IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SEAN BARTON,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C.A. No. 03A-09-006 JRJ
	)	
INNOLINK SYSTEMS, INC.	)	
	)	
Employer-Appellee	)	
	)	
and	)	
	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	
	)	
Appellee.	)	

Date Submitted: February 19, 2004
Date Decided: May 28, 2004

O R D E R

On Appeal of the Decision of the Unemployment Insurance Appeal Board.
Decision **AFFIRMED**.

Sean H. Barton, 20 Drexel Road, Claymont, DE 19703, employee-appellant. *Pro se.*

Matthew F. Boyer, Esquire, and Timothy M. Holly, Esquire, Connolly Bove Lodge & Hutz LLP, The Nemours Building, 1007 N. Orange St., P.O. Box 2207, Wilmington, DE 19899-2207, attorneys for employer-appellant Innolink Systems, Inc.

Mary Paige Bailey, Esquire, Dept. of Justice, 820 North French St., 6th Floor, Wilmington, DE 19801, attorney for appellee Unemployment Insurance Appeal Board.

JURDEN, J.

Upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

Procedural History

1. Appellant Sean Barton ("Barton" or "claimant") appeals from a decision of the Unemployment Insurance Appeal Board ("UIAB" or "Board") which denied him unemployment benefits. Barton was employed as a field computer technician and consultant by Innolink Systems, Inc. ("Innolink" or "employer") from approximately March 2002 until he was discharged on or about May 19, 2003. Barton subsequently filed a claim for unemployment benefits. A Claims Deputy determined that Barton was not entitled to unemployment benefits because he was fired for just cause.[1] Barton appealed this decision and an Appeals Referee determined that the claimant was entitled benefits.[2] The employer appealed the Referee's decision to the Unemployment Insurance Appeal Board and the Board held a hearing on August 27, 2003. The claimant failed to appear at the Board hearing. The Board reversed and held that Barton was discharged for good cause and was therefore disqualified from the receipt of unemployment benefits.[3] This appeal followed.

Standard of Review

2. In reviewing a decision on appeal from the Unemployment Insurance Appeal Board, this Court must determine if the decision is supported by substantial

[1] *See* Notice of Determination, UIAB Record ("Record") (Docket No. 3) at 39-40; *see also* 19 *Del. C.* § 3315(2), which provides in pertinent part that a claimant shall be disqualified for unemployment benefits "[f]or the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter. . . ."
[2] *See* Referee's Decision ("Ref. Dec."), Record at 43-46.
[3] *See* Decision of the Appeal Board ("Bd. Dec."), Record at 112-14.

evidence and is free from legal error.[4] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[5] Absent an abuse of discretion, this Court must uphold the Board's decision.[6] "Questions of credibility are exclusively within the province of the Board which heard the evidence. As an appellate court, it [is] not within the province of the Superior Court to weigh the evidence, determine questions of credibility or make its own factual findings."[7] The Court will only reverse a decision of the Board if its findings are not supported by substantial evidence, or where the Board has made a legal mistake.[8]

Discussion

The Standard for Determining "Just Cause"

3. Innolink states that it terminated the claimant's employment for three reasons: (1) claimant's failure to meet minimum billable hour standards set by the company; (2) receipt of numerous customer complaints about the claimant; and (3) claimant's intentional violation of company rules and claimant's moonlighting. The employer argues that these reasons constitute just cause for termination. The employer has the burden of proving just cause.[9] Employee performance and conduct is highly relevant in assessing just cause.[10] Absent evidence to the contrary, an employer necessarily sets the standard for acceptable workplace conduct and performance.[11] Just

[4] *K-Mart v. Bowles*, 1995 WL 269872 (Del. Super. Ct. Mar. 23, 1995) (citing 29 Del. C § 10142(d); *Johnson v. Chrysler Corp.,* 213 A.2d 64 (Del. 1965)).
[5] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. Ct. 1994).
[6] *Id*.
[7] *Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins.,* 803 A.2d 931, 937 (Del. 2002).
[8] *Delgado v. Unemployment Insur. Appeal Bd.*, 295 A.2d 585 (Del. Super. Ct. 1972).
[9] *MRPC Financial Mgmt. LLC v. Carter*, C.A. No. 02A-10-004, 2003 Del. Super. LEXIS 237 at *12 (Del. Super. Ct. June 20, 2003).
[10] *Id.* (citing *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. Ct. 1967) (other citations omitted).
[11] *Id.*

cause is defined as "a willful or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employee's expected standard of conduct."[12] "Wilful and wanton conduct is that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance; it is unnecessary that it be founded in bad motive or malice."[13] While just cause is essentially the equivalent of the term "misconduct," it does not mean "mere inefficiency, unsatisfactory conduct, or failure of performance as a result of inability or incapacity . . . ."[14] But the concept of just cause does include notice to the employee that further poor behavior or performance may lead to termination.[15]

Customer Complaints

4. The employer testified that some of its clients had reported dissatisfaction with the claimant's work performance. The employer attempted to submit several letters as evidence of these customer complaints. The Referee refused to consider these letters, finding that they constituted hearsay evidence and the customers were not present at the hearing or available for cross-examination.[16] The Board accepted a few of the letters and said it would give the letters their "due weight,"[17] but the Board decision does not make

[12] *Majaya v. Sojourners' Place*, No. C.A. 02A-10-008-RRC, 2003 WL 21350542 at *4, ¶5 (Del. Super. Ct. June 6, 2003) (citing *Avon Prods., Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986) (per curiam)); *see also MRPC Fin. Mgmt,* 2003 Del. Super. LEXIS at *12 ("just cause refers to a 'wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's expected standard of conduct.'") (citing *Abex Corp*., 235 A.2d at 272) (other citation omitted).
[13] *MRPC Fin. Mgmt,* 2003 Del. Super. LEXIS at *12.
[14] *Majaya,* 2003 WL 21350542 at *5 (quoting *Starkey v. Unemployment Insur. Appeal Bd.*, 340 A.2d 165, 166-67 (Del. Super. Ct. 1975)).
[15] *MRPC Fin. Mgmt,* 2003 Del. Super. LEXIS at *12-13 (citing *Ortiz v. Unemployment Insur. Appeal Bd.*, 317 A.2d 100 (Del. 1974); *Moeller v. Wilmington Sav. Fund Soc'y*, 723 A.2d 1177 (Del. 1999)).
[16] Ref. Dec. at 3 (Record at 45). No customers were present at the Referee or UIAB hearing.
[17] *See* Transcript of the UIAB Hearing ("Tr. UIAB Hrg.") at 14-15 (Record at 130-31). When the complaint letters were introduced, a Board member told Mr. Ross, "If you have numerous ones we only need a few of them." *Id.*

any reference to customer complaints and those letters were omitted from the administrative record created by the Board.[18]

5. On appeal to this Court, the employer cites *Henry v. Dept. of Labor*[19] in support of its assertion that this Court may consider these letters as part of the record.[20] *Henry* is distinguishable. In *Henry*, although the letters at issue were not contained in the certified record, the Court held that they were necessary for a review of the Board's decision, and the existence and content of those letters were not in dispute.[21] In the case at bar, the content of the hearsay letters is in dispute, and because the Board did not mention customer complaints in its decision to deny benefits, the letters are not necessary for a review of the Board's decision. The Court concludes that the employer has failed to meet its burden of proving that customer complaints established just cause for the claimant's termination. Nevertheless, a review of the letters is not necessary because the Court finds that there is substantial evidence in the record to support the Board's finding of just cause on other grounds.

Low Billable Hours

6. Howard Ross, testifying for the employer, stated that the claimant was also fired for repeatedly failing to meet the minimum billable hour standards that were established for Innolink employees.[22] In awarding benefits, the Referee reasoned that the inability of an employee to perform to the satisfaction and expectations of his employer

[18] There is no indication as to why the complaint letters were omitted from the administrative record. The Court assumes that the Board decision does not refer to the letters because the Board found just cause on other grounds.
[19] 293 A.2d 578 (Del. Super. Ct. 1972).
[20] *See* Answering Brief of Appellee Innolink (Docket No. 8) at 5, n.5. *Cf. Majaya,* 2003 WL 21350542 at *1 ("this Court is limited to consideration of the record that was before the Board") (citing *Hubbard v. Unemployment Insur. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976)).
[21] *Henry*, 293 A.2d at 580-81.
[22] *See* Tr. UIAB Hrg. at 4-5 (Record at 47-48).

does not constitute willful or wanton misconduct.[23] Consequently, the Referee determined that the employer's evidence regarding low billable hours did not satisfy its burden of proving by a preponderance of the evidence that the claimant was discharged for just cause.[24] The Board noted that the "employer testified that the claimant probably would have been terminated because of his lack of billable hours, regardless of his moonlighting."[25] The record contains substantial evidence in support of a showing that the claimant committed a pattern of conduct where the claimant consistently failed to meet company billable standards,[26] even after his employer held several performance review meetings and warned him that his job was in jeopardy if he did not meet those minimum billable hours.[27] The Court disagrees with the Referee's conclusion and finds that claimant's failure to satisfy his billable hour requirements, after repeated warnings, is sufficient reason to constitute just cause for his termination.[28]

Moonlighting (Interfering With Employer's Business Interests)

7. Claimant's moonlighting was the main point of contention between the parties. In April 2003, the claimant performed some work on Chris Dedel's home computer. Ms. Dedel was an employee of a company called Patterns, which was a long-time customer of Innolink. The claimant argues that because Ms. Dedel was an employee of a customer, she was not a direct customer of Innolink. The claimant also asserts that

[23] Ref. Dec. at 3 (Record at 45).
[24] *Id.*
[25] Bd. Dec. at 2 (Record at 113).
[26] *See, e.g.* Tr. UIAB Hrg. at 6-7 (Record at 122-23); Referee's Ex. # 1-4; Transcript of the Referee's Hrg. ("Tr. Ref. Hrg.") at 5-13 (Record at 52-60).
[27] Tr. UIAB Hrg. at 6-7 (Record at 122-23).
[28] *See MRPC Fin. Mgmt.*, 2003 Del. Super. LEXIS 237 at *12 ("Just cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination.") (citations omitted).

the work he did was on Ms. Dedel's personal home computer and therefore he was not intruding upon Innolink's business interests.

8. In opposition, the employer argues that the claimant violated company policy and interfered with Innolink's business interests by performing work on Ms. Dedel's computer without consulting Innolink. Mr. Ross testified that "any work that was done for any employees of [Innolink's] customers was strictly prohibited because that work was potentially able to be done by Innolink."[29] He also testified that the claimant had been previously warned that moonlighting was strictly prohibited. At the Referee's hearing, the claimant admitted that Ms. Dedel's home computer was later linked to her employer's network.[30] Moreover, Mr. Ross testified that the claimant had serviced home computers in the past and billed such work through Innolink. This evidence supports the Board's finding that such moonlighting work on a home computer was in competition with Innolink's business interests.

9. The employer also submitted evidence indicating that the claimant was aware that his work on Ms. Dedel's computer was prohibited as moonlighting. Specifically, the employer presented copies of email correspondence between the claimant and Ms. Dedel. This correspondence reveals that Ms. Dedel asked the claimant if he could work on her home laptop computer, and she specifically asked if he had "[a]ny interest in doing this on the side, outside of work?"[31] On March 31, 2003, the claimant responded via email: "I'd be more than happy to work on your laptop. Howard

[29] Tr. Ref. Hrg. at 19 (Record at 66).
[30] In reference to connecting Ms. Dedel's home computer to her employer's network, the claimant explained, "I did not set that connection up for her at her house. As an employee of Innolink I helped her connect back up over the phone like a help desk type of phone call while I was at Innolink." Tr. Ref. Hrg. at 24 (Record at 71).
[31] *See* email correspondence in the Record at 11 and as Ref.'s Ex. #3 (Record at 94).

[Ross] wouldn't want me 'moonlighting' so I can just do it for you as a favor. How does that sound?"[32] The claimant eventually acknowledged accepting "cash and a thank you card" from Ms. Dedel in return for servicing her laptop computer.[33] The employer argues "how and in what way the claimant is paid for his moonlighting work is irrelevant. The policy was clear that moonlighting is strictly prohibited no matter what. . . . damage is done to the company regardless of the compensation" because this kind of computer work is done by Innolink.[34]

10. The Referee determined:

> The testimony of the claimant and the employer in regard to the moonlighting was equally convincing and therefore in direct conflict one with the other. Where there is such a conflict in the evidence there can be no preponderance of the evidence that is required to establish willful or wanton misconduct.[35]

But the Board's decision, in pertinent part, states the following:

> Evidence presented below, including the claimant's admission that he was aware of the company policy prohibiting working on a customer's computer or the computer of a customer's employee, indicate that the claimant knew that he was not to perform such work without billing it through the employer. The employer specifically warned the claimant about such activity prior to the last incident when the claimant worked on Ms. Dedel's computer. Such activity deprives the employer of a business opportunity, is a conflict of interest, and violates an employee's duty of loyalty to his employer. It is a clear violation of the employer's interest, the employee's duties and the employee's expected standard of conduct. The claimant knew of his duty on March 31, 2003 when he indicated to Ms. Dedel. The fact that he performed the service requested with knowledge of the prohibition indicates that the behavior was willful or wanton.[36]
> The Board found that the employer had just cause for the suspension.[37]

11. The Court finds that there is substantial evidence in the record to support the Board's conclusion. In this case, the Referee's decision and the Board's

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[32] *Id.*
[33] Tr. Ref. Hrg. at 17-18 (Record at 64-65).
[34] Innolink's Letter of Appeal dated July 24, 2003, at 3 (Record at 109).
[35] Ref. Dec. at 4 (Record at 46).
[36] Bd. Dec. at 3 (Record at 114).
[37] *Id.*

determination hinged on the credibility of the witnesses, and in administrative appeals to this Court "questions of credibility are exclusively within the province of the Board."[38] The claimant's failure to appear at the Board hearing undoubtedly had an effect on the Board's credibility determination. A thorough review of the record reveals that the claimant has not offered an explanation for his absence at the UIAB hearing. Nevertheless, this Court has reviewed the record in its entirety, including the evidence that was presented at the Referee's hearing, in order to determine if the Board's decision is supported by substantial evidence and is free from legal error.

12. A decision by an administrative agency is not an abuse of discretion "unless it is based on clearly unreasonable or capricious grounds," or the agency "exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[39] The record contains substantial evidence that the claimant's work on Ms. Dedel's computer could be considered moonlighting, and the claimant was aware that such work was prohibited by his employer. The Board's determination that just cause existed, after considering the record before the Referee and the evidence presented at the Board level, is not an abuse of discretion. The Board found Mr. Ross's testimony to be credible and determined that the claimant's activities were a willful or wanton violation of the employer's business interests and its policy against moonlighting. The Board did not abuse its discretion or commit an error of law in reaching this determination and denying benefits.

[38] *Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins.,* 803 A.2d 931, 937 (Del. 2002).
[39] *K-Mart v. Bowles, supra*.

13. For the reasons stated above, the decision of the Board is supported by substantial evidence, is free from legal error, and is not an abuse of discretion. Accordingly, the decision of the Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge