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CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/29/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARLEN B. ADINA,) 1 CA-UB 12-0327
) 1 CA-UB 13-0004
Appellant,) (Consolidated)
)
v.) DEPARTMENT C
)
ARIZONA DEPARTMENT OF ECONOMIC) **MEMORANDUM DECISION**
SECURITY, an Agency,) (Not for Publication -
) Rule 28, Arizona Rules of
and) Civil Appellate Procedure)
)
JP MORGAN CHASE BANK NA,)
)
Appellees.)
_____)

Appeal from the Appeals Board of the Department of Economic
Security of the State of Arizona

A.D.E.S. Appeals Board No. U-1323337-BR and U-1331458-BR

Administrative Law Judge Louis Deleon
Administrative Law Judge Timothy Rollins

AFFIRMED

Arlen B. Adina, Appellant Phoenix
In Propria Persona

Thomas C. Horne, Attorney General Phoenix
by Carol A. Salvati, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

T H U M M A, Judge

¶1 Arlen B. Adina appeals from administrative decisions in two unemployment benefit cases. Adina challenges the Appeals Board's determination that she was discharged as a teller for negligent misconduct and challenges an overpayment determination. Because substantial evidence supports the decisions, the Appeals Board's determinations are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Adina worked for JP Morgan Bank (Employer) as a full-time teller for 12 years. Adina had a good work record until her transfer to the Glendale branch in 2010, about a year before her discharge. Employer apparently began coaching and counseling Adina on errors just a few months after her transfer to the Glendale branch. Adina's discipline and eventual discharge resulted from several specific errors she made in the summer and fall of 2011.

¶3 In June 2011, Adina posted a customer's deposit to the wrong account, causing the customer to incur a fee for insufficient funds and resulting in a customer complaint. In July 2011, Adina told a merchant customer that a deposit was twenty dollars short. This resulted in a customer complaint, and

¹ This court views the evidence in a light most favorable to upholding the decision of the Appeals Board. *Prebula v. Ariz. Dep't of Econ. Sec.*, 138 Ariz. 26, 30, 672 P.2d 978, 982 (App. 1983).

once investigated, Employer found the twenty dollars on the floor near Adina's teller station.

¶14 In August 2011, without consulting a manager and contrary to Employer's policies, Adina informed a merchant customer that checks must be endorsed before coming to the bank and, if that did not occur, deposits would not be processed. The customer complained to a district manager and Adina received a written warning a week later specifically mentioning all three of these errors. The written warning noted general "unsatisfactory performance" and stated that Adina was expected to "remain focused on every interaction and fully review and verify what is presented to you every time," as well as "seek management before telling customers if they have a transaction difference." Additionally, the written warning stated that failure to provide "[i]mmediate and sustained improvement . . . may result in further corrective action, up to and including termination."

¶15 In October 2011, again without consulting a manager, Adina incorrectly adjusted a customer's deposit amount from \$690 to \$241 because she believed there were checks missing from a deposit. In fact, the checks were included with the deposit. Unfortunately, it took Employer fourteen days to retrieve the archived checks amongst Adina's deposit paperwork and then

properly credit the customer's account. Due to this error, Employer discharged Adina.

¶16 Adina applied for unemployment benefits, and the Deputy determined she was eligible because "[a] disregard of the employer's interest has not been established." On Employer's timely appeal, the Appeal Tribunal held a formal hearing on January 10, 2012.² Employer testified it discharged Adina for "[u]nsatisfactory performance, specifically to policy and procedures." Employer maintained that Adina was warned on accuracy and efficiency, including that mistakes could lead to discharge.

¶17 When asked for her reasons for the mistakes, Adina stated "[e]very time they coach me or they ask me . . . why I'm having . . . errors or mistakes, I told them that sometimes it's so busy," adding she was required to cover multiple stations. When asked about the October 2011 incident that led to her discharge, Adina stated,

the scan [system] was just new to our . . . system. We didn't have this before, but it's . . . been like a year or more than a year that they put this in the system . . . the reason why I did the scan later, because it's so busy. . . . Those are not intentional mistakes, those are just mistakes that it could happen to anybody.

² Although Adina had an interpreter at subsequent proceedings, at this hearing, there was no interpreter and it does not appear that Adina had requested an interpreter.

Adina also claimed Employer was "harassing me to the point that I was making mistakes," an issue she said she did not raise because "I was so afraid of retaliation." When asked whether she had any proof that Employer did not treat her fairly, Adina stated, "every month they . . . were looking for my mistakes." Adina added she wrote (but did not send) a letter requesting a transfer to another branch due to the "miserable" working environment.³

¶18 Employer countered that "many of the incidents . . . were brought to our attention . . . either by customer complaint . . . or by our research and adjustment department," so "[i]t wasn't something that we were actually looking for." Employer also maintained that its policies were uniformly enforced.

¶19 On January 12, 2012, the Appeal Tribunal reversed the Deputy's ruling. The Appeal Tribunal found Employer's testimony more credible and found Adina was discharged for misconduct, specifically for violating a company rule and failure to exercise ordinary care amounting to negligent misconduct under Arizona Administrative Code (A.A.C.) R6-3-51300 and R6-3-51485.

³ Adina said she did not send the letter "because [she was] so afraid of the retaliation." This letter was not submitted before or during the hearing and was not part of the formal hearing record.

¶10 The Appeals Board reviewed the merits of the Appeal Tribunal decision.⁴ In doing so, the Appeals Board declined to consider new evidence and allegations Adina sought to press, restricted the review to the Appeal Tribunal record and generally adopted the findings of the Appeal Tribunal. The Appeals Board concluded that Adina's discharge date was November 3, 2011 and modified her disqualification period accordingly.

¶11 As a result of these administrative decisions, Adina received \$1,440 in unemployment benefits that she should not have received for the weeks of December 3, 2011 through January 7, 2012. At a hearing on the overpayment issue, where she was assisted by an interpreter, Adina confirmed receipt of the unemployment payments. The Appeal Tribunal affirmed an overpayment determination classified as administrative and the Appeals Board affirmed that decision.⁵ Likewise, the Appeals Board considered the merits of the appeal and affirmed the Appeal Tribunal decision.

¶12 Adina timely appealed both her discharge and overpayment cases to this court, which granted Adina's appeals

⁴ Although initially rejecting Adina's appeal in the misconduct case as untimely, the Appeals Board later concluded her appeal was the subject of a postal error and therefore timely.

⁵ As with the misconduct case, although initially rejecting Adina's appeal in the overpayment case as untimely, the Appeals Board later concluded her appeal was the subject of a postal error and therefore timely.

and consolidated the cases. This court has jurisdiction over the appeals pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) section 41-1993(B) (2013).⁶

DISCUSSION

I. Standard Of Review.

¶13 This court will affirm an Appeals Board decision if it is supported by substantial evidence and accepts the Appeals Board's factual findings unless they are arbitrary, capricious, or an abuse of discretion." *Rice v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 199, 201, 901 P.2d 1242, 1244 (App. 1995). This court reviews de novo whether the Appeals Board properly interpreted the law. *Id.; Prebula*, 138 Ariz. at 30, 672 P.2d at 982. However, "the credibility of witnesses is a matter peculiarly within the province of the trier of facts." *Anamax Mining Co. v. Ariz. Dep't of Econ. Sec.*, 147 Ariz. 482, 486, 711 P.2d 621, 625 (App. 1985).

II. Discharge For Misconduct.

A. Declining To Consider New Evidence And Arguments.

¶14 In her discharge case, Adina pressed additional arguments and evidence on appeal that she did not raise at the

⁶ Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

Appeal Tribunal hearing. The Appeals Board did not allow the introduction of this additional information.

¶15 The administrative process requires that “[a]ll interested parties shall be ready and present with all witnesses and documents at the . . . hearing and shall be prepared at such time to dispose of all issues and questions involved in the appeal or petition.” A.A.C. R6-3-1502(L). The Appeals Board does have discretion to order the taking of additional evidence. A.R.S. §§ 23-672(C), 23-674(C); A.A.C. R6-3-1507(C)(1)(b); see also *Avila v. Ariz. Dep’t of Econ. Sec.*, 160 Ariz. 246, 249, 772 P.2d 600, 603 (App. 1989).

¶16 In declining to consider the new arguments and evidence, the Appeals Board noted it would confine its review to the Tribunal hearing absent a showing “that such information could not have been presented at the Appeal Tribunal hearing with the exercise of due diligence” or of “unusual circumstances which would justify supplementing the record.” The Appeals Board then concluded that “[t]his record does not establish either ground,” and Adina “had sufficient notice of the issues . . . to have previously produced the information now submitted for inclusion in the record.”

¶17 Adina included the new information without any explanation why she did not present it at the Appeal Tribunal

hearing. She also did not show that anything prevented her from presenting the information at the prior hearings. Accordingly, the Appeals Board did not abuse its discretion in refusing to consider Adina's new arguments and evidence.

B. Discharge For Negligent Misconduct.

¶18 The Appeal Tribunal found Adina's conduct amounted to negligent misconduct for failure to exercise ordinary care; the Appeals Board adopted these findings. In her appeal to this court, Adina asserts that she was "not terminated due to misconduct" but was written up for "minor errors" that did not constitute negligent misconduct justifying discharge.

¶19 Employer had the burden of proof to show Adina's discharge was for disqualifying reasons. A.A.C. R6-3-51190(B)(2)(b). This requires proof that the employee "committed [acts] of misconduct connected with his work and he must have been discharged for such act(s)." A.A.C. R6-3-51385(A). Misconduct is defined as "any act or omission by an employee which constitutes a material or substantial breach of the employee's duties . . . or which adversely affects a material or substantial interest of the employer." A.R.S. § 23-619.01.

¶20 Ordinary carelessness may amount to negligent misconduct, which "generally arises when a worker knowingly fails to exercise ordinary care in the performance of his

duties." A.A.C. R6-3-51300(A)(1). However, "[i]n the absence of gross carelessness or negligence, or recurrence of ordinary carelessness or negligence," work errors are presumptively attributed to good faith and absent contrary evidence do not amount to negligent misconduct. A.A.C. R6-3-51300(A)(3). A claimant's work history with the employer is a factor of consideration in determining whether the employee's actions rise to misconduct. A.R.S. § 23-619.01(D).

¶21 As summarized above, Adina was counseled by her employer as early as February 2011, yet she still had significant work issues resulting in customer complaints. Starting in June 2011, Adina had several significant incidents regarding accuracy and efficiency in a comparatively short period of time. By that time, she knew of Employer's policies and had been warned about her errors. Employer testified that when counseled, Adina "acknowledged that . . . she needed to pay more attention and be more focused." Adina's acknowledgement shows her awareness and understanding that Employer expected her to improve her accuracy. While Adina provided testimony that her errors were due to the volume of work required of her, the Appeal Tribunal found the testimony of Employer more credible. This court does not re-weigh credibility. *Anamax Mining Co.*, 147 Ariz. at 486, 711 P.2d at 625.

¶122 Adina also claims Employer was targeting her and looking for her mistakes. Adina did not provide further evidence beyond her testimony at the hearing that Employer was being unfair with her. Employer testified that it uniformly enforced employment policies and that most of Adina's mistakes came to management's attention through either customer complaints or the bank's research department. Given this evidence, the Appeals Board did not err in rejecting Adina's allegations. See *id.*

¶123 Employer's written warning informed Adina that repeated carelessness could lead to her discharge. She was specifically instructed to involve management before informing customers that they had a transaction difference. Despite this requirement, Adina adjusted a customer transaction to the customer's detriment without first consulting management, all contrary to Employer's instructions. Finally, Adina had more than 12 years of experience as a teller, and therefore had considerable knowledge about teller duties. Given these facts, there was substantial evidence from which the Appeals Board could find negligent misconduct.⁷

⁷ Because substantial evidence supported the Appeals Board conclusion that Adina was discharged for negligent misconduct, this court need not address whether substantial evidence exists regarding misconduct for a rule violation.

III. Overpayment.

¶124 Based on her discharge for misconduct, Adina was assessed an overpayment totaling \$1,440. One "who receives any amount as benefits . . . to which the person is not entitled is liable to repay the overpaid amount to the department." A.R.S. § 23-787(A). An administrative benefit overpayment is "an overpayment which occurred without fault on the part of the claimant." A.A.C. R6-3-1301(6).

¶125 No one disputes that Adina received the specified unemployment benefits, and that due to her discharge for misconduct, the benefits were properly classified as an overpayment. No evidence shows that Adina was at fault for the Deputy's initial determination, so the Appeals Board correctly classified the overpayment as administrative. On appeal, other than challenging her discharge for negligent misconduct, Adina provides no argument countering these findings. Accordingly, and because substantial evidence supports the Appeals Board's conclusions regarding Adina's discharge for negligent misconduct, Adina's challenge to the overpayment finding fails.

CONCLUSION

¶126 Based on the Appeal Tribunal record, substantial evidence supports the Appeals Board determinations that Adina was discharged for negligent misconduct and received an overpayment properly classified as administrative. Accordingly, the Appeals Board determinations in Adina's unemployment cases are affirmed.

/S/ _____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/ _____
RANDALL M. HOWE, Presiding Judge

/S/ _____
PATRICIA A. OROZCO, Judge