

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

<b>REBECCA SANTORE</b>	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
	)	11A-11-008-JOH
v.	)	
	)	
<b>UNEMPLOYMENT INSURANCE APPEAL BOARD</b>	)	
	)	
Appellee	)	

*Submitted: August 24, 2012*

*Decided: October 15, 2012*

**MEMORANDUM OPINION**

*Upon Appeal from the  
Unemployment Insurance Appeal Board - **AFFIRMED***

***Appearances:***

Rebecca Santore, 2503 Kingman Drive, Wilmington, Delaware, 19810, Appellant

Caroline L. Cross, Esquire, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, Attorney for Appellee

HERLIHY, Judge

Rebecca Santore (“Santore”) has appealed a decision from the Unemployment Insurance Appeal Board (“Board”) denying her unemployment benefits. Santore filed for unemployment benefits in July, 2011.<sup>1</sup> A Claims Deputy from the Department of Labor, Division of Unemployment Insurance, (“Department”) found her ineligible for the receipt of unemployment benefits and issued an eligibility determination on August 8, 2011. The determination was mailed to Santore at her address of record on August 8, 2011, indicating also, an appeal had to be filed by August 18, 2011.<sup>2</sup> Santore filed an appeal of the Claims Deputy’s determination on September 21, 2011 and a hearing was held before the Appeals Referee solely on the issue of timeliness of her appeal.<sup>3</sup> Following the hearing, the Appeals Referee held that the Claims Deputy’s determination was final and binding, as the appeal was untimely filed.<sup>4</sup> Santore appealed to the Board. The Board affirmed the Claims Deputy’s determination and held no severe

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<sup>1</sup> *Santore v. Unemployment Insurance Appeals Board*, Appeal No. 10803948 (Del. U.I.A.B. Oct. 6, 2011) [hereinafter “Ref.’s Decision”], *aff’g* Determination of Claims Deputy (Sept 11, 2011); R. at 27.

<sup>2</sup> *Santore v. Unemployment Insurance Appeals Board*, Appeal No. 10803948 (Del. U.I.A.B. Nov. 1, 2011) [hereinafter “Board Decision”], *aff’g* Decision of Appeals Ref. (July 27, 2011); R. at 38.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

circumstances were present in this case warranting the Board to overlook the untimeliness of the appeal.<sup>5</sup>

The Court finds there is substantial evidence to support the findings below and that the Board did not abuse its discretion when deciding not to hear Santore's appeal on the ineligibility determination. Accordingly, the Board's decision is **AFFIRMED**.

### *Factual Background*

Santore was employed as a certified nursing assistant by Five Star Quality Care from January 18, 2011, until her discharge on July 18, 2011. She filed for unemployment benefits effective July 17, 2011. In two decisions, the Claims Deputy denied her claim and determined that she was not able to work or available for work on August 8, 2011. On August 8, 2011, the Department of Labor mailed Santore a letter, at her last address on record, informing her that she was not eligible for unemployment benefits. There was no record of the determination being returned to the Department as undeliverable by the United States Postal Service ("USPS").

The last day to timely appeal the Claims Deputy's determination was Thursday, August 18, 2011. Santore personally filed an appeal from that determination on September 21, 2011 at the local office. Additionally, she

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<sup>5</sup> *Id.* at 39.

submitted a letter dated August 2, 2011, including docket number 10794654, which was only referenced in the Claims Deputy's August 8<sup>th</sup> determination. The Claims Deputy issued a determination that she failed to file a timely appeal.

A hearing on the sole issue of timeliness was held before the Appeals Referee on October 5, 2011. At the hearing, the Department witness testified that on September 21, 2011, Santore arrived at the office and filed an appeal from the Claims Deputy's determination. The Department's witness noted that the letter dated August 2<sup>nd</sup> was dated prior to the issuance of the determination denying her claim for unemployment benefits; the letter dated August 2<sup>nd</sup> referenced the determination denying benefits dated August 8<sup>th</sup>. Also, Santore's file contained letters dated August 12, 2011 and September 7, 2011, which were in an envelope postmarked September 19, 2011. The Department had no documentation suggesting an appeal was filed before September 21, 2011.

At the hearing, Santore testified that she mailed her appeal in the beginning of August, along with two additional letters. When she subsequently discovered the Department did not receive the appeal documents, she went to the unemployment office and filed it in person. Santore further testified that she wrote the appeal the same day she received the determination in the mail which, she believed, was August 2<sup>nd</sup>. She acknowledged, however, the appeal was not written on August 2<sup>nd</sup> because her case had not been determined at that time. Instead, she

contends she wrote the appeal on August 9<sup>th</sup> and mailed it the next day. Her justification for the date of September 21<sup>st</sup> on her appeal of the Claims Deputy's determination was she reprinted the document on that date and her computer software automatically inserted that date on the letter template document.<sup>6</sup> Santore provided no proof of mailing of the appeal allegedly mailed before September 21<sup>st</sup>.<sup>7</sup>

Following the hearing, the Chief Appeals Referee affirmed the decision of the Claims Deputy based on Claimant's failure to file a timely appeal under 19 *Del. C.* § 3318(b). The Appeals Referee stated the following in his decision:

The claimant filed a claim for unemployment benefits and was made ineligible for receiving unemployment benefits in a determination that was dated and mailed to her on August 8, 2011 to her address of record . . . The last day the claimant had to file an appeal from the determination was August 18, 2011. The claimant reported to the unemployment office on September 21, 2011 and filed a late appeal. The Department of Labor has no record of the claimant filing an earlier appeal. The claimant provided no poof of mailing of any appeal.<sup>8</sup>

Santore appealed the Appeals Referee's decision to the Unemployment Insurance Board ("Board"). The Board determined there was no evidence in the record of departmental error warranting retaining jurisdiction in this case,

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<sup>6</sup> R. at 17-18.

<sup>7</sup> R. at 19-20.

<sup>8</sup> R. at 28.

notwithstanding the untimely appeal. Additionally, the Board held that, “[t]he record supports the inference that the only alleged reason for the Santore’s delay in filing an appeal was unrelated to any factor within the control of the Department or subject to remedy by the Board.”<sup>9</sup> The Board found that there were no severe circumstances present in this case or other grounds necessary for an exercise of discretion under 19 *Del. C.* § 3320 to allow for consideration of the underlying substantive issues.<sup>10</sup> The Board denied the application for further review, affirmed the decision of the Appeals Referee and held that the Claim’s Deputy’s determination denying unemployment benefits was final and binding. Santore timely filed the instant appeal challenging the Board’s decision.

### ***Parties’ Contentions***

Santore first disputes that the appeal was untimely. Specifically, she argues based on the Department’s receipt of the letter dated August 12<sup>th</sup>, the appeal was timely created and relies on her confusion with her computer software program.

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<sup>9</sup> Board Decision, at 2.

<sup>10</sup> 19 *Del. C.* § 3320 provides:

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

She points to the fact that she brought her computer to the hearing to demonstrate that the date in the program reflected the current date. She additionally asserts that the Department's receipt and possession of the second appeal letter in August, proves that she timely filed the appeal.

In opposition, the Board argues it did not abuse its discretion in denying Santore's application for further review and declining to accept the appeal according to 19 *Del. C.* § 3320. It points to the fact that her appeal was filed over a month late, and there was no evidence in the record of a mailing error on behalf of the Department. The Board requests this Court to affirm its decision.

### ***Standard of Review***

This Court's limited role in deciding an appeal from a Board's decision is to determine whether the decision is free from legal error and supported by substantial evidence.<sup>11</sup> Evidence is substantial if it reasonably supports the Board's decision.<sup>12</sup> While this Court will review the evidence to determine its substantiality and legal adequacy, it is not the Court's role to determine credibility or questions of fact.<sup>13</sup> Those determinations are left to the Board.<sup>14</sup>

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<sup>11</sup> *Onley v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

<sup>12</sup> *Id.* at 614.

<sup>13</sup> *Mack v. RSC Landscaping*, 2011 WL 7078291, at \*1 (Del. Super. Dec. 22, 2011).

<sup>14</sup> *Id.*

Additionally, in a case where the Board has discretion to open a matter, this Court must consider whether there was an abuse of discretion in the decision.<sup>15</sup> An abuse of discretion occurs when 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.”<sup>16</sup> Where the Board does not abuse its discretion in making a decision to hear a case after an untimely appeal, the Board’s decision must be affirmed.<sup>17</sup>

### ***Discussion***

#### ***The Board’s Decision is Supported by Substantial Evidence***

Section 3318(b) of Title 19 of the Delaware Code provides that the decision of the Claims Deputy will become final “10 calendar days after such Claims Deputy’s determination was mailed to the last known addresses of the claimant and the last employer . . .” “Generally, if a party fails to perfect an appeal within the statutorily mandated period, a jurisdictional defect results, thereby preventing the appellate court from exercising jurisdiction.”<sup>18</sup>

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<sup>15</sup> *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

<sup>16</sup> *PAL of Wilmington v. Graham*, 2008 WL 2582986, at \*4 (Del. Super. June 18, 2008) (internal quotations omitted).

<sup>17</sup> *Hefley v. Unemployment Ins. Appeals Bd.*, 2009 WL 5177136, at \*1 (Del. Super. July 17, 2009) (quoting *Russell v. Unemployment Ins. Appeal Bd.*, 2000 WL 1211216, at \*2 (Del. Super. Mar. 21, 2000)).

<sup>18</sup> *Preston v. Bd. Of Adjustment of New Castle County*, 772 A.2d 787, 791 (Del. 2001).



The decision of the Board in this case is supported by substantial evidence. The Claims Deputy's determination was issued on August 8, 2011, and sent to Santore's address on record. According to 19 *Del. C.* § 3318(b), she had until August 18, 2011 to timely appeal the decision of the Claims Deputy. The Department did not receive the appeal until September 21, 2011, when she filed the appeal in person.

Santore claims in her opening brief that because one of her letters to the Department was dated August 12<sup>th</sup>, the appeal itself was timely filed. This argument is without merit. Even if the document was created within the statutory time to file a timely appeal, it does not indicate the appeal was actually timely filed. Where Department records specify an untimely filed appeal and the claimant fails to provide proof that the appeal was timely filed, substantial evidence exists to find the appeal was not filed within the requisite time period.<sup>19</sup>

At the hearing, a Department witness testified that the Department received two letters dated August 12, 2011, and September 7, 2011, in an envelope postmarked September 19, 2011. The Department had no record of Santore's appeal prior to September 21, 2011. In fact, the witness highlighted that the appeal dated August 2, 2011, could not have even been written on August 2, 2011, as the determination was not even rendered until August 8, 2011. The Board was within

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<sup>19</sup> *Reiger v. KHM Transp.*, 2001 WL 1729128, at \*3 (Del. Super. Dec. 10, 2001).

its authority to find the Department witness more credible than Santore.<sup>20</sup> Based on the evidence in the record, the Board's determination that Claimant's appeal was untimely is supported by substantial evidence and is free from legal error.

***The Board did not Abuse its Discretion under 19 Del. C. § 3320***

Section 3320, Title 19 of the Delaware Code gives the Board authority to consider an untimely appeal *sua sponte* if it finds there was an administrative error on behalf of the Department, or "where the interest of justice would not be served by inaction."<sup>21</sup> If, however, "the lateness of the appeal is due to the claimant's unintentional or accidental actions, and not due to an administrative error, the Claims Deputy's determination will become final and § 3318(b) will jurisdictionally bar the claim from further appeal."<sup>22</sup>

It is well established in Delaware that absent an abuse of discretion by the Board, this Court must affirm the decision.<sup>23</sup> Santore alleges she timely mailed her appeal after receiving the determination. The Board found her appeal was first received by the Department on September 21, 2011, when she appeared in person

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<sup>20</sup> See *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005).

<sup>21</sup> *Funk*, 591 A.2d at 225.

<sup>22</sup> *Hartman v. Unemployment Ins. Appeal Bd.*, 2004 WL 772067, at \*2 (Del. Super. Apr. 5, 2004).

<sup>23</sup> *Hartman*, 2004 WL 772067, at \*2.

to file. Additionally, the Board held there was neither departmental error nor any other reasons warranting the exercise of jurisdiction under 19 *Del. C.* § 3320.

The Board did not abuse its discretion in declining not to *sua sponte* consider the appeal, even though the period to file a timely appeal had expired. While Santore alleges she timely mailed the appeal, she did not provide a proof of mailing or any other indication suggesting departmental error. There was no record of the determination being returned as undeliverable by the USPS. Merely alleging an error occurred is not sufficient to show a Department mistake, nor does it substantially prove that Santore's own actions were faultless.<sup>24</sup> The possibilities for error and inequity, including her computer program and allegations that paperwork was lost by the Department, are questions of credibility that were considered by the Board. This Court's review on appeal does not consist of a credibility determination.<sup>25</sup>

Additionally, there is nothing in the record suggesting evidence of injustice warranting the Board to *sua sponte* consider Santore's untimely appeal. In this case, her loss of benefits and economic hardship are insufficient to demonstrate

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<sup>24</sup> *Funk*, 591 A.2d at 226.

<sup>25</sup> *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005).

severe circumstances rising to the level of injustice.<sup>26</sup> Therefore, the Board did not abuse its discretion in refusing to consider Santore's appeal *sua sponte*.

***Conclusion***

For the reasons stated herein, the decision of the Board is **AFFIRMED**.

**IT IS SO ORDERED.**

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J.

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<sup>26</sup> *Morra v. Unemployment Ins. Appeal Bd.*, 2004 WL 1965825, at \*3 (Del. Super. July 29, 2004).