FILED BY CLERK
APR 29 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, Plaintiff/Appellee, v. PAMELA REDLON, Defendant/Appellant, and ARIZONA STATE PERSONNEL BOARD; DAVID LARA, STANLEY LUBIN, and CLAUDIA SMITH, Board Members, Defendants/Appellees.	2 CA-CV 2008-0143 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200700912

Honorable Charles A. Irwin, Judge

VACATED AND REMANDED

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In Propria Persona

B R A M M E R, Judge.

¶1 Appellant Pamela Redlon appeals the Cochise County Superior Court's reversal of the Arizona State Personnel Board's (Board) decision reinstating her as an employee of the Arizona Department of Economic Security (ADES). For the reasons stated below, we vacate the superior court's judgment and the Board's decision and remand this matter to the Board.

Factual and Procedural Background

¶2 The relevant facts are undisputed. Redlon was a long-time employee of ADES. In March 2004, ADES notified Redlon of four "charges of misconduct" against her that "show[ed] [her] blatant disrespect" for others and were "a source of embarrassment to State Service." ADES alleged Redlon had: (1) made discourteous statements to and threw a pen at a United Parcel Service (UPS) delivery person; (2) "display[ed] insubordinate and rude behavior" during a conversation with her supervisor, Kirk Edmonson; (3) intimidated a client, D.K.; and (4) "created a hostile office environment" during a confrontation with Edmonson and office support staff. After receiving Redlon's written response to the allegations, ADES informed Redlon on April 2 that it planned to dismiss her from its employment unless, by noon that day, she resigned by signing a letter it had prepared

showing her "involuntary resign[ation] from state service." Redlon then signed and submitted to ADES the letter it had prepared.

¶3 In February 2005, Redlon appealed her resignation from state service to the Board. Because Redlon had resigned rather than having been dismissed, the Board held a hearing to determine whether it had jurisdiction over Redlon's appeal.[1] The Board concluded it had jurisdiction to hear Redlon's claim, treating her resignation "as if it were a dismissal." ADES sought review of the Board's decision in the Cochise County Superior Court, which reversed the Board's decision. On appeal, this court reversed the superior court's decision, concluding the Board had jurisdiction to hear Redlon's claim because ADES had requested that she resign in lieu of being dismissed and had not informed her of her appellate rights or given her a reasonable amount of time to make her choice, rendering her resignation involuntary. *Ariz. Dep't of Econ. Sec. v. Redlon*, 215 Ariz. 13, ¶¶ 17-18, 21, 156 P.3d 430, 436-37 (App. 2007).

¶4 On remand, the Board assigned a hearing officer to both preside over a hearing of the merits of Redlon's claim and recommend to the Board findings of fact and conclusions of law. At the hearing, Redlon contested each of the four alleged incidents of misconduct, arguing ADES had "blown [them] out of proportion." In support of ADES's allegations, Edmonson, Redlon's former supervisor, testified about his first-hand knowledge of the

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[1]The Board has jurisdiction to hear appeals "relating to dismissal from state service . . . resulting from disciplinary action," but does not have authority to hear appeals relating to voluntary resignation from state employment. A.R.S. § 41-782(A); *see Ross v. Ariz. State Pers. Bd.*, 185 Ariz. 430, 432, 916 P.2d 1146, 1148 (App. 1995).

incidents, his written reports concerning them, and the written complaints submitted to him by the UPS driver and D.K. Redlon questioned ADES's witnesses, and testified about the incidents. During the hearing, Redlon also requested that the hearing officer telephone a former coworker, R., who she asserted could testify on her behalf. R., however, was unable to testify because she was at lunch when the hearing officer called her.

¶5 After the hearing, the hearing officer submitted to the Board his recommended findings of fact and conclusions of law. He recommended finding the evidence supported ADES's allegations, concluding Redlon's conduct warranted dismissal, and denying Redlon's appeal. The Board, however, found "[t]he only evidence offered in support of [ADES's second] allegation was hearsay," concluded "hearsay cannot stand alone without the support of other reliable evidence," and found no reliable evidence supported the second allegation of misconduct. The Board also found no reliable evidence supported ADES's third allegation of misconduct. It further concluded ADES had violated Redlon's due process rights by "fail[ing] to provide her with the documents [relating to the first three charges it had] relied upon to discharge her until the date of the hearing."

¶6 "The only charge proven by [ADES]," the Board found, "was the fourth one." And, the Board concluded, that incident alone did not warrant Redlon's dismissal. It, therefore, "directed [ADES] to reinstate [Redlon] to her former position, reimburse her for all pay withheld from her since the date of her discharge . . . [,] and restore all of the benefits to which she would have been entitled had she not been terminated."

¶7 On review of the Board's decision, the superior court determined the Board had erred in concluding hearsay could not alone support ADES's allegations, and had abused its discretion in failing to defer to the hearing officer's implicit finding that the hearsay evidence was reliable and finding that ADES had proven each of its allegations. The court further concluded neither the facts nor the law supported the Board's determination that ADES had violated Redlon's due process rights. The court reversed the Board's decision and upheld ADES's dismissal of Redlon. This appeal followed.

Discussion

Standard of Review

¶8 If a state employee appeals his or her dismissal, suspension, or demotion to the Board, the Board may reverse the agency's decision "only if [it] finds the [agency's] action to be arbitrary, capricious or otherwise contrary to law." A.R.S. § 41-785(C). An action is arbitrary if, for example, the evidence does not support the charge giving rise to the action taken. *See Pima County v. Pima County Merit Sys. Comm'n*, 189 Ariz. 566, 568, 944 P.2d 508, 510 (App. 1997).

¶9 A party dissatisfied with the Board's decision may then appeal to the superior court on the ground that the Board's decision was "[f]ounded on or contained [an] error of law," was "[u]nsupported by any evidence as disclosed by the entire record," was "materially affected by unlawful procedure," violated a constitutional provision, or was arbitrary or capricious. § 41-785(F).

¶10 After a decision in the superior court, an aggrieved party may appeal to this court, pursuant to the Administrative Review Act. *See Pima County Merit Sys. Comm'n*, 189 Ariz. at 569, 944 P.2d at 511; *see also* A.R.S. §§ 12-901 through 12-914. In reviewing the superior court's judgment, we reach the same underlying issues as that court did in reviewing the Board's determination. *See Pima County Merit Sys. Comm'n*, 189 Ariz. at 569, 944 P.2d at 511.

Due Process

¶11 In setting aside ADES's termination of Redlon, the Board concluded ADES had "denied [Redlon] due process by virtue of its failure to provide her with the documents that [we]re relied upon" in support of three of its allegations of misconduct "until the date of the hearing." The Board further found Redlon was not afforded the opportunity to question a witness about the third incident "because the witness was at lunch." On review, the superior court found the Board's conclusions were not supported by the facts or the law. We agree.[2]

¶12 The constitutional right to due process of law applies to administrative proceedings, includes the right to receive notice both of the action and the basis for that

[2]In her opening brief to this court, Redlon suggests the question whether ADES had violated her due process rights is res judicata, because this court determined in its April 2007 opinion that ADES had violated her right to due process by forcing her to choose between resignation and dismissal without providing her a reasonable amount of time or the necessary information regarding her appellate rights to make an informed, voluntary decision. *See Redlon*, 215 Ariz. 13, ¶¶ 17-18, 21, 156 P.3d at 436-37. That, of course, was not the basis for the Board's determination on remand that ADES had violated Redlon's due process rights at the July 2007 hearing. The doctrine of res judicata, therefore, does not apply.

action, and to have an opportunity to be heard at a meaningful time and in a meaningful manner. *See Salas v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 141, 143, 893 P.2d 1304, 1306 (App. 1995); *Bank of Ariz. v. Howe*, 293 F. 600, 606-07 (D. Ariz. 1923). It is undisputed that Redlon received notice of ADES's intention to take disciplinary action against her and of the four allegations of misconduct that were the basis for the proposed action. Consistent with her due process rights, Redlon was afforded a hearing before the Board's hearing officer, at which she was entitled to present exhibits, subpoena witnesses and, if any witnesses were unavailable to testify at the hearing, depose them. *See* Ariz. Admin. Code § R2-5.1-103(K), (N), (O).

¶13 Redlon asserted neither below nor on appeal that she was not informed of those rights prior to her hearing, and she subpoenaed no witnesses before the hearing nor offered any exhibits at the hearing. At the hearing, Redlon nonetheless requested that the hearing officer telephone R. to testify on her behalf. Because R. was unavailable at the time the hearing officer called her, Redlon could not examine her. Thus, contrary to the Board's finding, Redlon's inability to examine R. rested on Redlon's choice to not avail herself of her right to subpoena or depose witnesses, not ADES's or the hearing officer's failure to afford her due process.

¶14 The Board also erred in finding ADES had violated Redlon's due process rights by failing to provide her copies of the documents supporting its allegations prior to the date of the hearing. As the superior court noted, Redlon had, in fact, seen many of the documents ADES relied upon, including those that contained the factual bases for the allegations of

misconduct, before the date of the hearing. Moreover, "[i]t is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right." *Nat'l Labor Relations Bd. v. Interboro Contractors, Inc.*, 432 F.2d 854, 857-58 (2d Cir. 1970); *see, e.g., Miner v. Atlass*, 363 U.S. 641, 643 (1960) (no right to discovery in admiralty proceedings); *Starr v. Comm'r of Internal Revenue*, 226 F.2d 721, 722 (7th Cir. 1955) (no due process right to discovery in tax proceeding). And, by providing Redlon on the date of the hearing copies of the documents upon which it planned to rely, ADES complied with the Board's procedural rules. *See* Ariz. Admin. Code § R2-5.1-103(K). ADES's failure to disclose the documents earlier, therefore, violated none of Redlon's rights.

Substantial Evidence

¶15 Redlon asserts the Board's decision was supported by substantial evidence and, therefore, the superior court erred by reversing its decision. In addition to its determination that Redlon's due process rights had been violated, the Board's decision was based on its conclusion that only hearsay evidence supported the second charge. Although the Board correctly observed that hearsay was admissible in administrative proceedings, it concluded that "hearsay cannot stand alone without the support of other reliable evidence." We agree with the superior court that the Board had stated the law inaccurately. Hearsay may be the sole evidence supporting an agency's action if that hearsay is reliable. *See Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (App. 1990). In the context of an administrative hearing, hearsay evidence "is considered reliable where the circumstances tend to establish that the evidence offered is trustworthy." *Id.* "Generally, hearsay is unreliable when: '[T]he

speaker is not identified, when no foundation for the speaker's knowledge is given, or when the place, date and time, and identity of others present is unknown or not disclosed.'" *Id.*, *quoting Plowman v. Ariz. State Liquor Bd.*, 152 Ariz. 331, 337, 732 P.2d 222, 228 (App. 1986) (alteration in *Wieseler*).

¶16 We also agree with the superior court that not all the evidence supporting that charge was, in fact, hearsay.[3] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). That charge involved a conversation between Redlon and Edmonson, who testified about his direct participation in the incident before the hearing officer. This testimony was not hearsay, and the Board therefore erred as a matter of law in rejecting it on that basis. *See Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 27, 156 P.3d 1149, 1155 (App. 2007) (legal error constitutes abuse of discretion).

¶17 Thus, we do not reach the question whether the Board's decision was supported by the evidence because it erred as a matter of law in evaluating that evidence and therefore abused its discretion in setting aside ADES's termination of Redlon. *See id.* That

[3]The superior court apparently believed the Board had found that hearsay evidence alone supported three of ADES's allegations. The Board, however, only explicitly found the evidence supporting the second allegation was hearsay. Nonetheless, the Board twice made that finding, replacing the hearing officer's recommended findings regarding both the first and second allegations against Redlon. Because the Board made no explicit findings regarding the first allegation, it appears the Board may have intended one of the repeated findings to pertain to the first allegation. It is also unclear from the Board's decision whether it concluded the third allegation was supported by hearsay alone. We, therefore, only address the Board's clear finding that the second allegation was supported solely by hearsay. However, insofar as the Board found the first and third allegations were supported by hearsay alone, the record, as the superior court noted, indicates otherwise.

conclusion, however, does not end our inquiry. The superior court reversed the Board and upheld ADES's decision to dismiss Redlon. As we explain below, there was no proper basis for the court to have done so; rather, it should have remanded the case to the Board to evaluate the evidence under the proper legal standards.

¶18 In deciding there was "nothing in the record" to support the Board's determination that the hearsay evidence was unreliable, the superior court reasoned the Board must defer to the hearing officer's determination of how much weight should be accorded to the hearsay evidence—essentially, whether the evidence was credible. Indeed, the superior court adopted the hearing officer's legal conclusions and "found that the record supports all charges herein." But the hearing officer's role is advisory only; the Board is the final fact-finder and it owes no deference to the hearing officer's factual findings or any legal conclusions based on those findings. *See Evans v. State ex rel. Ariz. Corp. Comm'n*, 131 Ariz. 569, 572, 643 P.2d 14, 17 (App. 1982) ("It is clear, both by statute and regulation, that the Personnel Board is the final fact finder and that the function of the hearing officer is advisory only."); Ariz. Admin. Code § R2-5.1-103(D), (E), (F), (R); *cf. Pima County Merit Sys. Comm'n*, 189 Ariz. at 569, 944 P.2d at 511 ("The superior court does not decide whether the record supports the appointing authority's version of the facts, but whether it supports the [review board's] factual findings.").

¶19 Although ADES agrees the Board was "not bound by a hearing officer's credibility findings," it nonetheless argues, relying on *Ritland v. Arizona Board of Medical Examiners*, 213 Ariz. 187, 140 P.3d 970 (App. 2006), that the Board "must accord [the

hearing officer's] credibility findings greater weight than other findings of fact." That case, however, does not control here. In *Ritland*, the Arizona Board of Medical Examiners (medical board) investigated a doctor for misconduct. *Id.* ¶ 2. As required by statute, the medical board referred the matter to the Office of Administrative Hearings for a hearing before an administrative law judge (ALJ). *Id.* ¶¶ 3, 8. After that hearing, the ALJ issued a recommended decision that included factual findings. *Id.* ¶ 3. Although the medical board had statutory authority to "review, accept, or modify" that decision, it adopted the ALJ's factual findings despite having reservations about the ALJ's credibility determinations. *Id.* ¶¶ 4, 8. Division One of this court, recognizing that the medical board was the "ultimate decision maker," determined the board was not required to adopt the ALJ's findings. *Id.* ¶¶ 9, 12. But the court also stated the medical board could depart from the ALJ's credibility determinations "only if it finds evidence in the record for so doing" and its decision "reflect[s] its factual support for rejecting the ALJ's credibility findings." *Id.* ¶ 14.

¶20 Although the situation before us is facially analogous to the one in *Ritland*, the analogy fails when we compare the governing statutes and regulations. First, we observe that the medical board was required by statute to refer the matter to a different agency—the Office of Administrative Hearings. *Id.* ¶ 8. In contrast, here, the hearing officer who initially heard the matter was merely a representative of the Board, and whether the Board refers a matter to its appointed hearing officer is completely within its discretion. *See* Ariz. Admin. Code § R2-5.1-103(D); *Evans*, 131 Ariz. at 572, 643 P.2d at 17 ("[W]hen the Board

delegates its responsibility to conduct an evidentiary hearing to a hearing officer, it does so as a convenience to itself alone.").

¶21 Moreover, the medical board was required by statute to justify in writing any decision to reject or modify the ALJ's recommended decision. *Ritland*, 213 Ariz. 187, ¶ 8, 140 P.3d at 973; *see* A.R.S. § 41-1092.08(B). The Board's governing statutes and regulations contain no similar requirement. The regulations instead provide that the Board "may affirm, reverse, adopt, modify, supplement, or reject the hearing officer's proposed findings of fact and conclusions of law in whole or in part." Ariz. Admin. Code § R2-5.1-103(R). Indeed, although § R2-5.1-103(D) grants the hearing officer the authority "to grant or refuse extensions of time, to set proceedings for hearing, to conduct the hearing, and to take any action in connection with the proceedings that the Board is authorized by law to take," it explicitly reserves to the Board the authority to "mak[e] the final findings of fact, conclusions of law, and order." We recognize that the hearing officer, having heard the witness testimony, is in the best position to assess witness credibility. *See Ritland*, 213 Ariz. 187, ¶ 10, 140 P.3d at 973. Therefore, in most circumstances, it would be sensible for the Board to give the hearing officer's assessment due consideration, and perhaps defer to it. However, the Board is not required to do so, and its declining to do so is neither arbitrary nor capricious. Nor must the Board explain any departure from the hearing officer's credibility findings.

¶22 In its role as fact-finder, the Board must decide whether the witnesses' testimony was credible, reconcile conflicting evidence, and weigh the sufficiency of the

evidence presented. *See Pima County Merit Sys. Comm'n*, 189 Ariz. at 568, 944 P.2d at 510. Because the Board erred as a matter of law in rejecting all the evidence related to at least one of ADES's allegations of misconduct as unreliable hearsay, it never made those determinations.[4] By reversing the Board's decision, rather than remanding the matter to the Board, the superior court erred.

Disposition

¶23 Because both the Board and the superior court erred as a matter of law, we vacate the superior court's order and remand the case to the Board to consider the evidence under the proper legal standards.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[4]Accordingly, we need not decide whether the Board could properly reduce the discipline imposed for the fourth charge.