

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 01/4/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DN

NICOLAS G. LOPEZ,) No. 1 CA-UB 09-0147
)
Appellant,) DEPARTMENT B
)
v.)
) **MEMORANDUM DECISION**
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, an Agency,) Not for Publication -
) (Rule 28, Arizona Rules
and) of Civil Appellate Procedure)
)
JCR PROPERTY SERVICES, LLC,)
)
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-1110938-BR

Administrative Law Judge William Bebout

AFFIRMED

Nicolas G. Lopez
In Propria Persona Appellant

Mesa

Thomas Horn, Attorney General
By Dawn R. Williams, Assistant Attorney General
Attorneys for Appellee Arizona Department of
Economic Security

Tucson

G E M M I L L, Judge

¶1 Nicolas Lopez appeals from the Arizona Department of Economic Security ("ADES") Appeals Board decision that affirmed earlier determinations that Lopez was disqualified from collecting unemployment insurance benefits due to his discharge for willful or negligent misconduct in connection with his employment with JCR Property Services, LLC ("JCR"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In September 2008, Lopez was discharged from his employment with JCR, a facility contract maintenance company owned by John Rosser. During his employment with JCR, Lopez worked as a field supervisor. He worked Monday through Friday and was required to report to Rosser's residence each work day at 5:30 am.

¶3 After being discharged, Lopez applied for unemployment benefits. In April 2009, an ADES deputy determined that Lopez was eligible for unemployment insurance benefits, and JCR appealed the deputy's determination. JCR alleged that Lopez was ineligible to receive unemployment insurance because he was discharged from JCR for his poor performance and disregarding instructions.

¶4 On May 8, 2009, a telephone hearing was held before an ADES Appeal Tribunal. During the hearing, the Tribunal heard

testimony from Lopez, Rosser, and Chris Knight, an operations manager with JCR and Lopez's former supervisor. According to Rosser, Lopez was discharged on September 5, 2008, because of his repeated failures to arrive to work on time. Rosser and Knight testified that Lopez was late to work on August 28 and 29, 2008, and that he arrived 30 minutes late to work on September 4, 2008. Knight testified that Lopez admitted to him that he was late on those dates because he overslept. Rosser and Knight also testified that Lopez was issued a written warning on August 14, 2008, for being late and that Lopez was given oral warnings after arriving late on August 28 and 29.

¶15 Lopez, on the other hand, testified that he arrived five minutes early to work on September 4. He also testified that on August 14 he was given an oral warning, not a written warning, for being late, and that he did not believe he was late on August 28 or 29. He did, however, admit that he was sent home twice in August for "non-performance."

¶16 On May 29, 2009, the Appeal Tribunal issued its decision, reversing the deputy's determination that Lopez was eligible for unemployment insurance. The Tribunal concluded that Lopez "was discharged for repeatedly failing to exercise due care for punctuality, despite previous warnings," which constituted willful or negligent misconduct. The Tribunal found that Lopez was issued a written warning on August 14 for

arriving late to work and that he arrived late to work on August 28 and 29 because he overslept. After the August 29 incident, Lopez was given an oral warning that he could not be late for work. The Tribunal also found that Lopez was 30 minutes late to work on September 4 because he overslept and that this incident resulted in his discharge the next day.

¶17 Lopez timely pursued an administrative appeal arguing, among other things, that the Tribunal's findings of fact were incorrect because he was not late to work on the days in question. The Appeals Board affirmed the Tribunal's decision, adopting the Tribunal's findings of fact, reasoning, and conclusions of law. In its decision, the Board also added "that the Employer's corroborated evidence of tardiness by the Claimant that impacted the work and revenue is more credible than the Claimant's contentions that he received no notice, particularly in light of the Claimant's acknowledgments to the Employer that he was late due to oversleeping three times within a week." The Board also added that the "Claimant, as a field supervisor, had duties to oversee other workers at the beginning of each shift."

¶18 Lopez timely requested further administrative review and the Appeals Board affirmed its own decision. Lopez then requested judicial review by this court, and we, pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993 (2010),

granted his application for appeal.

ANALYSIS

¶9 Lopez challenges the sufficiency of the evidence presented before the Appeal Tribunal. He asserts that the Appeals Board's decision should be reversed because Rosser and Knight provided false statements during the hearing regarding Lopez's tardiness and because there was no documentation that Lopez was late on the days in question.¹

¶10 We are bound by the Board's findings of fact "unless they are arbitrary, capricious, or an abuse of discretion." *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). We view the evidence in a light most favorable to upholding the decision of the Board and will affirm that decision if it is supported by substantial evidence. *Id.*; *Ross v. Ariz. Dep't of Econ. Sec.*, 171 Ariz. 128, 129, 829 P.2d 318, 319 (App. 1991). When the separation is a discharge, the employer has the burden of proving the discharge was for disqualifying reasons. *Ross*, 171 Ariz. at 129, 829 P.2d at 319.

¶11 Pursuant to A.R.S. § 23-775(2) (Supp. 2010), a claimant is disqualified from unemployment insurance benefits if the claimant is discharged for willful or negligent misconduct

¹ We note that Lopez's opening brief includes affidavits supporting Lopez's assertions that he was not late to work on the days in question. However, because these affidavits were not submitted before the Tribunal or Board and are not part of the official record, we cannot consider them.

connected with the employment. "Willful or negligent misconduct connected with the employment' includes . . . repeated failure without good cause to exercise due care for punctuality or attendance in regard to the scheduled hours of work set by the employer." A.R.S. § 23-619.01(B) (1995).

¶12 Applying the above statutes, the Tribunal and Board concluded that Lopez was disqualified from receiving unemployment benefits because he was discharged for wilfull or negligent misconduct by "repeatedly failing to exercise due care for punctuality, despite previous warnings." Lopez, however, challenges the factual findings supporting the Board's conclusion.

¶13 As previously noted, the Board, by adopting the Tribunal's factual findings, found that Lopez was issued a written warning on August 14 for arriving late to work and that he subsequently reported late to work on August 28 and 29 because he overslept. It also found that Lopez was issued an oral warning after arriving late on August 29 and, despite this warning, he was 30 minutes late to work on September 4. Because substantial evidence exists to support these findings, we affirm the Board's decision.

¶14 At the May 2009 hearing, Rosser and Knight each testified about Lopez's repeated failure to arrive at work on time. They both testified that he was late to work on August 28

and 29, 2008, and September 4, 2008, despite previous warnings. Knight also testified that Lopez said he was late on those days because he overslept. In addition, Lopez admitted that he had received an oral warning for being tardy and that he had been sent home twice in August for non-performance. Although Lopez denied being late on September 4, he could not recall if he was late on August 28 and 29.

¶15 The testimony from Rosser and Knight constitutes substantial evidence supporting the Board's findings. Accordingly, the Board's findings were not "arbitrary, capricious, or an abuse of discretion." See *Avila*, 160 Ariz. at 248, 772 P.2d at 602. Although Lopez asserts on appeal that Rosser and Knight provided false testimony at the hearing, the credibility of witnesses is a matter peculiarly within the province of the trier of fact, in this case, the Tribunal and Board. See *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983). It is not for this court to reweigh the evidence and then substitute our judgment for that of the Tribunal or Board. See *Curtis v. Richardson*, 212 Ariz. 308, 313, ¶ 22, 131 P.3d 480, 485 (App. 2006).

CONCLUSION

¶16 Because we find no reversible error, the Board's

decision is affirmed.

 /s/
JOHN C. GEMMILL, Judge

CONCURRING:

 /s/
DIANE M. JOHNSEN, Presiding Judge

 /s/
MICHAEL J. BROWN, Judge