

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

April 24, 2012

Ashley R. Smack  
4223 Whitney Swamp Road  
Bridgeville, DE 19933

Big Lots Stores, Inc.  
c/o UC Express/TALX  
P.O. Box 283  
St. Louis, MO 63166-0283  
Attn: Margery Humphrey, Unemployment Insurance Consultant

**RE: *Ashley R. Smack v. Big Lots Stores, Inc.***  
**C.A. No. S10A-06-003-ESB**

Date Submitted: January 19, 2012

Dear Mses. Smack and Humphrey:

This is my decision on Ashley R. Smack's appeal of the Unemployment Insurance Appeal Board's dismissal of her claim for unemployment benefits for failing to appear for a hearing before the Board on her appeal of the Appeals Referee's finding that she was not entitled to unemployment benefits. Smack worked as a customer service specialist for Big Lots Stores, Inc. from March 24, 2007, until she was terminated on December 31, 2009, for being late to work too many times.

Smack filed a claim for unemployment benefits on January 17, 2010. Big Lots opposed her claim. The Claims Deputy and Appeals Referee ruled in favor of Big Lots, reasoning that it had "just cause" to terminate her because she had been late to work too many times. Smack then filed an appeal of the Appeals Referee's decision with the Board. The Board sent Smack a written notice setting forth the date, time and location of the hearing on her appeal. The written notice also told

Smack that her “failure to appear for [her] hearing in a timely manner could result in [her] appeal being dismissed.” Smack did not appear at the hearing before the Board. The Board dismissed Smack’s appeal after waiting the customary 10 minute grace period. Smack then filed an appeal of the Board’s decision with 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. On appeal from a decision of the Board, this Court is limited to a determination of whether there is substantial evidence in the record sufficient to support the Board’s findings, and that such findings are free from legal error.<sup>1</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>2</sup> The Board’s findings are conclusive and will be affirmed if supported by “competent evidence having probative value.”<sup>3</sup> The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>4</sup> It merely determines if the evidence is legally adequate to support the agency's factual findings.<sup>5</sup> Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.<sup>6</sup>

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<sup>1</sup> *Unemployment Ins. Appeals Board of the Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

<sup>2</sup> *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

<sup>3</sup> *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. Super. 1950).

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

<sup>5</sup> 29 Del.C. § 10142(d).

<sup>6</sup> *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

## DISCUSSION

Smack argues that she missed the Board hearing because she went to the wrong office. Her hearing was held at the Board's office in Dover. Smack went to the Board's office in Georgetown instead of Dover. She argues that she is entitled to unemployment benefits because she was (1) a hard worker for four years, and (2) can not work due to a back injury. This Court's appellate review of a Board decision is limited. Since the Board did not hold a hearing on the merits of Smack's case, the only issue this Court can properly address is whether or not the Board abused its discretion in dismissing her case. This issue has been addressed previously in *Archambault v. McDonald's Restaurant*.<sup>7</sup> In that case, the Court held:

The Board maintains statutory authority to promulgate regulations designed to ensure the prompt and orderly determination of the parties' rights. In that regard, the Board has adopted Unemployment Insurance Appeals Board Rule B which provides in pertinent part, that "[a]ll parties are required to be present for a hearing at the scheduled time. Any party who is not present within 10 minutes after the scheduled start time for hearing shall be deemed to waive his right to participate in said hearing." The Court cannot conclude that the Board abused its discretion by dismissing Claimant's appeal. This Court has previously recognized "the importance of adhering to a hearing schedule to efficiently manage and dispose of cases and the need to enforce rules such as Rule B to engender cooperation from the interested parties." Thus, the Court concludes that the Board did not act arbitrarily by dismissing Claimant's appeal for failure to appear.<sup>8</sup>

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<sup>7</sup> 1999 WL 1611337 (Del.Super. Mar. 22, 1999); See also *Strazzella v. Joe Tejas, Inc.*, 2008 WL 376354 (Del Super. Feb. 12, 2008).

<sup>8</sup> *Id.* at 1999 WL 1611337, at \*2.

The Board in this case did not abuse its discretion when it dismissed Smack’s appeal for not appearing on time for the hearing on her appeal. Smack was provided with notice and an opportunity to be heard. The notice clearly told Smack that the hearing before the Board would be in Dover. The written notice also told Smack that her “failure to appear for [her] hearing in a timely manner can result in [her] appeal being dismissed.” The Board waited the customary 10 minutes after the scheduled start time, but Smack failed to appear. Smack was put on notice of the consequences of not appearing at the hearing on time. Therefore, she has no reason at all to complain about the Board’s dismissal of her appeal and claim for unemployment benefits. The Board’s decision is in accordance with the applicable law and is supported by substantial evidence in the record.

#### **CONCLUSION**

The Unemployment Insurance Appeal Board’s decision is **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

/s/ E. Scott Bradley

cc: Prothonotary