**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| CHARLES A. WEISS, JR., | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | C.A. No. 02A-12-003 WCC |
| | ) | |
| v. | ) | |
| | ) | |
| DELAWARE DEPARTMENT OF HEALTH AND SOCIAL SERVICES, | ) | |
| | ) | |
| | ) | |
| Appellee. | ) | |

Submitted: April 28, 2003
Decided: July 30, 2003

**O R D E R**

**Upon Appeal from the Merit Employee Relations Board. Affirmed.**

Charles A. Weiss, Jr., 152 South Kings Croft Drive, Bear, DE 19701. *Pro se* Appellant.

Ilona M. Kirshon, Esquire, Department of Justice, Carvel State Office Building, 820 N. French Street, 6th Floor, Wilmington, DE 19801. Attorney for Appellee Delaware Department of Health and Social Services.

**CARPENTER, J.**

This 30th day of July, 2003, after consideration of the appeal of Charles A. Weiss, Jr. ("Appellant") from the November 14, 2002 decision of the Merit Employee Relations Board ("Board"), and upon review of the briefs and the record below, it appears to the Court that:

1. The Appellant was employed by the Delaware Department of Health and Social Services ("Employer" or "DHSS"), as a Field Investigator in the Audit and Recovery Management Services ("ARMS") unit in New Castle County. The ARMS unit investigates welfare fraud. Policy contained in the ARMS Standing Operating Procedures Manual requires Field Investigators to maintain mandatory duty travel logs on a daily basis, which are used to document the employee's whereabouts during the workday. Employees then submit these logs to their supervisors on a weekly basis and attest to the accuracy by signing and dating the bottom of the form. ARMS had an additional policy regarding the use of the State vehicles during lunch breaks. This policy provided that a Field Investigator was permitted to drive his state car home for lunch if his home was in a straight line between field assignments or within a reasonable distance of the field assignments. The purpose of this policy was to prevent employees from driving unreasonable distances during lunch. When stopping for lunch while driving a State vehicle, the duty travel log was to reflect an entry for the address where the Field Investigator

stopped, including their home. It is this policy Appellant was terminated for violating. Following an investigation, Appellant was discharged for misuse of a state vehicle, misuse of time by being home during on-duty periods, and for falsifying travel logs. A hearing was held before the Board at which time the Board unanimously found against the Appellant.

2. During the Board hearing, Dean Stotler testified for the Employer that he had previously worked in the ARMS unit as a Field Investigator with Appellant. He stated that it was well known among everyone in the Field Investigation Unit that Appellant went home during the day and used the State vehicle to run errands. He also testified that Appellant had made comments about swimming at lunch in his backyard pool as well as other comments that led coworkers to believe he would stay at home for extended periods of time.[1]

3. Another witness for Employer, William T. Garfinkel, the Director of the ARMS Unit, testified that he learned from Dean Stotler that Appellant and another Field Investigator in the ARMS unit who lived in the same development were taking their State cars home during the day for extended periods of time, not doing their assigned jobs and falsifying their logs to cover up their whereabouts to

[1] It was also testified that Appellant had claimed to go home during the day to get a tan, hang Christmas lights, spend time with his grandchildren and to work in his shop. *See* Record of the Merit Employee Relations Board, Docket #02-01-252 at 519-20 (hereinafter "R. at ___").

make it look like they were working in the field, all in violation of State policy. Further, he stated that Appellant's residence was not in a straight line between work locations and would not be considered to be reasonably close to these locations and that Appellant's travel logs did not indicate where he had stopped for lunch on the days at issue.

Mr. Garfinkel testified that he had asked Carl McIlroy, the Supervisor of the ARMS Special Investigations Unit, to investigate the allegations and to report back to him.[2] Mr. McIlroy subsequently conducted several days of surveillance of Appellant's home and the home of another employee who lived in the same development. Mr. McIlroy testified that it was during this surveillance that he witnessed Appellant at his residence for extended periods of time, contrary to what was recorded in his travel logs.[3]

---

[2] The Special Investigations Unit conducts internal affairs investigations as well as welfare fraud investigations.

[3] Mr. McIlroy testified that while he was setting up surveillance at the other employee's home on September 25, 2001, he witnessed Appellant enter the development in his state car at 11:15 a.m. Then at 12:04 p.m. and at 12:33 p.m. McIlroy passed by Appellant's residence and witnessed the state car parked in front of the residence. At 12:50, approximately an hour and a half later, he saw Appellant leave his residence in his state car. He testified that when he later reviewed Appellant's travel log, it indicated that Appellant was at various locations relating to his job from 11:15 until 12:40, when he took lunch at 12:40 until 1:40. Specifically, he logged that he was at the Northeast Service Center in Wilmington at 11:15 when he was seen in his neighborhood, then to headquarters in New Castle and then to lunch from 12:40 - 1:40. McIlroy then testified that he conducted surveillance the next day, September 26, 2001, when he observed Appellant's state car at his residence at 11:15 a.m. Appellant's travel log for this day reflects that he was on location working on a case at this time. *See* R. at 169 - 74.

4. Thereafter, Mr. McIlroy and Mr. Garfinkel prepared a report of their findings for Martha Austin, Human Relations Manager in the Human Resources Department. Mr. Garfinkel then discussed the findings with Lynn Beaty, Director of the Division of Management Services. Director Beaty then instructed Mr. Garfinkel to turn the case over to the DHSS Office of Labor Relations for an independent investigation by Investigative Administrator Mike Rogers. On October 5, 2002, Mr. Rogers was instructed to take over the investigation as to whether Appellant and other employees were misusing state vehicles and falsifying their duty logs. Rogers subsequently set up surveillance in Appellant's neighborhood on three occasions during which he witnessed Appellant at his residence and in his state vehicle for extended periods of time during the day, contrary to what was recorded in his travel logs.[4]

---

[4] Mr. Rogers testified that on October 10, 2001, he observed a Ford Taurus matching the description of Appellant's state car parked in front of Appellant's residence from 11:10 a.m. until 1:55 p.m. This vehicle was identified because it had a state-owned license plate. Rogers conducted his surveillance by parking his car in a place where he could observe all vehicles entering or leaving the neighborhood until 1:55 p.m., when he witnessed the Ford Taurus exit the neighborhood. He stated that he then checked Appellant's residence and observed that the car was gone. Rogers further testified that Appellant's travel log indicated on that date that Appellant had been at various work-related locations. Appellant's travel log stated that he was at Thatcher Street State Service Center at 11:00 a.m., arrived at Porter Service Center at 11:20 and remained there until 11:35; left at 11:50 for the Claymont Service Center where he remained until 12:25, and that he took lunch from 1:00 to 2:00.

Rogers conducted a second day of surveillance on October 12, 2001, beginning at 10:45 a.m. He testified that on this day, he witnessed a state car come into the development at 11:15 a.m., which then parked in front of Appellant's house for three and a half hours, leaving at 2:45 p.m. Rogers testified that Appellant's travel log entries for that date indicated that he was

5. Mr. Rogers testified that he then reported back to his supervisor, as well as with Appellant's supervisor Mr. Garfinkel, about what had transpired over that third day of surveillance. He testified that he was present when Mr. Garfinkel called Appellant into his office to inform him that he had been under surveillance since September. Mr. Rogers stated that Appellant admitted his misuse of the state car and falsification of travel logs by stating "I'm wrong, I got caught, I shouldn't have done it."[5] He testified that Appellant then offered to resign rather than have the matter investigated further. However, Appellant later withdrew this resignation. Subsequently Mr. Rogers prepared a Confidential Memorandum detailing his investigation and describing the conversation in which Appellant admitted his wrongdoing.

6. Division Director Beaty testified that when the investigation was

---

traveling on various business routes, Appellant's travel log for October 12, 2001 provided that he was in the field at a North Clayton Street address, then at the Chapman Service Center, then at Porter Service Center, then at lunch which ended at 1:30 p.m., then at North East Service Center and finally at headquarters.

The third and final day of surveillance was conducted on October 16, 2001. He testified that on this date, he saw a state vehicle which matched the color, make and model of Appellant's vehicle enter the development, after forty-five minutes he drove by and saw Appellant standing in front of his house. Rogers testified that he realized Appellant had seen him as he drove by so he did not return to the previous surveillance location, but instead moved to a new location at the entrance of the development. He stated that at 11:50 a.m., Appellant left the neighborhood and made a u-turn and drove over to Rogers where they engaged in a conversation about why he had returned home that day. *See* R. at 248 - 49, 254 - 61.

[5] *See* R. at 265. It was testified by Mr. Garfinkel that Appellant stated "Okay, you got me. Okay. You got me. You got the evidence. But there's reasons." *See also* R. at 43, 69-70.

completed, she received a copy of the report dated October 21, 2001 from the Manager of Labor Relations summarizing the findings of Appellant's conduct, concluding that there had been inappropriate use of State cars, falsification of travel logs and unauthorized absence from work. She testified that she regarded this as serious infractions from an employee who was responsible for conducting welfare fraud investigations and testifying in court about those investigations. Further, she stated that she was concerned that the falsification of travel logs on a repetitive basis adversely impacted Appellant's ability to carry out his responsibilities credibly.

7. Subsequently, Appellant was notified that DHSS was considering terminating his employment and that he was entitled to a pre-termination hearing. Following his request, a hearing was held and the hearing officer recommended termination in a letter opinion dated December 18, 2001. On January 9, 2002, Appellant filed a direct appeal of his termination with the DHSS with the Board pursuant to Merit Rule 21.0111. Three days of evidentiary hearings were held before the Board at the conclusion of which the Board unanimously upheld the decision of DHSS. Appellant subsequently filed this appeal.

8. On appeal from the Merit Employee Relations Board, the function of the Superior Court is to determine whether the Board's decision is supported by

substantial evidence and free from legal error.[6] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] The Court is not the trier of fact nor has the authority to weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.[8] Rather, this Court merely determines if the evidence is legally adequate to support the Board's factual findings.[9] Weighing the evidence and determining questions of credibility, which are implicit in factual findings, are functions reserved exclusively for the Board.[10] "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below, resolving all doubts in its favor."[11]

9. Appellant contends that substantial evidence does not exist for this Court to uphold the decision of the Board. His argument focuses on inconsistencies in the testimony and reports of the investigators who testified at the Board hearing.

---

[6] *McIlroy v. Department of Health and Social Services,* 2000 WL 703672 at *2 (Del. Super. Ct.) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)); *see also DeMarie v. Delaware Department of Transportation*, 2002 WL 1042088 (Del. Super. Ct.).

[7] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).

[8] *Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965).

[9] DEL. CODE ANN tit. 29, § 10142(d) (1997).

[10] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988); *Conner v. Wells Fargo*, 1994 WL 682486 (Del. Super. Ct.).

[11] *General Motors Corp. v. Guy*, 1991 WL 190491 at *3 (Del. Super. Ct.) (citation omitted).

Specifically, the investigators made errors in Appellant's street address, the description of the state vehicle which he was issued, and the dates and times in which this vehicle was observed.

10. Title 29, chapter 59 of the Delaware Code creates the Merit System of Personnel Administration, which includes the Merit Employee Relations Board, the Merit Rules and a grievance system for redress of violations of the merit rules.[12] Section 5930 provides that the Merit Rules shall provide for discharge for cause.[13] Merit Rule 15.1, "Employee Accountability" provides:

> 15.1 Employees shall be held accountable for their conduct. Measures up to and including dismissal shall be taken only for just cause. "Just cause" means that management has sufficient reasons for imposing accountability. Just cause requires:
> showing that the employee has committed the charged offense;
> offering specified due process rights specified in this chapter; and
> imposing a penalty appropriate to the circumstances.[14]

Furthermore, the discharge of an employee under the Merit System is *prima facie* correct and the burden is on the discharged employee to present evidence sufficient to rebut this presumption.[15] The Court must now decide whether substantial

---

[12] *State of Delaware Dept. Natural Resources and Environmental Control ("DNREC") v. Murphy*, 2001 WL 282817 at *3 (Del. Super. Ct.) (citing DEL. CODE ANN. tit. 29, § 5914; *Dep't of Corrections v. Worsham*, 638 A.2d 1104, 1106 (Del. 1994)).

[13] *See* DEL. CODE ANN. tit. 29, 5930 (Supp. 2003).

[14] *See* Merit Rules, Chapter 15 Employee Accountability.

[15] *Hopson v. McGinnes*, 391 A.2d 187, 188 (Del. 1978).

competent evidence exists on the record to support the Board's finding that Appellant failed to meet his burden of establishing the absence of "just cause" for his termination.

11. Appellant challenges the credibility of the witnesses and their testimony due to several inconsistencies. While the inconsistencies in various portions of testimony is concerning, as already stated, it is solely the responsibility of the Board to determine the credibility of the witnesses, weigh their testimony and to make findings of fact. This Court's role is simply to determine if the evidence is legally adequate to support the Board's factual findings. Here, the record reflects that the Board held three days of hearings including testimony presented from ten witnesses. The Board thereupon issued a thorough opinion ultimately finding that Appellant did not meet his burden of showing by a preponderance of the evidence that the DHSS did not have just cause to terminate his employment. A review of the record supports this finding of the Board. Despite several witnesses misidentifying his address as "152 Kings Court", they were nonetheless able to identify the location of his house on the map of his development. Furthermore, all identified his address as "152" despite identifying the street as "Kings Court" rather than "Kings Croft Drive".[16]

[16] Appellant's address as provided by the Department of Motor Vehicles is 152 South Kings Croft Drive.

Moreover, Mr. McIlroy identified Appellant's house on the map as well as the road it was located on.

12. While the witnesses described the color of the vehicle as blue or battleship gray, and despite the vehicle tag number having never been recorded by the investigators, all of the witnesses involved in the investigation testified that they saw a state-owned Ford Taurus with state tags entering the development, parking in front of Appellant's house and then leaving the development. It was additionally testified that the Appellant was seen driving the vehicle. Further, while the witnesses described the color of the vehicle as blue or battleship gray, no evidence or testimony was presented by Appellant that the color of the car was otherwise. Rather, it was not until Appellant's closing argument that he suggested that the car was not blue or battleship gray.[17]

13. In the present case, the Board found that the DHSS properly exercised its discretion when it decided to terminate Appellant. The Board considered the evidence and noted the discrepancies in the testimony and ruled that the Employer's decision was justified and that the Appellant had not met his burden of proving

[17] Finally, despite Appellant attaching a copy of his travel logs which has also been submitted as evidence during the hearing, as previously stated this Court cannot weigh the evidence, make factual findings or determine credibility, rather, as already discussed, it is for the Board to make these determinations.

otherwise. As stated by the Board:

> [T]he totality of the evidence, including the multiplicity of the dates and the similarity of the behavior on each of them, coupled with [Appellant's] admissions, the direct observations of Mr. Rogers who actually identified [Appellant] and his vehicle in places other than those recorded by [Appellant] on his logs, and the testimony of Dean Stotler, compels the conclusion that [Appellant] was indeed playing fast and loose with the policy about taking State vehicles home for lunch, that he was taking extended and unauthorized time at home, well beyond his assigned lunch hour, and, most critically, that he was improperly concealing his behavior by making false sworn entries in his mandatory log.[18]

The Board also found that the Appellant's termination had not been shown to be improper or inappropriate under the Merit Rules. After a review of the proceedings before the Board, the Court finds that these determinations are supported by substantial evidence on the record. Further, the Court agrees that the required disclosure of the Appellant's conduct would significantly undermine his credibility as a fraud investigator and would potentially jeopardize any investigation in which he was involved. Such conduct cannot be condoned by this Court nor can it be acceptable conduct by an agency charged with the responsibility of protecting public monies from fraud and abuse. This agency's action was not only proper and appropriate but the only reasonable action that could have been taken.

14. Appellant makes additional arguments in his reply brief which are not

[18] *See* R. at 690.

part of the record below and which were not advanced before the Board.[19] Therefore, pursuant to title 19, section 2350(b) these arguments will not be considered by the Court on appellate review.[20]

15. Because the Board's decision is supported by substantial evidence, the decision of the Board is AFFIRMED.

IT IS SO ORDERED.

_____

Judge William C. Carpenter, Jr.

[19] Specifically, in the "Facts" section, Appellant states that his pay was suspended in violation of his rights under the State Merit System and in violation of his rights under the Due Process clause of the federal and state constitutions. Furthermore, he states that his suspension violated Merit Rule 15.4 claiming he was not provided notice of his entitlement to a predecision meeting and that his Employer did not "first review with [him] the basis for the action and [did not provide [him]] an opportunity for response."

[20] *See Kidd v. Community Systems, Inc.*, 1995 WL 862129 at *2 (Del. Super. Ct. ).