

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

April 24, 2006

Tasha Marie Stevens, Esquire
Fuqua and Yori, P.A.
28 The Circle
P.O. Box 250
Georgetown, Delaware 19947

Michael P. Stafford, Esquire
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, Delaware 19899-0391

RE: Deborah Anne Pulli v. Intervet, Inc.
C.A. No. 05A-11-003

DATE SUBMITTED: March 8, 2006

Dear Counsel:

This is the Court's ruling on Deborah Pulli's appeal from an Unemployment Insurance Appeal Board decision.

Statement of Facts

Deborah Pulli, Appellant, was terminated from her employment with Intervet, Inc. (Intervet), Appellee, on March 15, 2005. Intervet's reason for her termination was insubordination after disregarding repeated instructions not to discuss matters relating to an internal investigation of a complaint previously filed by Pulli.

Pulli was employed as a laboratory technician at Intervet for approximately four and a half years. Following a short-term medical leave, Pulli returned to Intervet in January 2005. Upon her return, she allegedly discovered that her co-worker, who was running the lab in her absence, had falsified company records. Pulli spoke with her co-worker and told her that she

needed to inform management or that Pulli would inform them about the falsified records.

Allegedly, her co-worker destroyed the documents, created new records, and told management that Pulli was harassing her. In response to these incidents, on February 18, 2005 Pulli filed a complaint with Human Resources Department (Human Resources) against her supervisor and co-worker. Pulli listed two witnesses in her complaint.

Upon receiving the complaint, Intervet began an investigation into Pulli's allegations. Pulli was instructed not to communicate with her co-workers regarding the complaint and subsequent investigation. Further, Human Resources informed Pulli that the investigation was confidential and she was not to discuss the investigation with anyone but the investigating officers. If anyone tried to talk to her, she was to tell that person that she cannot discuss it and inform the investigating officers immediately.

On March 14, 2005, Pulli contacted Eric Ellis to be a witness in the investigation. Ellis was not listed in Pulli's complaint as a potential witness. She claims that Ellis was agreeable to being a witness. Ellis claims that he did not want to get involved and told her so. Pulli contacted Intervet's Human Resources and provided Ellis' name as an additional witness. At that point, Human Resources instructed Pulli to have no further conversations with Ellis concerning the investigation.

According to Intervet, Pulli disregarded the instructions not to have further conversations relating to the investigation with Ellis. Intervet believed that Pulli attempted to discuss the investigation with Ellis. Allegedly, after Ellis was questioned by Human Resources, Pulli approached him in the research and development area and asked him about the interview he had with Human Resources. Ellis contacted Human Resources to inform them of this conversation.

Pulli initially denied that this conversation occurred, but later admitted that she did speak to Ellis. However, Pulli claimed that she did not discuss the investigation. Ellis testified that he did not discuss the investigation with Pulli because he was told not to by Human Resources.

Intervet discharged Pulli on March 15, 2005, for insubordination. The basis for the insubordination claim was Intervet's belief that Pulli disregarded the repeated instructions to not discuss the investigation.

Pulli filed for unemployment compensation benefits on March 17, 2005. On April 6, 2005, a Claims Deputy denied this request because he found Pulli's termination was for just cause and thus, she was ineligible for these benefits.

Pulli appealed the Claims Deputy's decision to an Appeals Referee, who heard her case on April 28, 2005. On May 11, 2005, the Referee affirmed the Claims Deputy's decision, holding Pulli ineligible for benefits because her termination was for just cause.

Pulli then appealed the Referee's decision to the Unemployment Insurance Appeal Board (Board). Her appeal was heard on October 12, 2005. Only four Board members were present and heard her appeal. Two Board members agreed with the Referee's decision that Pulli was terminated for just cause. The other two disagreed with the Referee's decision. Board decisions require a majority vote to affirm or reverse the Referee's decision and thus, according to precedent, the Referee's decision stands in the case of a split vote by the Board. Pulli now appeals this decision to this Court.

Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court

is to determine whether the agency's decision is based on substantial evidence.¹ Questions of law are to be reviewed de novo.² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³ The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁴ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁵

Analysis

The Appellant filed her opening brief *pro se*. She sets out the reason given for her termination as insubordination and interfering with an investigation conducted by Intervet's Human Resources Department. She then argues that she should not have been fired because she did not interfere with the investigation; specifically, she did not speak to Ellis about the investigation. She points out that the Employee Standards of Conduct Handbook states: "Conduct jeopardizing an employee's... ability to perform his or her job, or that of a co-worker, will not be tolerated and will result in corrective action, ranging from a warning to termination of employment". The Appellant emphasizes that the term "corrective" is the key word. Next, the Appellant claims that Human Resources never informed her that she would be fired if she discussed the investigation. Thus, the Appellant argues that Intervet has not met the burden of reasonability to discharge her for the stated reasons.

¹ *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

² *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962).

³ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. 1986), *app. dismiss.*, 515 A.2d 397 (Del. 1986).

⁴ *Johnson v. Chrysler Corp.*, 312 A.2d at 66.

⁵ 29 Del. C. § 10142(d).

The Appellant then sets out her version of the facts involved in this matter; specifically, her interactions with Ellis. She attacks Ellis' version of the facts about their interactions as fabricated. She states that she never mentioned the investigation when talking with Ellis, even though she did ask him to be a witness for her in the investigation. She quotes Ellis' testimony from the Board hearing where he states that he did not discuss the investigation with the Appellant because he was told not to. Thus, she believes that the investigation was not impeded and she should not have been fired.

The Appellees argue that the Appellant is ineligible for unemployment benefits because she was terminated for just cause. Further, the Appellees argue that the Referee's determination that the Appellant was terminated for just cause is supported by substantial evidence. The Appellees set out that "just cause" means "a willful or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employer's expected standard of conduct."⁶ The Appellees state that "[w]illful 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".⁷ According to the Appellees, insubordination is an employee's "refusal to obey some order which a superior officer is entitled to give and have obeyed."⁸ The Appellees argue that insubordination is sufficient substantial evidence to deny unemployment benefits and is just cause for termination.⁹

⁶ *Majaya v. Sojourner's Place*, 2003 WL 21350542, *4 (Del. Super.) quoting *Avon Products, Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del.)

⁷ *MRPC Financial Management, LLC v. Carter*, 2003 WL 21517977, *4 (Del. Super.).

⁸ *Scott v. Unemployment Insurance Appeal Bd.*, 1993 WL 390365, *4 n.2 (Del. Super.).

⁹ *Granison v. Roizman & Co.*, 2005 WL 400577, *2-4 (Del. Super.).

The Appellees state that even though the Board was evenly split in this case, substantial evidence in the record still supports the Referee's decision that the Appellant was terminated for just cause.¹⁰ The Appellees set out the alleged facts about the Appellant's conduct; specifically, how she ignored the instructions not to discuss the investigation with anyone and especially Ellis. Finally, the Appellees state that deciding between alternate factual accounts and witness credibility is not for this Court on appeal.¹¹ Thus, the Appellees argue that the Referee's decision should be affirmed because it is supported by substantial evidence and is free from legal error.

The Appellant's reply brief attacks the Board's tie vote. While Appellant did not raise this in her opening brief, the answering brief did address this issue, citing case law as to this issue. Therefore, this Court will address this issue.

In the Appellant's reply brief, it is argued that this matter is not properly before this Court for review because the tie vote by the Board does not constitute a legally significant decision. Appellant points out that the Board itself acknowledged that a vote of less than a majority has no legal significance, citing *Warrington v. State*¹², but the Referee's decision controls if there is not a majority. Appellant disagrees with the Board's position and cites *Hopson v. McGinnis*¹³ in support of her argument. In *Hopson*, the plaintiff appealed her termination from the Division of Adult Corrections to the State Personnel Commission (Commission). The Commission's vote was tied; and the Superior Court, on appeal, determined that the tie vote upheld the plaintiff's termination and dismissed the plaintiff's appeal. The Supreme Court overturned the Superior

¹⁰ Appellees cite *King v. Pathmark*, 2003 WL 21742159 (Del. Super.) as an example where the Board was divided but the Referee's decision was supported by substantial evidence.

¹¹ *Unemployment. Ins. Appeal Bd. v. Div. of Unemployment Ins.*, 803 A.2d 931, 937 (Del. 2002).

¹² 1994 WL 387028 (Del. Super.).

¹³ 391 A.2d 187 (Del.).

Court's decision based on the applicable statute, 29 *Del. C.* § 5949, stating the Commission actually decided nothing and that a tie vote "does not establish a Commission ruling nor take the matter to a conclusion by that body."¹⁴

The Appellant admits that the Supreme Court in *Hopson* based its decision on a statute then applicable to the Commission and provisions of Administrative Procedures Act, neither of which are applicable to this case. The Appellant analogizes the role of the Board to the Commission in *Hopson*. The Appellant points out that 19 *Del. C.* § 3321 empowers the Board to make rules and regulations relating to appeals and that the Board in its decision here stated that no decision can be decided without at least a majority of the Board. The Appellant states that the Rules of the Board set out that the Board only makes a legally significant decision with a majority vote so a tie vote decides nothing. The Appellant argues that as the Supreme Court rejected the Commission's split vote, this Court should reject the Appellees' assertion that the Appellant's discharge was upheld by the split vote.

The Appellant goes on to establish that this Court can review the record and break the tie or can remand this case back to the Board for decision according to *Hopson*.¹⁵ Appellant requests that the case be remanded back to the Board for further proceedings and decision because of the Board's expertise.

The Appellees cite to the *Granison* case along with others for support that this case is properly before this Court. *Granison* has the almost exact facts and circumstances as this case. There was a 2-2 vote by the Board and this Court examined and affirmed the Referee's decision.

¹⁴ *Id.* at 189.

¹⁵ *Id.*

The *Hopson* case is distinguishable from the case here. First, in the *Hopson* case there was no prior adjudication of the issue presented to the Commission unlike here where Appellant's case had been ruled upon by a Claims Deputy and a Referee before reaching the Board. Thus, in *Hopson* there was not a prior decision to rely upon. Second, the *Hopson* case addresses a different statute and administrative system that do not apply to the case before this Court. Therefore, *Hopson* is not applicable to this case.

The Referee and the Board heard testimony from both sides. Each party's testimony contradicted the other's. In her opening brief, the Appellant's argument attacks factual issues and this Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.¹⁶ It merely determines if the evidence is legally adequate to support the agency's factual findings.¹⁷ Here, two members of the Board, the Claims Deputy, and the Referee, after weighing the evidence and the credibility of witness testimony, held that substantial evidence existed that Appellant was terminated for just cause and thus not entitled to unemployment benefits.

"When there is a tie [at the Board level], the immediately preceding administrative decision controls."¹⁸ Here, the Board was split 2-2 so the Referee's decision controlled. The Referee ruled that there was just cause for Appellant's termination and she was not entitled to unemployment benefits.

The Referee based its decision on the facts presented and therefore cannot be overturned by this Court unless there was an abuse of discretion by the Board or Referee. The Board and the

¹⁶ *Johnson v. Chrysler Corp.*, 312 A.2d at 66.

¹⁷ 29 *Del. C.* § 10142(d).

¹⁸ *Granison*, 2005 WL 400577 at *1-2.

Referee conducted the hearing appropriately and ruled within its powers. This Court is satisfied that the Referee's decision is based on sufficient substantial evidence. While reviewing this case, no error of law or abuse of discretion has been found. Therefore, the decision of the Referee is affirmed.

Conclusion

For the above stated reasons, the Referee's decision is affirmed.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary

cc: Unemployment Insurance Appeals Board