IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PAL of WILMINGTON,	)	
	)	
Appellant,	)	
	)	C.A. No. 07A-05-008 JRJ
v.	)	
	)	
CAROL GRAHAM, Claimant, and	)	
UNEMPLOYMENT INSURANCE	)	
APPEAL BOARD,	)	
	)	
Appellees.	)	

Date Submitted: March 3, 2008
Date Decided: June 18, 2008

OPINION

Upon Appeal of the Decision of the Industrial Accident Board.
AFFIRMED.

Richard R. Wier, Jr., Esquire, RICHARD R. WIER, JR., P.A., Wilmington, Delaware, Attorney for Appellant.

Mary Page Bailey, Esquire, STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware, Attorney for Unemployment Insurance Appeal Board.

Jurden, J

I. Introduction

Plaintiff appeals the decision of the Unemployment Insurance Appeal Board denying its request for a rehearing and granting Claimant unemployment benefits. For the reasons set forth below, the Court finds that the Board's decision to grant Claimant unemployment benefits is supported by substantial evidence and that the Board did not abuse its discretion when it denied Plaintiff's request for a rehearing. Accordingly, the Board's decision is **AFFIRMED.**

II. Statement of Facts

In April 2004, Claimant Carol Graham ("Graham") began working as an administrator for Plaintiff, the Police Athletic League of Wilmington ("PALW"). In December 2005, Graham accepted the position of Director of Programs with PALW. PALW advised her that it would review her performance in the first three months of employment. On April 5, 2006, Velda Jones-Potter, the president of the board of directors, presented Graham with her evaluation. According to the evaluation, Graham demonstrated deficiencies in areas essential to her role as Director of Programs. To address her deficient work performance, PALW created a sixty day performance plan, which included a reevaluation of Graham's progress after the first thirty days. The objective of the plan was "to present

again to [Graham] the tasks for which she is responsible, evaluate progress toward successful completion of these tasks, and determine what, if any, role [Graham] shall have in the PALW organization going forward" for the period of January through March 2006.[1] During that time, Graham was to "provide a weekly written status of her work and shall meet weekly with the Executive Director to review progress with these assignments."[2] At the end of the first thirty days, Graham's performance was to be "reviewed, at which time PALW [would] take corrective action if necessary up to and including termination."[3]

Before implementing the plan, PALW asked Graham to sign it. Graham refused to sign and submitted her voluntary resignation on April 6, 2006. Graham interpreted the plan as "an ultimatum,"[4] and refused to participate because the plan addressed her duties in her previous administrative position, rather than in her current position.[5] Although PALW accepted her resignation on April 7, 2006, Sylvia Lewis-Harris ("Lewis-Harris") responded on behalf of PALW, and rebutted Grahams's allegations that she was told to either sign a corrective action plan or resign. Lewis-Harris, who was Graham's supervisor at the time, wrote:

[1] Docket Item ("D.I.") 5, at 9.
[2] *Id.* at 13.
[3] *Id.*
[4] *Id.* at 56.
[5] *Id.* at 60, 87.

> We received your voluntary resignation letter on April 6, 2006. That letter is, however, false and misleading. In the meeting on April 5, you were never asked for your resignation. Mrs. Potter and I documented and reviewed the history of your performance, a sixty-day work plan, and the process for monitoring your performance going forward. You voiced disagreement with some aspects of the performance assessment, which you also documented. We acknowledged your right to disagree with the assessment and accepted the document as submitted.
>
> There was no ultimatum given. Mrs. Potter and I explained that the only requirement was that you perform the job for which you would be compensated. These requirements were detailed in the sixty-day work plan. The option to resign, if you were not in agreement with the work plan was discussed. You indicated that you were unwilling to agree to follow the work plan and that you preferred to voluntarily resign your position.[6]

On August 18, 2006, Graham filed for unemployment benefits. On September 25, 2006, the Claims Deputy held that Graham was qualified to receive unemployment benefits. PALW timely appealed that decision to the Appeals Referee. After holding a hearing on December 18, 2006, the Appeals Referee reversed the decision of the Claims Deputy. The Referee determined that "[t]here was no evidence that this is the case of resignation in lieu of discharge."[7] The Referee found that Graham resigned without good cause, noting that she "voluntarily resigned her position because she

[6] D.I. 5, at 43.
[7] *Id.* at Ex. L (Decision of Appeals Referee, 12/19/2006), at 147.

did not agree with the evaluation and did not wish to sign for the evaluation and the performance plan."[8] She concluded:

> The employer was reasonable in its expectation that the claimant would adhere to the proposed performance plan. Part of being an employee is accepting coaching and criticism from the employer. Employees may not always agree with an employer's evaluation of their job performance but disagreeing with the evaluation does not give an employee the recourse of leaving gainful employment to join the ranks of the unemployed. . . . The claimant's unemployment is the result of his own choice and his own doing.[9]

Graham appealed the Referee's decision to the Unemployment Insurance Appeal Board (the "Board") on December 29, 2006. Due notice was sent to both parties that a hearing was scheduled for February 14, 2007. On February 6, 2007, PALW requested that the hearing date be changed. The Board granted PALW's request and rescheduled the hearing to February 28, 2007. The Board sent notice to PALW and its counsel on February 12, 2007.

Neither PALW nor its counsel was in attendance at the hearing held on February 28, 2007. Upon questioning by the Board, the Board Secretary stated that she sent PALW and its counsel notice stating that the hearing had

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[8] D.I. 5, Ex. L (Decision of Appeals Referee, 12/19/2006), at 147.
[9] *Id.* at 147-48.

been rescheduled to February 28, 2007.[10] Both PALW and its counsel, however, contend that they were not notified of the new date. Although the Board records indicate that notice was sent to the attention of Lewis-Harris for PALW, there is no documentary evidence that notice was sent to counsel. PALW also claims that it never received the notice. No mail, however, was returned to the Department of Labor as undelivered.[11]

The Board went forward with the hearing despite PALW's absence. At the hearing, Lewis-Harris, who had since been terminated by PALW, testified on behalf of Graham. In contradiction to the letter she issued on behalf of PALW, Lewis-Harris testified that Graham was given an ultimatum to sign the evaluation.[12] Based on this new evidence, the Board found that Graham was induced to resign under pressure and qualified for benefits. Notably, the Board determined that "[t]he wording of the performance plan, without any other evidence, would be sufficient to lead to [sic] Board to the conclusion that the claimant was being given an ultimatum and was threaten [sic] with future action that all but guaranteed her termination."[13] It also determined that the plan "certainly tends to contradict

[10] D.I. 5, at 82:15-83:13.
[11] *Id.* at Ex. A (Decision of UIAB Denying PALW's Request to Reopen, 4/27/2007), at 117.
[12] D.I. 5, at 90.
[13] *Id.* at 77.

the testimony of the board president before the Referee[.]"[14] The Board concluded that PALW's decision to evaluate Graham with a sixty day performance plan, which included a mandatory reevaluation after the first thirty days, "speaks for itself, and . . . was clearly an ultimatum, which at least implied the intention to terminate the claimant at the end of 30 days."[15] As a result, the Board determined PALW produced "no competent evidence of misconduct that would lead the Board to believe that she was discharged for just cause."[16]

PALW requested a rehearing on April 5, 2007, five days before the Board's decision became final on April 10, 2007. On April 27, 2007, the Board denied PALW's request for a rehearing because the Board found that PALW's failure to appear was not the result of a departmental error or extraordinary circumstance. In its decision, the Board noted that "notice was sent to both the Employer and Employer's counsel."[17] PALW then filed the instant appeal to this Court.

III. Parties' Contentions

PALW raises three arguments on appeal. First, PALW submits that the Board abused its discretion when it refused to hold a rehearing because

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[14] D.I. 5, at 77.
[15] *Id.*
[16] *Id.*
[17] *Id.* at Ex. A, at 117.

neither PALW nor its counsel received the twenty-day notice required by 29 *Del. C.* § 10122. In support of this argument, PALW contends that (1) Lewis-Harris admitted at the hearing that she did not receive notice for PALW; (2) there is no evidence that either counsel or PALW received notice of the February 28, 2007 hearing date; (3) the Board knew that PALW was represented by counsel who had appeared at all prior hearings; and (4) the Board's decision to rely on testimony from the Board Secretary that notice was sent is legally insufficient. Second, PALW submits that the Board's decision that Graham was qualified for unemployment benefits was not based on substantial evidence because (1) Graham testified that she voluntarily resigned; (2) there was no evidence showing PALW intended to terminate Graham; and (3) the Board's decision that Lewis-Harris was credible failed to consider her motive to lie and her letter in which she rebutted Graham's assertion of an ultimatum. Finally, PALW argues that the Board committed an error of law because it applied the improper "constructive discharge" legal standard, rather than the appropriate "voluntary quit" standard.

In response, the Board contends that it must only give parties five-days' notice under Division of Unemployment Insurance Regulation 19 and is not subject to the twenty-day requirement of 29 *Del. C.* § 10122. The

Board further submits that, despite a lack of documentary evidence establishing that notice was sent to PALW and counsel, the testimony of the Board Secretary and the presumption that mail sent to the correct address is received is sufficient to establish that PALW received notice of the new hearing date. Thus, the Board did not abuse its discretion in denying PALW's request for a rehearing. The Board makes no arguments as to the substantive finding that Graham is qualified for benefits. Similarly, Graham did not file a brief in response to PALW's contentions.

IV. Standard of Review

This Court's appellate review of a Board decision is limited. In reviewing the decisions of the Board, this Court must determine whether its findings and conclusions are "free from legal error and supported by substantial evidence in the record."[18] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[19] The "substantial evidence" standard means "more than a scintilla but less than a preponderance of the evidence."[20] The Court "does

[18] *Federal Street Financial Service v. Davies*, 2000 WL 1211514 (Del. Super.)(citing *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981).
[19] *Anchor Motor Freight v. Ciabottoni*, 716 A.2d 154, 156 (Del. 1998).
[20] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

not weigh the evidence, determine questions of credibility, or make its own factual findings."[21]

A discretionary decision of the Board will be upheld absent an abuse of discretion.[22] An abuse of discretion occurs when the Board "acts arbitrarily or capriciously"[23] 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."[24] The Court reviews questions of law *de novo* to determine "whether the Board erred in formulating or applying legal precepts."[25]

Where a party requests a rehearing, the Board has discretion to consider whether to reopen a case where no valid appeal has been filed by either party.[26] The Board will only revisit a decision "where there has been some administrative error on the part of the Department of Labor which deprived the claimant of the opportunity to file a timely appeal, or in those

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[21] *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Ct. Oct. 4, 1996) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).
[22] *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).
[23] *Kreshtool v. Delmarva Power & Light Co.*, 310 A.2d 649, 652 (Del. Super. Ct. 1973).
[24] *Nardi v. Lewis*, 2000 WL 303147, at *2 (Del. Super. Ct. Jan. 26, 2000) (citations omitted).
[25] *Id.*
[26] *Funk*, 591 A.2d at 225.

cases where the interest of justice would not be served by inaction."[27] Absent an abuse of discretion, the Board's decision must be affirmed.

V. Analysis

A. The Board did not Abuse its Discretion When it Refused to Hold a Rehearing

Due process requires that a party have a full and fair opportunity to be heard in its own defense.[28] The procedural requirements and formality of that opportunity vary depending on the circumstances.[29] In the context of a hearing before the Unemployment Insurance Appeal Board, the party whose rights may be affected is entitled to notice and a hearing.[30] Proper notice requires that the party receive an adequate, proper and lawful notification of the agency action that will affect its right in a meaningful time and manner.[31] Stated another way, due process requires that "the notice inform the party of the time, place, and date of the hearing and the subject matter of the proceedings."[32] For example, in *Turkey's Inc. v. Peterson*, the Court held that due process was satisfied where an employer was notified of the

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[27] *Robledo v. Stratus*, 2001 WL 428684 (Del. Super).
[28] *Morris v. S. Metals Processing Co.*, 530 A.2d 673, 1987 WL 37999 (Del. Super.) (Table).
[29] *Id.*
[30] *Hunter v. First USA/Bank One*, 2004 WL 838715 (Del. Super)(citing *Tsipouras v. Tsipouras*, 677 A.2d 493, 496 (Del. 1996)).
[31] *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).
[32] *Phillips v. Delhaize Am., Inc.*, 2007 WL 2122139, at *2 (Del. Super. Ct. Jul. 20, 2007) (citations omitted).

claimant's application for benefits, her appeal, the hearings, the right to subpoena witnesses, and the right to retain counsel if so desired.[33] For purposes of sending notice of an appeal to the Unemployment Insurance Appeal Board, Delaware Division of Unemployment Insurance Regulation Number 19, rather than 29 *Del. C.* § 10122, governs the timing of notice.[34] Regulation 19 requires that the Board mail the parties notice at least five days before the hearing.[35]

Due process requirements are fulfilled when they are "accomplished by a method reasonably calculated to afford the party an opportunity to be heard."[36] For notice to be effective, it must be received.[37] In Delaware, notice that is correctly addressed, stamped and mailed is presumed to have been received by the party to whom it was addressed.[38] Lack of evidence of any mailing error by the Department of Labor supports the presumption that properly mailed and addressed mail was received.[39] For example, in the case of *Reagan National Advertising, Inc. v. Unemployment Insurance*

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[33] *Turkey's Inc. v. Peterson*, 2002 WL 977190, at *5 (Del. Super. Ct. May 13, 2002).
[34] *See* 29 *Del. C.* § 10161 (listing the agencies subject to the Administrative Procedures Act).
[35] *Hennig v. Unemployment Ins. Appeal Bd.*, 1989 WL 89605, at *1 (Del. Super. Ct. Jul. 10, 1989).
[36] *Reagan Nat'l Adver., Inc. v. Unemployment Ins. Appeal Bd.*, 1990 WL 105632, at *2 (Del. Super. Ct. Jul. 19, 1990).
[37] *State ex rel. Hall v. Camper*, 347 A.2d 137, 138 (Del. Super. Ct. 1975).
[38] *Id.* at 139.
[39] *Funk*, 591 A.2d at 226.

Appeal Board, the Court held that direct testimony from the claims deputy that she mailed notice was sufficient, despite any documentary evidence of mailing, to establish that notice was sent to the party.[40]

This presumption may be rebutted, however, by evidence that notice was never received.[41] Only where there is evidence that the Board was at fault for a misdelivery will a party's right to due process be violated.[42] In contrast, if notice is properly addressed by the agency and not received because of some fault of the party to whom it was addressed, the notice may still be deemed sufficient even if the party did not receive it.[43] A party's right to due process will not be violated where notice was not received as a result of the party's failure to inform the agency of her correct address.[44]

In this case, the Board did not abuse its discretion in refusing to grant PALW a rehearing. At the hearing, the Board's Secretary testified that she mailed notice to both PALW and its counsel. In fact, PALW does not dispute that the Department of Labor sent notice to its office.[45] Due process

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[40] *Reagan Nat'l Adver., Inc.*, 1990 WL 105632 at *3.
[41] *Camper*, 347 A.2d at 139 (citing *Jewell v. Unemployment Compensation Commission*, 183 A.2d 585, 587 (Del. 1962)).
[42] *Funk v. Unemployment Ins. Appeal Bd.*, 1989 WL 158472, at *4 (Del. Super.).
[43] *See Funk*, 591 A.2d at 226 (finding no due process violation "where the claimant had notice through prior experience of the possible misdelivery of his mail and where the misdelivery was made through no fault of the Department of Labor").
[44] *De Maio v. Beebe Hosp. of Sussex County, Inc.*, 1994 WL 45426, at *2 (Del. Super. Ct. Jan. 11, 1994).
[45] Docket 7, at 18 (citing Docket 5, at 73, 74).

only requires that the party in interest receive notice by "a method reasonably calculated to afford the party an opportunity to be heard."[46] Here, a method reasonably calculated to afford PALW a chance to appear before the Board was employed. The agency sent properly mailed and stamped notice to PALW's address on file. That is sufficient to afford PALW due process.

PALW contends that it never received notice because Lewis-Harris testified that she did not receive the notice. PALW, however, misconstrues the requirements of due process. That Lewis-Harris did not receive the notice because she was no longer employed with PALW is immaterial. PALW, as the true party in interest, had a duty to not only inform the Department of Labor that Lewis-Harris was no longer employed with the organization, but also to inform counsel of the change in the hearing date.[47] Moreover, PALW's failure to inform the Department of Labor of Lewis-Harris's termination is not a departmental error. There is no evidence of "misdelivery" or that PALW's failure to receive notice was the fault of the

[46] *Reagan Nat'l Adver., Inc.*, 1990 WL 105632 at *2.

[47] PALW does not dispute that it had the responsibility to keep its mailing address current with the Department of Labor. Notably, Lewis-Harris was terminated on December 26, 2006. Docket 9, Ex. A. PALW should have been aware that Lewis-Harris should not be receiving mail on behalf of PALW before the initial hearing date of February 7, 2007. More importantly, PALW does not contend that it did not receive notice of the original hearing date that was presumably mailed to the attention of Lewis-Harris. PALW's contention is thus, in the very least, surprising.

Department of Labor. As a result, the Board had substantial evidence before it to determine that PALW was sent notice.

The Court further notes that there is no requirement that counsel for a party receive notice in the context of an agency hearing. Similarly, that the Board knew that PALW was represented by counsel is not relevant as to whether PALW received proper notice. Rather, due process requires that the party receive notice of the hearing.[48] Just as in *Reagan National Advertising, Inc.*, the Board had before it direct testimony that notice was properly sent to both PALW and its counsel. Counsel for PALW has offered no authority, nor can the Court find any, supporting its assertion that counsel must also receive notice in the context of an agency hearing where it is undisputed that the actual party in interest was sent proper notice. Because PALW was sent proper notice of the new hearing date and the Board Secretary testified that she sent notice to both PALW and its counsel, the Board had sufficient evidence with which to find that appropriate notice was sent.

[48] *See, e.g.*, *Phillips*, 2007 WL 2122139 at *2 ("[D]ue process requires that the notice inform the *party* of the time, place, and date of the hearing and the subject matter of the proceedings.") (emphasis added).

PALW relies heavily on the case of *Kostyshyn v. Unemployment Insurance Appeal Board*[49] to argue that the Board abused its discretion. In that case, the claimant sought to reopen the Board's decision and testified that he did not receive notice of the hearing. The Board found his testimony to lack credibility and refused to reopen the decision. On appeal, this Court reversed and found insufficient evidence to support the Board's finding that notice was sent:

> Although it is within the province of the Appeal Board to determine claimant's credibility, the record must nevertheless show that notice was sent before it may be presumed that it was received. The only things in the record on this are the statement of the Board's attorney that the notice was sent and a copy of a notice which claimant testified that he received on the date of the hearing on his motion to reopen. There was neither testimony by the person who sent the notice nor explanation of the procedure for sending notices that would support a finding that the notice was sent.[50]

Kostyshyn is distinguishable from this case. Unlike *Kostyshyn*, the Board's Secretary testified that she sent proper notice to PALW. In fact, the Board records indicate that notice was sent to PALW to the attention of Sylvia Lewis-Harris.[51] Although PALW stresses that there is no record of how notice was sent, what procedures were followed, or whether postage was prepaid, the Board Secretary testified that she mailed notice to PALW

[49] 1982 WL 593159 (Del. Super. Ct. Jul. 9, 1982).
[50] *Kostyshyn*, 1982 WL 593159 at *1.
[51] D.I. 5, at 73, 74.

and that notice was sent to PALW to the attention of Lewis-Harris. Notably, the Board Secretary sent notice to the same address that she had sent prior notices for the initial hearing, all of which were received.[52] This evidence demonstrates that the Board had sufficient evidence before it to conclude that notice was sent properly. As a result, the Board's decision to deny PALW's request for a rehearing was not an abuse of discretion.

B. The Board's Decision is Supported by Substantial Evidence

PALW argues that the Board's decision that Graham is entitled to benefits is not supported by substantial evidence. Specifically, PALW contends that Graham was not pressured to resign and resigned voluntarily.

Section 3314 of Title 19 of the Delaware Code provides that "[a]n individual shall be disqualified for benefits: (1) [f]or the week in which the individual left work voluntarily without good cause attributable to such work . . . ." The employee has good cause to leave where the cause "would justify one in voluntarily leaving the ranks of the employed and joining the ranks of the unemployed."[53] Good cause does not exist, however, merely because the employer creates an undesirable situation.[54] Rather, the employee must first "do something akin to exhausting his administrative remedies" by, for

[52] D.I. 5, Ex. A, at 116-17.
[53] *0'Neal's Bus Serv., Inc. v. Employment Sec. Comm'n.*, 269 A.2d 247, 249 (Del. Super. Ct. 1970).
[54] *Id.*

example, notifying the employer of the undesirable situation.[55] Although "voluntarily" means "proceeding from one's own choice or full consent," Delaware courts have held that an employee does not leave voluntarily where she was induced under pressure to leave her job.[56] In such a case, the employee's resignation is "tantamount to a discharge . . . without just cause", and the employee may receive benefits.[57]

In this case, the Board's decision that Graham was induced under pressure to resign is supported by substantial evidence. The Board first determined that the evaluation plan crafted for Graham focused mostly on her previous position as an administrator, rather than on her current position as a program director.[58] The Board held that the language of the plan indicated that the document was "clearly an ultimatum, which at least implied the intention to terminate the claimant at the end of 30 days."[59] For example, the plan was implemented to "determine what, <u>if any</u>, role Carol shall have in the PALW organization going forward."[60] Similarly, PALW reserved the right to "take corrective action if necessary up to and including

[55] *0'Neal's Bus Serv., Inc.*, 269 A.2d at 249.
[56] *Anchor Motor Freight, Inc. v. Unemployment Ins. Appeal Bd.*, 325 A.2d 374, 376 (Del. Super. 1974).
[57] *Id.*
[58] D.I. 5, Ex. B, at 122.
[59] *Id.*
[60] D.I. 5, at 9 (emphasis added).

termination."[61] Even though PALW is correct that the Board's decision does not address the motive of Lewis-Harris or the discrepancy between her testimony and the letter she authored while employed by PALW, the Board stated that "[t]he wording of the performance plan, without any other evidence, would be sufficient to lead the Board to the conclusion that the claimant was being given an ultimatum and was threaten [sic] with future action that all but guaranteed her termination."[62] The Board further found that the testimony of Lewis-Harris, who testified that Graham was given an ultimatum, was credible. As a result, the Board had sufficient evidence before it to find that Graham's resignation was not voluntary.

PALW relies on *Short v. Unemployment Insurance Appeal Board and Phoenix Steel*[63] and *Redding v. Medical Center of Delaware*[64] to argue that Graham voluntarily quit and was not constructively discharged. In *Short*, the claimant resigned from his employment after being laid off for one year. While laid off, the claimant had the right to bid on other jobs with the company, but it was unlikely that he could return to his former position. By resigning, however, the claimant was able to receive $1,900.00 in severance pay, even though he would lose the ability to bid on different positions. The

[61] D.I. 5, at 9.
[62] *Id.*
[63] 1985 Del. Super. LEXIS 1056 (Del. Super. Ct. Jul. 26, 1985).
[64] 1994 Del. Super. LEXIS 12 (Del. Super. Ct. Feb. 4, 1994).

Court affirmed the Board's decision that "the claimant was given a choice, which he made on his own, without any inducement by the employer other than monetary."[65]

In *Redding*, Redding's employer wanted to demote her for deficient performance. After Redding opposed the demotion, her employer offered her a ninety-day evaluation period. Redding's performance failed to improve, and she was demoted to the only other available position in her department. Because she refused to accept this position, her employer informed her that she would be terminated. Instead, Redding chose to resign. On appeal, this Court affirmed the Board's decision that Redding did not qualify for benefits because the employer's offer to place Redding in a position with fewer responsibilities did not induce her to resign.[66]

The holdings in *Short* and *Redding* do not persuade the Court that the Board erred. In both *Short* and *Redding*, the claimants were given options for different jobs within the organization rather than termination. Moreover, in neither case did the employer's actions suggest an intention to terminate the claimant. In contrast, neither the evaluation plan nor the comments made by Graham's superiors present an option for Graham. Although Graham was not explicitly forced to sign the evaluation plan, the wording of

[65] *Short,* 1985 Del. Super. LEXIS at *4.
[66] *Redding,* 1994 Del. Super. LEXIS 12.

the plan was laden with implicit threats that she would be terminated, rather than reassigned. The language of the plan suggested, at least implicitly, that Graham must either accept the new evaluation, which mainly addressed her old position, or risk termination. This interpretation was supported by the testimony of Lewis-Harris at the Board hearing. Graham "exhausted her administrative remedies" by voicing disagreement with the plan and documenting those disagreements.[67] The Board correctly applied the proper "constructive discharge" standard because there was substantial evidence that Graham's resignation was induced under pressure to resign. Thus, the holdings in *Short* and *Redding* are unavailing.

Importantly, although PALW stresses that there was no explicit threat to terminate Graham, that she chose to resign, and that the Board's decision failed to consider Lewis-Harris's motive to lie, this Court cannot weigh the evidence, make factual determinations, or weigh the credibility of witnesses. Rather, this Court can only determine whether the Board's decision is supported by substantial evidence. In this case, the language of the performance plan implied that Graham would be forced to resign if she did not sign the plan, Graham's testimony that she was threatened with a forced resignation and the supporting testimony of Lewis-Harris, which the Board

[67] D.I. 7, at 13.

found to be credible, is evidence adequate to support the Board's decision. As a result, the Board's decision is supported by substantial evidence.

VI. Conclusion

The Court finds that the Board did not abuse its discretion when it refused to reopen its March 30, 2007 decision because there was sufficient evidence in the record to demonstrate that PALW was sent proper notice. The Court also concludes that the Board's decision finding Graham qualified for benefits is supported by substantial evidence. According, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge