

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Appellant

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***Re: Dina Petrilli v. Discover Bank and Unemployment Insurance
Appeal Board***

C.A. No. 10A-05-001 RRC

Submitted: December 5, 2011
Decided: March 2, 2012

On Appeal from a Decision of the Unemployment Insurance Appeal Board.

AFFIRMED.

Dear Ms. Petrilli, Ms. Fortune, and Ms. Moak:

INTRODUCTION

Dina Petrilli (“Appellant”) appeals from a decision of the Unemployment Insurance Appeal Board (“the Board”) denying a rehearing on the Appeal Referee’s determination that Appellant was fired for just cause, thereby disqualifying her from unemployment benefits. This Court concludes that the Board did not abuse its discretion either by dismissing the appeal when Appellant failed to appear at her hearing, or by denying Appellant’s request for a rehearing. As such, the Appeal Board’s determination is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

This case arises from Appellant’s termination from employment with Discover Bank in June 2009. Appellant had been previously employed by Discover Bank (“Employer”) for twenty-three years. Employer testified that Appellant was terminated for excessive attendance infractions. Prior to her firing in June 2009, Employer contends Appellant was repeatedly warned regarding her poor attendance during March, April, May, and June 2009.

A Claims Deputy determined Appellant was disqualified from benefits. An initial hearing was scheduled before an Appeals Referee in August 2009, but was dismissed for Appellant’s failure to appear. Appellant sought review from the Appeal Board. Appellant claimed she missed the initial hearing with the Appeals Referee because she was mistaken about the hearing date. The Appeal Board remanded because the Board accepted Appellant’s reason for failing to appear before the Appeals Referee. A second hearing was scheduled before the Appeals Referee in October 2009. Appellant and the Employer’s representative appeared and presented evidence regarding Appellant’s termination. The Appeals Referee affirmed Appellant’s disqualification from benefits.

Appellant appealed the Appeals Referee’s decision to the Board and a hearing was scheduled for February 17, 2010 at 9:00 A.M. Appellant failed to appear on time for the hearing and the appeal was dismissed. Board regulations provide that if

an appellant does not appear within ten minutes of the time indicated for the appeal, the failure to appear may result in dismissal.¹

Appellant contends that she arrived at the hearing at 9:11 A.M. and was denied entry. The transcript from the hearing provides that at 9:12 A.M. the Board determined Appellant was not present and dismissed the appeal for Appellant's failure to prosecute. Appellant applied for a rehearing and the Board denied that application in April 2010. Appellant appealed to the Superior Court in May 2010. In March 2011, initial briefing was completed.

The Board is only contesting Appellant's appeal insofar as Appellant's claims involve her non-appearance at the hearing and the Board's denial of a rehearing. The Board explained that it takes no position regarding the underlying merits of Appellant's disqualification. Counsel for the Employer notified the Court that Employer does not oppose Appellant's present appeal. This case was reassigned to the undersigned Judge in October 2011. The Court requested supplemental briefing from the Board in November 2011.

STANDARD OF REVIEW

This Court's review of an Unemployment Insurance Appeal Board decision is defined by statute. Pursuant to 19 Del. C. § 3323(a), "the findings of the Unemployment Insurance Appeal Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law." Superior Court review "is limited to a determination of whether there was substantial evidence sufficient to support the [Board's] findings."² Substantial evidence requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³

This Court does not weigh evidence or make determinations based on credibility or facts.⁴ An abuse of discretion will be found only if "the Board 'acts arbitrarily or capriciously' or 'exceeds the bounds of reason in view of the

¹ 19 Del. Admin. C. §1201-4.2 ("All parties to the appeal shall be present at the Board's hearing. Failure to appear within 10 minute of the time indicated on the Notice may result in the Board hearing the appeal in absence of the delinquent party or, if the delinquent party is the appellant, dismissal of the appeal.")

² *Unemployment Ins. Appeals Bd. v. Duncan*, 337 A.2d 308, 309 (Del 1975).

³ *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del 1965).

circumstances and has ignored recognized rules of law or practice so as to produce injustice.”⁵ An administrative agency’s decision is an abuse of discretion if “it is based on clearly unreasonable or capricious grounds” or “the Board exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.”⁶

CONTENTIONS

I. Appellant’s Contentions

Appellant contends that she has not received a fair opportunity to an administrative appeal on the merits because she never received a full hearing before the Appeal Board. While Appellant claims that she was one minute late to the Appeal Board hearing, she argues it is unfair to deny her an appeal on the merits. The reason Appellant claims she was late to the hearing is that she got lost on her way and that her directions were incorrect.

The only time Appellant’s appeal has been analyzed ‘on the merits’ was before the Appeals Referee in October 2009. Appellant concedes that she advocated ineffectively before the Appeals Referee because she “was intimidated by the process . . . mentally shut down . . . crying throughout.”⁷ Appellant wishes to have the “opportunity to be heard again properly and correctly.”⁸

Additionally, Appellant argues that no ‘just cause’ was provided regarding her attendance. Appellant contends that the alleged attendance problems cited by her employer are reasonable when analyzed individually, but concedes they seem damaging together. Further, Appellant points out that the attendance infractions all occurred within a six-month period before which her attendance was never cited. Appellant contends that denying her unemployment benefits is unduly cruel because the issues regarding work attendance were reasonable and unavoidable.

Appellant contends that she has exhausted all administrative remedies and should receive judicial review. She concedes that she was not on time for her Appeal Board hearing but believes she pursued every available remedy by seeking a

⁵ *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572 * 2 (Del. Super. Apr. 30, 2009) (citations omitted).

⁶ *Nardi v. Lewis*, 2000 WL 303147 *2 (Del. Super. Jan. 26, 2000).

⁷ Appellant’s Br. at 2.

⁸ *Id.*

rehearing and then appealing to this Court when the rehearing was denied. Appellant argues that by simply being one minute late, her appeal was denied, and the Board's denial of a rehearing is now offered to prove that her administrative remedies were unfulfilled and judicial review is inappropriate. Appellant argues she has appealed in the precise fashion provided by the Board.

II. The Board's Contentions

The Board vigorously argues in opposition that Appellant is not entitled to judicial review on the merits because she failed to pursue administrative remedies by failing to appear at the Appeal Board hearing. The Board asserts that Appellant received proper notice of the hearing and was notified of the consequences of her failure to appear. Additionally, the Board asserts it did not abuse its discretion by denying Appellant's request for a rehearing because Appellant did not demonstrate "excusable neglect."

DISCUSSION

I. THE BOARD DID NOT ABUSE ITS DISCRETION IN DISMISSING CLAIMANT'S APPEAL WHEN SHE FAILED TO APPEAR AT THE APPEAL BOARD HEARING

When a claimant for unemployment benefits appeals the decision of an Appeals Referee, the Board must schedule a hearing to take additional evidence, and analyze the referee's decision.⁹ "[J]udicial . . . review shall be permitted only after any party claiming to be aggrieved thereby has exhausted all administrative remedies."¹⁰ A claimant's final remedy in this context is a hearing before the Appeal Board.

The Superior Court has previously declined jurisdiction to address the merits of an appeal where a party failed to exhaust administrative remedies by not appearing at a Board hearing.¹¹ "[W]here a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act. Only after completion of the administrative process may a court review the claim."¹² In that case, the Court found that by failing to timely appear

⁹ 19 Del C. § 3320.

¹⁰ 19 Del C. §3322(a).

¹¹ *Griffin v. Daimler Chrysler*, 2000 WL 33309877 *2 (Del. Super. Apr. 27, 2011).

¹² *Id.* at *1(internal citations omitted).

at the Appeal Board hearing the claimant forfeited the right to appeal to the Superior Court.¹³

In *Archambault v. McDonald's Restaurant*¹⁴, an appeal from a decision of the Board, an appellant argued that she missed her hearing because she got lost after receiving inaccurate directions. The appeal was dismissed and the Court found that the board did not abuse its discretion.¹⁵ “The Board maintains statutory authority to promulgate regulations designed to ensure the prompt and orderly determination of the parties’ rights.”¹⁶ To that end, the Board adopted a rule which in pertinent part provides, “[a]ny party who is not present within 10 minutes after the scheduled time for hearing shall be deemed to waive [the] right to participate in said hearing.”¹⁷ Administrative agencies must adhere to a schedule to effectively manage and dispose of cases.¹⁸

In *Kreider v. JC Penney Custom Decorating*¹⁹, a similar appeal from a Board decision, appellant missed his Appeal Board hearing and claimed to be confused by driving directions generated by an online map service. The Board denied a rehearing and held that a claimant’s failure to appear before the Board because of faulty directions was not attributable to department error and therefore did not constitute an abuse of discretion.²⁰

Appellant argues that her claim is ripe for judicial review because she has exhausted her administrative remedies by appealing the denial of her rehearing and completing all prior appeals in accordance with the Board’s policies. The Board counters by contending that Appellant failed to fulfill her administrative remedies because she did not timely appear for her Appeal Board hearing. Superior Court precedent favors the State’s position.

¹³ *Id.*

¹⁴ 1999 WL 1611337 (Del. Super. Mar. 22, 1999).

¹⁵ *Id.* at *2.

¹⁶ *Id.*

¹⁷ 19 Del. Admin. C. §1201-4.2 (“All parties to the appeal shall be present at the Board’s hearing. Failure to appear within 10 minute of the time indicated on the Notice may result in the Board hearing the appeal in absence of the delinquent party or, if the delinquent party is the appellant, dismissal of the appeal.”)

¹⁸ *Archambault*, 1999 WL 1611337 (Del. Super. Mar. 22, 1999).

¹⁹ *Id.*

²⁰ *Kreider v. JC Penney Custom Decorating*, 2010 WL 2562210 *1-2 (Del. Super. June 24, 2010).

Like the appellants in the cases cited, Appellant similarly failed to appear for the Appeal Board hearing. *Archambault* and *Kreider* are apt in that they addressed appellants who failed to appear at the hearing because of getting lost and receiving poor directions.

As reasoned in each of those cases, the Board must “promulgate regulations designed to ensure the prompt and orderly determination of the parties’ rights.”²¹ The Board rules regarding timeliness are necessary to ensure that appeals are handled effectively and efficiently. The propriety and goal of the Board’s regulations must be balanced against an appellant’s right to receive a hearing that reaches the case’s merits.

This Court must faithfully defer to the standard of review in this appeal. The Board’s decision can only be overturned where the Court determines that the Board abused its discretion. If substantial evidence is found to support the Board’s decision, the Board’s decision must be affirmed.²² The Court does not analyze evidence, or weigh credibility or facts.²³ An abuse of discretion will be found only where the Board acts “arbitrary or capriciously.”²⁴

The Court finds pause in this analysis because Appellant arrived at the hearing merely minutes beyond the ten minute extension provided by the Board’s regulations. Ordinarily it is preferable to decide appeals on the merits rather than on procedural grounds. However, where the appellant is responsible for the procedural defect, the need for a decision on the merits is obviated. Appellant was only minutes beyond the period allowed by Board regulations. It is notable, however, that the Appellant was not merely minutes late for the 9:00 A.M. hearing. Rather, Appellant was late beyond the ten minute extension provided to allow flexibility for tardy appellants.

While losing the right to an appeal on the merits is dispositive and the general preference is that appeals be determined substantively, under the applicable law, the Court must give deference to the Board. The Board is charged with a large volume of cases and reasonably must enforce regulations to ensure that its large caseload is efficiently managed. Even if the Court might have found differently on first impression, the Board retains authority over its administrative

²¹ *Archambault*, 1999 WL 1611337 *2 (Del. Super. Mar. 22, 1999).

²² *Duncan*, 337 A.2d 308, 309 (Del 1975).

²³ *Johnson*, 213 A.2d 64, 66 (Del 1965).

²⁴ *Straley*, 2009 WL 1228572 * 2 (Del. Super. Apr. 30, 2009) (citations omitted).

proceedings, and the Board's determination must be given proper weight. The Court's scope of review is limited. On this record the Court cannot say that the Board acted arbitrarily or capriciously. Therefore, the Court finds that the Board did not abuse its discretion by dismissing Appellant's appeal when she failed to timely appear at the Appeal Board hearing.

II. THE BOARD DID NOT ABUSE ITS DISCRETION WHEN DENYING APPELLANT'S REQUEST FOR A REHEARING

The Court's review of a decision by the Board to deny a rehearing is similarly limited.²⁵ Like any decision of the Board, the Court must analyze the denial of a rehearing for an abuse of discretion.²⁶ When addressing a Board's authority to grant or deny a rehearing, an Appellant must demonstrate excusable neglect.²⁷ "[E]xcusable neglect has been described as that neglect which might have been the act of a reasonably prudent under the circumstances."²⁸ "Excusable neglect is not to be characterized as mere carelessness or negligence."²⁹

The Court addressed the broad discretion given to the Board to decide whether to grant a rehearing request in *Strazzella v. Joe Tejas, Inc.*³⁰ In *Strazzella*, the court found that, "[p]ursuant to its authority,³¹ the Board followed its regulations, provided due notice to all parties involved, waited ten minutes after the scheduled hearing for [appellant] to appear, and then dismissed [the] appeal."³²

Likewise, there is no abuse of discretion in this case. Appellant has not demonstrated excusable neglect sufficient to excuse her failure to timely appear for the Appeal Board hearing. Like in *Strazzella*, the board acted fairly, followed its regulations and its decision to deny the application for a rehearing was proper.

²⁵ *Connors v. Mountaire Farms of Delmarva*, 1996 WL 453327 (Del. Super. May 22, 2006).

²⁶ *Funk v. U.I.A.B.*, 591 A.2d 222, 225 (Del. Super. 1991).

²⁷ *Mullins v. Dover Downs, Inc.*, 1998 WL 278402 (Del. Super. Mar. 11, 1998).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 2008 WL 376354 (Del. Super. Feb. 12, 2008).

³¹ See 19 Del.C. §3321(a) ("The manner in which disputed claims shall be presented and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the . . . Board for determining the rights of the parties, whether or not such regulations conform to common-law statutory rules of evidence and other technical rules of procedure").

³² *Strazzella*, 2008 WL 376354 *3 (Del. Super. Feb 12, 2008).

Lastly, and notably, even though Discover Bank does not presently challenge Appellant's request to be heard in Superior Court, the Board retains the right to defend its procedures and regulations. The Board's vigorous defense of those regulations was based upon supportive Superior Court precedent and its own regulations, and as stated, the underlying decisions were not arbitrary or capricious.

CONCLUSION

Accordingly, for all the reasons stated above, the decision of the Unemployment Insurance Appeal Board is **AFFIRMED**.

Richard R. Cooch, R.J.

oc: Prothonotary
Unemployment Insurance Appeal Board