SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5688-14T2

Y.A.L.E. SCHOOL SOUTHEAST III, INC.,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR and MARK MANCHIO,

Respondents.

Submitted December 22, 2016 – Decided February 17, 2017

Before Judges Lihotz and O'Connor.

On appeal from the Board of Review, Department of Labor, Docket No. 054-396.

Archer & Greiner, P.C., attorneys for appellant (Peter L. Frattarelli, of counsel and on the brief; Ashley M. LeBrun, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Board of Review (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Paul D. Nieves, Deputy Attorney General, on the brief).

PER CURIAM

Appellant Y.A.L.E. School Southeast III, Inc., appeals from respondent Board of Review's (Board) final decision affirming the Appeal Tribunal, which had reversed the Deputy Director's initial determination denying unemployment compensation benefits to claimant Mark Manchio (claimant). We affirm.

I

We discern the following from the record. Appellant is a private school for disabled children. Appellant employed claimant as a teacher's aide from January 17, 2014 to March 27, 2015, when he was terminated for misconduct. After he was discharged, claimant applied for unemployment benefits. A Deputy Director (Deputy) of the Division of Unemployment and Disability Insurance (Division) found claimant did not qualify for benefits because the claimant had been:

> [D]ischarged for use of inappropriate or abusive language towards management/co-worker. [His] actions constitute[d] a willful and deliberate disregard of the standards of behavior [his] employer had a right to expect. Therefore, [his] discharge was for simple misconduct connected with the work. [He was] disqualified for benefits.

Before the Deputy made this determination, appellant had forwarded to the Division three incident reports. The first incident report, signed by claimant and his supervisor, reveals claimant admitted using a student's lunch account on November

14, 2014 to pay for claimant's own lunch. The report noted claimant had received counseling and a verbal warning over the previous year for using his cell phone and chewing tobacco during school hours. The report concluded by stating, "Any additional policy violations occurring during the 2014-15 school year will be documented in writing and additional appropriate disciplinary action, including possible termination, will be taken."

The second incident report, also signed by claimant and his supervisor, revealed that on November 21, 2014, claimant was observed resting his head on his hands with his eyes closed in the classroom. At the time, he was required to supervise the children in the room. When another member of the staff walked into the room, claimant woke up. This incident report also concluded with the admonition any additional policy violations during the school year would be documented in writing and appropriate disciplinary action taken, including possible termination.

The third incident report, which was not signed by claimant, states on March 20, 2015, claimant was told to report to a classroom where a student was having a "behavioral crisis." The claimant did so, but exited the classroom before the crisis subsided, leaving two aides to contend with the student, who

required more than two aides to control her. When claimant returned to the classroom minutes later, one of the staff persons confronted claimant for leaving the classroom before the staff was able to calm the student. According to the report, claimant laughed and said "I'm sorry." The staff person said, "Have some consideration." The report states claimant mumbled "an expletive" under his breath, and walked out of the classroom. Claimant was discharged one week later on March 27, 2015.

Appellant appealed the Deputy's determination to deny claimant's benefits to the Appeal Tribunal. In the notice of hearing the Appeal Tribunal sent to the claimant and appellant, the parties were instructed to submit any documents they wanted the Appeal Tribunal to consider. Nothing in the record shows appellant sent documents to the Appeal Tribunal.

The Appeal Tribunal's notice to the parties also instructed as follows:

> **IMPORTANT: YOU MUST CALL THE OFFICE OF APPEALS ON THE DATE OF HEARING (SHOWN BELOW) 15 TO 30 MINUTES BEFORE THE SCHEDULED HEARING TIME. YOU WILL BE ASKED TO PROVIDE YOUR NAME, AREA CODE AND TELEPHONE NUMBER.** At the time of the hearing, remain by the phone and keep the line clear. The Appeals Examiner will call you back when ready for the hearing. The Appeal Tribunal may not be able to call at the exact time set, so please remain near your phone for at least

> 60 minutes after the scheduled hearing time. Your appeal may be dismissed or you may be denied participation in the hearing if you fail, without good cause, to follow these instructions.
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> [(Second emphasis added).]

Appellant did not call the Office of Appeals before the hearing and the Appeal Tribunal did not call it when the hearing was about to start. Thus, appellant did not participate in the hearing; claimant did call and testified at the hearing.

Claimant testified appellant discharged him because he had gotten into an argument with a co-worker on March 20, 2015. Specifically, claimant testified he had left the classroom to see if the school bus to transport students home had arrived. When he returned to the classroom, another staff person "yelled at" and was "very nasty" to claimant about leaving her in the classroom with a student in crisis. Claimant characterized the student as merely "acting up a little bit."

Claimant testified he stayed calm when confronted by the other staff member and even "chuckled and laughed a little bit" which, he asserted, incited her to contact his supervisor and allege he had cursed at her. He denied using profane or vulgar language or raising his voice to the co-worker. He claimed appellant did not ask to hear his version of what had occurred.

One week later, he was fired. He denied having received prior warnings. No other material testimony was provided.

The Appeal Tribunal reversed the Deputy, finding:

> On Friday, March 20, 2015, the claimant left the classroom at the end of the day to see if a specific bus had arrived for a student, who was in the hallway. When he returned to the classroom, another teacher's assistant loudly argued with him for leaving her alone in the classroom. The claimed chuckled and laughed. The teacher's assistant became angry. She complained to the lead teacher. The claimant had no prior warnings or counseling. The employer discharged the claimant on 03/27/15 . . . .
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> Decisions of the Appeal Tribunal must be based on competent evidence. Although the employer made allegations to the Deputy concerning the claimant's separation, those allegations are hearsay and not competent. The employer was provided an opportunity to offer competent evidence to substantiate those allegations, but did not participate. Therefore, the Appeal Tribunal is bound by the available competent evidence, the sworn testimony of the claimant. The claimant provided credible testimony that he did not raise his voice to the other teacher's assistant or utilize profane or vulgar language.
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> There is no evidence that the claimant willfully or deliberately violated the behavior to which the employer was entitled. The employer's contention that the claimant was discharged due to misconduct is rejected, as the claimant did not raise his voice or utilize vulgar or profane language. . . . In this case, the claimant has denied all allegations of misconduct connected with

> the work and is not subject to a disqualification under N.J.S.A. 43:21-5(b).
>
> No disqualification arises under N.J.S.A. 43:21-5(b), from 03/22/15 through 05/16/15, as the claimant was not discharged for misconduct connected with the work. . . .
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> The determination of the Deputy is reversed.

Appellant appealed the Appeal Tribunal's determination to the Board. Appellant attached the three incident reports to its letter requesting an appeal. The Board reviewed appellant's "allegations" and "the record below" and affirmed the Appeal Tribunal.

II

On appeal, appellant maintains the Appeal Tribunal erred because it: (1) excluded appellant's written submissions to the Deputy; (2) found claimant's testimony credible; and (3) arrived at a decision unsupported by the facts. Appellant maintains the Board erred because it: (1) failed to consider the "procedural due process denied to employer by the improper notice of the appeal tribunal;" (2) failed to consider appellant's evidence; and (3) failed to render a decision supported by the evidence.

The scope of our review is limited. We are bound to affirm the Board's determination if reasonably based on the proofs. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). "[T]he test is not whether an appellate court would come to the same

conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs." Ibid. (quoting Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985)). We may intervene if the agency's action was arbitrary, capricious or unreasonable, or was "clearly inconsistent with its statutory mission or with other State policy." Ibid. (quoting George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994)). We may also disturb an agency's decision if the record does not "'contain[] substantial evidence to support the findings on which the agency based its action . . . .'" Id. at 211 (quoting George Harms, supra, 137 N.J. at 27).

We first address appellant's claims against the Appeal Tribunal. While appellant claims this panel failed to consider its submissions, there is no proof appellant provided any evidence to the Appeal Tribunal. In the notice of hearing before the Appeal Tribunal, both claimant and appellant were instructed to provide the Appeal Tribunal with any documents they wanted the panel to consider. Appellant neither submitted documents nor participated in the hearing. Appellant states the Appeal Tribunal was required to consider the evidence submitted to the Deputy, but appellant fails to cite any legal authority for such premise and we were unable to find any.

Second, appellant faults the Appeal Tribunal for finding claimant's testimony credible, and further asserts its decision was not supported by the evidence. As we discuss below, even if the Appeal Tribunal considered the November 2014 incident reports, which were acknowledged by claimant, its finding there was no disqualifying incident in 2015 would not change. Appellant assumes the Appeal Tribunal had the three incident reports before it when it made its determination, but the record indicates the evidence before the Appeal Tribunal was limited to claimant's testimony.

Appellant chides the Appeal Tribunal for finding claimant credible because, during the hearing, claimant testified he had not received any warnings about his conduct before March 20, 2015. By contrast, the three incident reports make reference to claimant receiving warnings in the past. However, if it did not have the incident reports, the Appeal Tribunal could not know the claimant's testimony was inconsistent with the incident reports.

Finally, appellant maintains the evidence before the Appeal Tribunal does support a finding of misconduct. On March 20, 2015, the relevant statute disqualified a person for benefits "[f]or the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the

seven weeks which immediately follow the week, as determined in each case." N.J.S.A. 43:21-5(b). "Misconduct" was defined in N.J.A.C. 12:17-10.2 as follows:

> For an act to constitute misconduct, it must be improper, intentional, connected with one's work, malicious, and within the individual's control, and is either a deliberate violation of the employer's rules or a disregard of standard behavior which the employer has the right to expect of an employee.
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> [N.J.A.C. 12:17-10.2(a).][1]

The regulation defining misconduct mandated a two-prong standard to establish misconduct, "[f]irst, the conduct must be improper, intentional, connected with the work, malicious, and within the employee's control. Second, the conduct must also be either a deliberate violation of the employer's rules or a disregard of the standards of behavior which the employer has the right to expect." Silver v. Bd. of Review, 430 N.J. Super. 44, 53 (App. Div. 2013) (emphasis omitted). "[S]imple misconduct . . . could result from a single . . . violation committed intentionally and with malice." Id. at 56. The terms "'intentional' and 'malicious' as used in the regulation . . .

[1] N.J.A.C. 12:17-10.2 was amended by 47 N.J.R. 1009(a), effective May 18, 2015. This amendment repealed the definition of "misconduct," but such definition was still in effect at the time of claimant's alleged misconduct.

include deliberate disregard of the employer's rules or policies, or deliberate disregard of the standards of behavior that the employer has the right to expect of an employee." Ibid.

Here, given claimant's testimony, the Appeal Tribunal's determination was not arbitrary, capricious or unreasonable. According to the claimant, another teacher's aide "yelled at" and was "nasty" to him because claimant did not assist her with a difficult student. When he laughed at her and left the room, the co-worker reported him to his superior and claimed he had sworn at her. Claimant was fired a week later; before he was fired, appellant did not provide claimant an opportunity to give his version of what had occurred. The competent evidence before the Appeal Tribunal did not establish the claimant had engaged in misconduct.

As for appellant's contentions against the Board, we reject its argument the Board erred because it did not consider the "improper notice" provided by the Appeal Tribunal. Appellant did not assert this claim before the Board. Appellant asserts for the first time before us the notice was defective because it failed to advise that, if a party fails to call the Office of Appeals fifteen to thirty minutes before the time of the

scheduled hearing, a party may forfeit its right to participate in the hearing.

"Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). Even if this issue had been raised, the Board did not address this question in its decision and, thus, we decline to do so in the first instance. Duddy v. Gov't Emps. Ins. Co., 421 N.J. Super. 214, 221 (App. Div. 2011). That said, we cannot resist observing the notice warns if a party does not follow its instructions and call the Office of Appeals, fifteen to thirty minutes before the hearing, that party may be denied participation in the hearing.

Appellant next claims the Board failed to consider appellant's evidence, and that its decision was not supported by the record. We disagree. First, the Board stated it reviewed the record below, including the appellant's allegations. There is no indication the Board did not consider appellant's evidence. Second, even taking the incident reports into consideration, there is sufficient evidence to support the Board's decision.

It is the March 20, 2015 incident that caused appellant to terminate claimant. Appellant relies upon the March 20, 2015 incident report to establish what occurred on that date. The

content of that report was furnished by one of claimant's co-workers, making such contents hearsay. The report, which claimant did not sign, does not indicate the claimant admitted to any of the alleged facts in the report. Nothing in the report can be deemed an admission by claimant pursuant to N.J.R.E. 803(b).

We recognize that hearsay is admissible in unemployment hearings. N.J.A.C. 1:12-15.1(b). But, the residuum rule still applies. DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 85 (App. Div. 2001). As our Supreme Court held in Weston v. State:

> [A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.
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> [Weston v. State, 60 N.J. 36, 51 (1972).]

Here, the Board could not have relied upon the contents of the March 20, 2015 incident report because its contents constituted hearsay. Therefore, there was no competent proof the claimant engaged in misconduct on March 20, 2015. The the Board did not have a basis to find appellant's termination of claimant was justified. Even if claimant's testimony was

discredited because the other incident reports revealed he had been warned before March 20, 2015 any additional acts of misconduct might result in his termination, in the final analysis, there was no competent proof claimant engaged in the misconduct referenced in the March 20, 2015 incident report. It was that alleged misconduct that caused appellant to terminate claimant.

Appellant argues the business record rule, see N.J.R.E. 803(c)(6), salvages the contents of the March 20, 2015 incident report from being inadmissible on hearsay grounds. We disagree. N.J.R.E. 803(c)(6) provides:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

In our view, the issue is whether the source of the information — the co-worker - is trustworthy. A critical factor that must be considered in determining whether a document is trustworthy under this rule is whether the declarant was under a duty to make a truthful record. See Phoenix Assocs., Inc. v.

Edgewater Park Sewerage Auth., 178 N.J. Super. 109, 116 (App. Div. 1981), aff'd 89 N.J. 2 (1982). There is no indication the co-worker had a duty to render a truthful account of what occurred on March 20, 2015. Moreover, appellant did not seek to hear claimant's version of events.

Accordingly, considering the sources of information in the incident report, as well as the circumstances surrounding its preparation given appellant's failure to obtain claimant's version of events, the report was not sufficiently trustworthy to make it admissible under N.J.R.E. 803(c)(6). Because there was no competent evidence the claimant engaged in misconduct on March 20, 2015, we must affirm the Board. There is substantial evidence in the record to support its decision.

To the extent any argument raised by appellant has not been explicitly addressed in this opinion, it is because we are satisfied the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.