I mean sexual jokes?" A. "I never sent her no sexual jokes, none whatsoever. Never, ever have sent her any text messages of any sexual nature.").

[79] *Roshon v. Appoquinmink Sch. Dist.*, 5 A.3d 631, at *2 (Del. 2010) (citations omitted).

[80] Employer asserts that the Board's Answering Brief conceded the point that the Board did not listen to the recording of proceedings before the Appeals Referee. Employer's Reply Br. at 9 ("[I]n this case [the Board] has conceded that its review was limited to the Referee's decision and the referee's summary of all testimony and evidence and did not review the tape or transcript of the Referee's hearing."). However, the Board's Answering Brief references only "the alleged failure of the Board to review the transcript or recording of the hearing below. . . ." The Board's Answ. Br. at 10. Thus, it does not appear that the Board conceded this point, although the crux of the Board's position was that this alleged failure was irrelevant to the instant issues. *Id.* at 9-10.

[81] *Richardson's Market v. Covais*, 1995 WL 269242, at *2 (Del. Super.) (affirming the Board's determination that the employee voluntarily quit her employment, with good cause, and that the employer's due process rights were not violated because the "rudimentary requirements of fair play" were satisfied) (citation omitted); *see also Robbins v. Unemployment Ins. Appeal Bd.*, 1994 WL 45344, at *4 (Del Super.) ("[Section 3320(a)] of the Delaware Code affords the Board substantial latitude as to what evidence it may consider in reaching a decision. The Board may base its decision on evidence previously submitted to the Appeals Referee or on new, additional evidence.");

In this case, the Appeals Referee's summary is entirely consistent with the operative testimony before the Appeals Referee, thereby rendering the summary sufficient to familiarize the Board with the record. A review of both the Referee's summary and the transcript of proceedings before the Appeals Referee confirms that Ms. Leake's allegations of sexual harassment were apparently somewhat undermined by her admission that she herself engaged in the dissemination of sexual messages and jokes; indeed, the Appeals Referee found that she did in fact send "explicit text messages" to Employee.[82] At bottom, the Appeal's Referee's determination turned on his assessment of the credibility of the witnesses, and the Referee found that Employee's testimony was not credible, thereby accepting Ms. Leake's testimony as to the allegations of sexual harassment.

On appeal, the Board's decision did incorrectly indicate that Ms. Leake had not been presented as a firsthand witness,[83] but, at the hearing, the Board acknowledged reading the Referee's decision and all documents submitted.[84] Similarly, the Board incorrectly classified the testimony regarding the alleged incident as hearsay.[85] It is not clear from the record whether the Board intended to correctly convey the fact Ms. Leake was merely not presented as a firsthand witness at that particular hearing, or if the Board was erroneously stating that Ms. Leake was never presented as a firsthand witness. In any event, this alone is not sufficient to warrant a reversal of the Board's decision. The transcript of the hearing before the Board indicates that the Board was aware of the substance of Ms. Leake's testimony and did not exclude her testimony from consideration.[86] The Appeals Referee's decision was predicated on his consideration of Ms. Leake's allegations, her admission to engaging, to some degree, in behavior similar to that at issue, and Employee's perceived lack of credibility. Although Employer included testimony from Ms. Harrigan containing additional allegations of misconduct, it was also revealed that Employee was not previously afforded an opportunity to learn the nature of or

---

Kowalski v. Unemployment Ins. Appeal Bd., 1990 WL 28597, at *9 ("There is no requirement that the Referee's decision be specifically addressed.").

[82] Appendix to Employee's Answ. Br. at 89.

[83] *Id.* at 99. The Board has indicated that it likely included this incorrect sentence due to a scrivener's error. The Board's Answ. Br. at 11.

[84] Appendix to Employee's Answ. Br. at 65.

[85] *Id.* at 99.

[86] Thus, Employee is correct in that the Board "may have inadvertently mischaracterized Ms. Leake's testimony as hearsay, but it didn't *exclude* the evidence." Employee's Supplemental Answ. Br. at 7.

specifically deny these allegations;[87] this was significant in light of Employer's statement that Ms. Harrigan's allegations contributed to Employer's decision to terminate Employee.[88] In turn, the Board was free to adjust the weight it afforded to these allegations accordingly. Thus, notwithstanding the somewhat unclear nature of the Board's reasoning on this particular issue, on balance, the Board's decision is nonetheless sufficiently reasoned and supported; as stated in *American Jurisprudence*, "[w]hile a court reviewing whether an agency rule is arbitrary or capricious may not supply a reasoned basis for the agency action that the agency itself has not given, a reviewing court will uphold a decision of less than ideal clarity if it can reasonably discern the agency's path."[89]

Although Employer is correct that there were certain factual discrepancies in the Board's decision, the Court concludes that these discrepancies were, in the overall picture, *de minimis* and do not impair the otherwise broad discretion of the Board to weigh the evidence presented and reach its conclusion. It is true that the cover page of the transcript of proceedings before the Board incorrectly indicates that the hearing took place

---

[87] *See supra* note 76.

[88] *See supra* note 73.

[89] 2 Am.Jur.2D *Administrative Law* § 501 (2011) (citation omitted). Another authority has observed that "arbitrary and capricious" review encompasses simply an "adequate reasoning" requirement:

> The [*Motor Vehicle Manufacturers of the United States v. State Farm*] Court generalized the content of a statement of basis and purpose required to support or avoid a conclusion that a rule is arbitrary and capricious:
>
> > Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
>
> As stated and applied in *State Farm*, this requirement seems to impose on agencies only a modest burden of explanation.

Richard J. Pierce, Jr., *Administrative Law Treatise* 448-49 (4th ed. 2003). Although the foregoing passage speaks to arbitrary and capricious review of decisions rendered under an agency's rulemaking authority, a subsequent section of the treatise confirms that the standard would be the same in the context of review of an agency's adjudicative determination. *See id.* at 808 ("[The treatise] discuss[es] the requirement of reasoned decisionmaking in detail § 7.4. Since that requirement applies to adjudication as well as to rulemaking, [the treatise] will not repeat the discussion in this section.").

before five board members,[90] but this apparent error is meaningless in light of the fact that the Board's decision identified the three Board members handling this appeal, and all three members signed the instant decision.[91] A quorum of the Board is three members,[92] and it is manifest on the face of the decision that it complied with this requirement.

With respect to Employer's contention that the Board decision's characterization of Mr. Seibel's testimony as including a statement that the work atmosphere could result in "edgy comments," it is true that the precise language used by the Board does not appear in the transcript of Mr. Seibel's testimony.[93] Nonetheless, in response to a question about where the "line" was with respect to sexual harassment, Mr. Seibel explicitly testified that there was "a certain amount of give and take [] with the workers back and forth."[94] Thus, while perhaps it would have been preferable for the Board to use more precise, record-supported language in its decision, this alleged "misstatement" [95] was, at most, an imperfect (yet substantially correct) attempt to paraphrase the substance of Mr. Seibel's testimony. In turn, the Court rejects Employer's contention that this issue was in any way prejudicial.

The Board, faced with the same allegations by Ms. Leake, the new allegations by Ms. Harrigan, and Employee's unequivocal denials of the instant misconduct, was free to reach the opposite factual conclusions. While it would have been preferable (and more conducive to appellate review) for the Board to exercise greater care when drafting its decisions, thereby preventing the need for this Court to assess the materiality of technical or factual errors, the Board's decision is nonetheless entitled to deference in this case. Employer is correct that, in *Renshaw v. Widener University*, a case where the Board did not take additional evidence or hold a hearing, this Court expressed its reluctance to affirm a Board decision that "amount[s] to a naked judgment of credibility different from that arrived at by the officer who heard the testimony."[96] However, this proposition is inapposite to the case at hand; here, the Board conducted a hearing and provided both parties a full, fair, and complete

---

[90] Appendix to Employee's Answ. Br. at 63.
[91] *Id.* at 97, 99.
[92] 19 Del. C. § 3103 ("Any 3 Board members shall constitute a quorum.").
[93] Employer's Reply Br. at 8 ("There is no testimony from Mr. Seibel in the record about a work atmosphere at DART that could sometimes result in edgy comments.").
[94] Appendix to Employee's Answ. Br. at 85.
[95] *Id.*
[96] *Renshaw v. Widener University*, 1987 WL 6471, at *1 (Del. Super.).

opportunity to offer evidence, including witness testimony. Thus, the Board heard testimony from Employee, Employer's representatives, and Ms. Harrigan, together with its review of the record of proceedings below. Under these circumstances, the Court's review is confined to determining whether the Board's decision was supported by substantial evidence and free from legal error.[97]

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[98] Here, Employee's denials of committing misconduct, together with Ms. Leake's testimony about the instant allegations, her participation in the sexual joking and banter that was apparently inherent in the workplace, and Employer's acknowledgement that such sexual joking was part of the "give and take" of the workplace, are adequate to support the conclusion that the degree of Employee's alleged misconduct did not rise to the level of "just cause" for termination. Thus, this Court will not "weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[99]

Importantly, the Board did not necessarily find that Employee had not committed misconduct, but simply that Employer had not carried its burden of proof on this critical point; this Court will reverse the Board's determination on satisfaction of the burden of proof only for "errors of law, inconsistencies, or a capricious disregard for competent evidence."[100] The Court finds no error of law in the Board's decision, and it was not irrational, unreasonable, or unconsidered such that it could be considered capricious.[101] Although there

---

[97] 19 Del. C. § 3323(a); *Unemployment Ins. Appeals Bd. v. Duncan*, 337 A.2d 308, 309 (Del 1975); *Ingram v. Unemployment Ins. Appeals Bd.*, 2001 WL 1482451, at *1 (Del. Super) ("On appeal from a decision of the Unemployment Insurance Appeal Board, the scope of the court's review is limited to a determination of whether the Board's decision is supported by substantial evidence and free from legal error.") (citations omitted).
[98] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[99] *Johnson v. Chrysler Corp.*, 59 Del. 48, 51 (Del. 1965).
[100] *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. Ct. 1979).
[101] *See, e.g., Willdel Realty, Inc. v. New Castle County*, 270 A.2d 174, 178 (Del. Ch. Ct. 1970) (noting that the label "'[a]rbitrary and capricious' is usually ascribed to action which is unreasonable or irrational, or to that which is unconsidered. . . ."). *See also* 2 AM.JUR. 2d *Administrative Law* § 499 (2011) ("[Under arbitrary and capricious review], [t]he court must determine only whether the agency has considered relevant factors and articulated a rational connection between the facts found and the choice made.") (citation omitted); *cf.* Annotation, *Arbitrariness*, 33 FED. PRAC. & PROC. JUDICIAL REVIEW § 8334

were certain inconsistencies between the Board's decision and the Appeal's Referee's decision, the Court finds these inconsistencies to be immaterial to the ultimate result and, consequently, insufficient to overcome the baseline deference that is afforded to decisions of the Board. It follows that Employer's due process rights were not violated in this case; in administrative proceedings, due process simply requires that "the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."[102] As stated, the Board held a hearing and provided both parties a fair opportunity to present evidence and articulate their positions; therefore, the "rudimentary requirements of fair play" were satisfied.

The Court notes that the public policy of this State does not countenance sexual harassment, in the workplace or otherwise. As noted by the Supreme Court of Delaware, "[w]hether sexual harassment in the workplace violates the public policy of this State is not in dispute."[103] However, the issue before the Court is not whether sexual harassment is good cause for termination; rather, the discrete question before the Court is whether the Board's determination that Employer had not carried its burden of proof in this particular case was supported by substantial evidence and not capricious.

Finally, this Court will not reverse the Board's determination based on the 85 day period between the hearing and the Board's decision. Although Unemployment Insurance Appeal Board Regulation 6.1 indicates that the decision shall issue its decision "promptly" and "usually within 14 days" of the date of the hearing, the very language of this rule indicates that it is an aspirational standard, rather than a substantive rule of law or procedure. While it is arguable that, under the circumstances, 85 days cannot be considered prompt, and that there is, at least to some degree, an inherent element of prejudice arising from such a delay, it remains that a reversal by this Court is

---

(2011) ("'Arbitrary or capricious' review communicates the least judicial role, short of unreviewability, in the word formula system. In the word formula system, the arbitrariness standard communicates a lesser degree of judicial scrutiny than does the reasonableness test or the agreement test. Thus, it applies in those administrative schemes in which the courts are to have a lesser role.") (citation omitted).

[102] *Ridings*, 407 A.2d at 240 (citation omitted).

[103] *Schuster v. Derocili*, 775 A.2d 1029, 1038 (Del. 2001). The *Schuster* Court, in a case of first impression in Delaware, held that "Delaware recognizes a common law cause of action for a breach of a covenant of good faith and fair dealing implied in an at-will employment contract where a plaintiff alleges that her termination directly resulted from her refusal to succumb to sexual harassment in the workplace." *Id.* at 1039-40.

not the appropriate remedy, as there is no authority for the proposition that the Board's delay in issuing an opinion, standing alone, is sufficient grounds for reversal.[104] To the extent that Employer contends that this delay is grounds for reversal because it gave rise to the previously discussed factual inconsistencies, the Court's holding that any such inconsistencies do not require reversal necessarily forecloses this argument.

As stated, this Court's appellate review of the Board's decisions is limited; a Board decision must be affirmed if it is supported by substantial evidence and free from legal error.[105] Even if the Court might have reached a

---

[104] One authority has analyzed the test for unreasonable delay of agency action in the context of the federal Administrative Procedures Act's provisions for obtaining a court order to compel agency action by a certain deadline:

> [T]he [*TRAC v. FCC*] Court set forth a six-part test for determining whether an agency action has been unreasonably delayed, 750 A.2d at 78:
>
> > (1) [T]he time agencies take to make decisions must be governed by a "rule of reason". . .; (2) where Congress has provided a timetable or other indication fo the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason. . .; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake. . .; (4) the court should consider the effect of expending delayed action on agency activities of a higher or competing priority. . .; (5) the court should also take into account the nature and extent of the interest prejudiced by delay. . .; and, (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."
>
> It is hard for a petitioner to prevail under this deferential standard, and most do not.

Richard J. Pierce, Jr., *Administrative Law Treatise* 839 (4th ed. 2003). Thus, even in the context of reviewing an agency's alleged unreasonable delay for purposes of compelling agency action by a date certain, the standard is deferential; accordingly, a reversal predicated on the bare fact of the 85 day delay in this case would not be an appropriate remedy.

[105] *See, e.g., City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. Ct. 2002) ("If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.") (citation omitted). *See also* 11 Del. C. § 763 (noting that a person is guilty of sexual harassment (an unclassified misdemeanor) when he or she "suggests, solicits, requests, commands, importunes or otherwise attempts to induce another person to have sexual contact or sexual intercourse or unlawful sexual

different conclusion in the first instance, it is nonetheless bound by a Board determination that is supported by substantial evidence.[106] The instant Board decision was free from legal error and supported by substantial (though conflicting) evidence. Consequently, the Board's decision must be affirmed.

CONCLUSION

Accordingly, for all the reasons stated above, the decision of the Unemployment Insurance Appeal Board is **AFFIRMED.**

_____
Richard R. Cooch, R.J.

RRC/rjc
oc: Prothonotary
cc: Unemployment Insurance Appeal Board

penetration with the actor, knowing that the actor is thereby likely to cause annoyance, offense or alarm to that person.").

[106] *See supra* note 60.