UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0844

September Term, 2015

EVERTON BROWN

v.

MARYLAND DEPARTMENT OF LABOR, LICENSING AND REGULATION

Kehoe,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 5, 2016

This appeal arises from a decision of the Board of Appeals (the "Board") of the Department of Labor, Licencing and Regulation ("DLLR") concerning a claim for unemployment benefits filed by Everton Brown. Mr. Brown sought benefits after he was terminated from his employment with AEG Environmental, Inc. ("AEG"). A DLLR claims specialist denied his claim after finding that he had been terminated for "gross misconduct," as that term is used in Md. Code (1999, 2008 Repl. Vol., 2015 Supp.), § 8-1002 of the Labor and Employment Article ("LE"). A hearing examiner for DLLR reduced the finding to "misconduct," LE § 8-1003, and imposed the statutory minimum ten-week disqualification from benefits. Mr. Brown appealed the hearing examiner's decision to the Board and to the Circuit Court for Baltimore County, unsuccessfully, and now appeals to this Court. We affirm.

I. BACKGROUND

Mr. Brown began working for AEG Environmental, Inc., a Westminster company, as a driver technician in August 2013. His tenure there was short-lived—he was terminated from his employment on October 18, 2013, while still on probation. An AEG representative testified before a DLLR hearing examiner that he was terminated because he reported late to work on several occasions and engaged in a confrontational "screaming match" with his supervisor.

Mr. Brown filed for unemployment benefits after his discharge, but a DLLR claims specialist denied his claim on November 8, 2013, after determining that Mr. Brown was discharged for behavior rising to the level of "gross misconduct." LE § 8-1002. Some

procedural hiccups followed,[1] but Mr. Brown ultimately succeeded in appealing the gross misconduct finding

In a decision dated May 30, 2014, a DLLR hearing examiner amended the claim specialist's decision and found that Mr. Brown was terminated for simple "misconduct."

[1] Mr. Brown appealed the claim specialist's decision on November 25, 2013, the last day allowable, but DLLR's records showed that it did not receive his appeal until November 29. An evidentiary hearing on the timeliness issue was scheduled before a DLLR hearing examiner on December 20, 2013, but Mr. Brown failed to appear on time because he had trouble finding the hearing venue, and his appeal was dismissed. Mr. Brown filed a petition to reopen his appeal, and a DLLR hearing examiner granted that motion on January 30, 2014.

At an evidentiary hearing, Mr. Brown testified that he had faxed his appeal to DLLR on November 25, 2013, and called to confirm that it had been received. However, the date stamp on his appeal read November 29, and as such, a DLLR hearing examiner held that Mr. Brown's appeal of the claim specialist's gross misconduct finding was late without good cause under LE § 8-806(e), confirming the dismissal of his appeal.

Mr. Brown appealed that decision to the Board, which decided not to hold the confusion against him:

> The claimant credibly testified that he faxed his appeal on November 25, 2013. That was the last day for a timely appeal to be made. The claimant then credibly testified that he called the Lower Appeals office and was told his appeal had been received. It was reasonable for him to rely upon that assurance. The claimant should not have been expected to remember the number to which he faxed something more than two months prior. Nor should the claimant have been expected to recall to whom he spoke on that day. The claimant's memory of either of those two details would have bolstered his testimony, but his lack of recall does not render that testimony unworthy of belief.

The Board reversed the hearing examiner's decision and remanded the claim for a decision on the merits.

LE § 8-1003. The hearing examiner, who had taken evidence and testimony from Mr. Brown and representatives of AEG, made the following findings of fact:

- Mr. Brown was terminated for repeated tardiness and a verbal altercation with a supervisor during his probationary period.
- AEG believed Mr. Brown had been late for the start of his shifts on September 27 and October 3, 2013. Although Mr. Brown testified that he had been only three or four minutes late on these occasions, AEG documented that was over thirty minutes late.
- Mr. Brown was late to appointments, on October 4 after causing an oil spill in the yard, and on October 16 after getting lost.
- Mr. Brown engaged in a heated argument with a supervisor regarding the keys to a truck. Mr. Brown contended that he did not know the person he argued with was a supervisor, but he conceded that he yelled back at the person, and that the argument was loud and lasted for several minutes.

The hearing examiner held that AEG met its burden of proving, by a preponderance of the evidence, that Mr. Brown's termination was the result of misconduct. The examiner acknowledged the differences between Mr. Brown's and AEG's versions of when and how late Mr. Brown had been on the dates in question, but concluded that "the fact that [Mr. Brown] engaged in a verbal altercation, which he conceded involved yelling over several minutes, during his first two months of employment with [AEG] is inappropriate conduct and sufficient to warrant a finding of misconduct." The examiner then denied Mr. Brown

unemployment benefits for ten weeks beginning October 13, 2013, the minimum penalty allowable under § 8-1002(b).

Mr. Brown again appealed to the Board, which adopted the hearing examiner's findings of fact after reviewing the record and found that Mr. Brown had been discharged for at least one violation of AEG's attendance policy and for engaging in a disruptive, loud, verbal altercation with a supervisor. The Board also affirmed the hearing examiner's conclusion that AEG had met its burden to show that this behavior rose to the level of simple misconduct, and concurred that the minimum ten-week penalty was warranted.

Mr. Brown petitioned for judicial review in the Circuit Court for Baltimore County. The court affirmed the Board's decision, and this timely appeal followed.

II. DISCUSSION

Maryland's Unemployment Insurance Law provides for unemployment benefits "for the benefit of individuals unemployed *through no fault of their own*." LE § 8-102 (emphasis added). To that end, LE § 8-1003 disqualifies an individual who is terminated as a result of misconduct[2] from receiving unemployment benefits for a minimum of ten weeks. The sole question for us on appeal is whether the Board's decision that Mr. Brown engaged in misconduct, and was therefore disqualified from receiving unemployment benefits for ten weeks, is supported by substantial evidence.[3] We find that it was, after

[2] There are higher grades of misconduct—"gross misconduct" or "aggravated misconduct," *see* LE §§ 8-1002 and 8-1002.1—that carry increasingly severe disqualifications from unemployment benefits.

[3] Mr. Brown phrased the appellate questions as follows:

(continued…)

looking through the circuit court's ruling to review the agency's decision. *See Parham v. DLLR*, 189 Md. App. 604, 612-13 (2009).

A reviewing court's role is to determine only "if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Parham*, 189 Md. App. at 613 (quoting *United Parcel v. People's Counsel*, 336 Md. 569, 577 (1994)). Although we can always determine whether an administrative agency made an error of law, "[o]ur review of the Board's findings of fact is deferential. In the absence of fraud, our inquiry is whether the findings are supported by substantial evidence and are reasonable, not whether they are right." *Parham*, 189 Md. App. at 613 (quoting *Dep't of Econ. & Emp't Dev. v. Taylor*, 108 Md. App. 250, 261-62 (1996), *aff'd sub nom. DLLR v. Taylor*, 344 Md. 687, (1997)). The test for determining whether there was substantial evidence to support the Board's factual findings is whether reasoning minds could reach the same conclusion from the facts relied upon by the Board. *Johns Hopkins Univ. v. Bd. of Labor, Licensing, & Regulation*, 134 Md. App. 653, 657 (2000).

The Board found that Mr. Brown was terminated from his employment with AEG as a result of simple misconduct, which is "a transgression of some established rule or

1. Does the Accardi Doctrine apply to an employer established policy and procedures which dictates due process of law?

2. Did DLLR abuse[] its discretion withholding evidence, erecting erroneous evidence and refus[ing] to comport with COMAR Rules[?]

policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises." *Johns Hopkins Univ.*, 134 Md. App. at 660 (quoting *DLLR v. Hider*, 349 Md. 71, 85 (1998)); *see also Rogers v. Radio Shack*, 271 Md. 126, 132 (1974). A finding of misconduct under § 8-1003 does not require intentional misbehavior. *See Johns Hopkins Univ.*, 134 Md. App. at 662-63 (explaining that a showing of intentional conduct is not required, even in the context of mental deficiency).

Two dispositive factual findings support the Board's decision—*first*, that Mr. Brown violated his employer's attendance policy by reporting late for work on at least one occasion, and *second*, that he engaged in a loud, verbal altercation with a supervisor—and these findings are well-supported in the record. Mr. Brown himself testified before the hearing examiner to being at least a "couple of minutes" late and engaging in a loud verbal argument with another employee. It's true that Mr. Brown and AEG gave conflicting accounts of exactly how late Mr. Brown arrived for work on any one occasion,[4] but "credibility determinations are the sole province of the agency," *DLLR v. Propper*, 108 Md. App. 595, 605 (1996) and it is not our role to second-guess the Board's decision to give greater weight to AEG's version of the story. In light of the evidence presented to the Board, a "reasoning mind" readily could conclude that Mr. Brown was late for work on at

[4] Mr. Brown argues specifically that he was never more than three or four minutes late, and that the record lacks any evidence to support AEG's allegation that he arrived thirty-five minutes late on September 27, 2013.

least one occasion, and engaged in a verbal, confrontational argument with another employee. *Johns Hopkins Univ.*, 134 Md. App. at 657.

Nor do we see legal error in the Board's conclusion that Mr. Brown's behavior amounted to misconduct under LE § 8-1003. Tardiness and engaging in a shouting match with a supervisor both, and independently, qualify as "a transgression of some established rule or policy of the employer." *Hernandez v. DLLR*, 122 Md. App. 19, 27 (1998) (quoting *Radio Shack*, 271 Md. at 117). And although Mr. Brown contends that he didn't know the employee he yelled at was his supervisor, or that getting into an argument would result in his termination, a finding of misconduct doesn't require that the offending employee engage in "intentional misbehavior." *Hider*, 349 Md. at 84; *Johns Hopkins Univ.*, 134 Md. App. at 662-63; *Hernandez*, 122 Md. App. at 27. After finding misconduct, § 8-1003 required the Board to impose *at least* a ten-week disqualification.

Mr. Brown makes two final arguments. He argues *first* that the Board's misconduct finding was not supported by substantial evidence because AEG, in violation of its own employment policies, terminated him before investigating the incident or asking Mr. Brown for his side of the story. By failing to do so, he seems to argue, AEG violated the *Accardi* doctrine,[5] *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and gave the Board an inaccurate account of the events leading up to his termination. Whether

[5] The Court of Appeals has interpreted the *Accardi* doctrine to mean that "an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded." *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2003).

or not AEG followed company procedure leading up to Mr. Brown's termination doesn't matter—AEG is a private company and *Accardi* applies only to the actions of federal or state administrative agencies. *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2003). And although he disagrees with AEG's account of what happened and its reasons for firing him, he had the opportunity to testify to his version of events before the DLLR, to cross-examine opposing witnesses, and to offer documentary evidence, and the Board resolved the disputed facts in AEG's favor.

Second, Mr. Brown urges us to hold that he was deprived of due process because DLLR failed to release to him a copy of a statement in evidence given by Mr. Miles, an AEG employee, after he requested it, and because the agency declined to review evidence Mr. Brown submitted after the evidentiary hearing. These failures, he argues, violated COMAR and prevented him from mounting a meaningful defense. We agree that COMAR 09.32.11.02(I) required DLLR to forward Mr. Brown "any information contained in the official Agency record, or other Agency documents in the custody of the Secretary that may be pertinent or material to the case." Even so, we find the error was harmless. Mr. Miles was the person with whom Mr. Brown had argued, and the hearing transcript (which Mr. Brown did receive) included the testimony from several AEG employees recounting that argument in a consistent manner. In response to Mr. Brown's objection to the statement during the hearing, the examiner explained that it was hearsay and would be given the weight it deserved, and Mr. Brown doesn't say how he was prejudiced by it. At

most, it appears cumulative to testimony AEG presented in person about Mr. Brown's argument with his supervisor.

With regard to the Board's refusal to review evidence offered after the hearing, Mr. Brown misunderstands COMAR's procedural requirements. As the Board stated in its opinion, it was required only to review evidence presented before the hearing examiner at the evidentiary hearing, not evidence Mr. Brown sought to present afterwards. COMAR 09.32.06.03H provides that "appeals to the Board of Appeals shall be considered upon the evidence in the record based on the hearing before the hearing examiner," and while the regulations allow the Board discretion to hear additional testimony, it is under no obligation to do so.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLEE.