

13-0519

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

NICOLE PARSONS.

Petitioner,

v.

Civil Action No: 12-AA-125

Judge Jennifer F. Bailey

2013 APR 24 AM 10:24
CATHY S. [Signature]
KANAWHA COUNTY CIRCUIT COURT

WOMEN'S HEALTH CENTER OF
WEST VIRGINIA, and
JACK CANFIELD, Commissioner,
WORKFORCE WEST VIRGINIA, and
BOARD OF REVIEW, WORKFORCE
WEST VIRGINIA

Respondents.

ORDER

This matter came before the Court on appeal from an administrative decision of the Board of Review, WORKFORCE West Virginia. The Court has studied the petition, the underlying record as a whole, the briefs of the parties and all other pertinent legal authorities. As a result of these deliberations, for the reasons set forth in the following opinion, the Court concludes that the decision should be reversed.

Statement of Facts

The Petitioner, Nicole Parsons, was employed as a nurse at Respondent Womens' Health Center of West Virginia. Beginning March 26, 2012, she began an extended a maternity leave due to a complicated pregnancy and a sick baby. She and her employer eventually agreed that she would return to work on Monday, June 4, 2012, although there was some dispute whether she would work Mondays and Fridays or Mondays, Tuesdays and Wednesdays. The Petitioner's baby was sick and she called in and failed to attend her first scheduled day of work. As a result,

the Respondent sent a letter to the petitioner advising her that her “employment has been terminated.” The Petitioner applied for unemployment benefits and was deemed eligible by Deputy Andy Osborne’s decision of June 13, 2012. The Respondent appealed, and in a decision issued on July 30, 2012, Administrative Law Judge Truman J. Sayre, Jr. affirmed the Deputy’s decision. Just three (3) days prior to the issuance of the order, the Administrative Law Judge conducted a hearing whereby he heard the testimony of the Petitioner, of her employer and considered fourteen (14) exhibits. As a result of the hearing, Administrative Law Judge Sayre found in the Findings of Fact and Conclusions of Law that the Petitioner had been discharged but not for misconduct, and therefore, she was not disqualified from receiving unemployment compensation benefits. Once again, the Respondent appealed. The Board of Review, WORKFORCE West Virginia, by order dated September 13, 2012, reversed the decision of Administrative Law Judge Sayre, finding that the Petitioner had no plans to return to work on Tuesday and Wednesday following her Monday failure to work, thus concluding that she had effectively resigned from her employment. However, there was no established agreed to work schedule other than Monday, June 4, 2012. Further, the Petitioner was advised of her termination prior to any opportunity to work on Tuesday or Wednesday of that week.

Standard of Review

In a judicial proceeding to review a decision of an administrative agency, the Supreme Court of Appeals of West Virginia has stated that the decision shall be upheld unless the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or

- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. Pt. 1, *Smith v. Bechtold*, 438 S.E.2d 347 (W.Va. 1993), quoting Syl. Pt. 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 309 S.E.2d 342 (1983).

The scope of review is “extremely limited” and the reviewing court must be careful to avoid substituting its own judgment for that of the administrative decision makers. *Gino’s Pizza of West Hamlin v. West Virginia Human Rights Commission*, 418 S.E.2d 758, 763 (W.Va. 1992); *Frank’s Shoe Store v. W.Va. Human Rights Commission*, 365 S.E.2d 251, 254 (W.Va. 1986); *CDS, Inc. v. Camper*, 438 S.E.2d 570, 573 (W.Va. 1993). The Supreme Court has also noted that “If an administrative agency’s factual finding is supported by substantial evidence, it is conclusive.” *In re Queen*, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996).

Discussion

Generally speaking, a factual determination made by the Board of Review, WORKFORCE West Virginia will not be overturned unless it is clearly wrong. *Adkins v. Gatson*, 192 W.Va. 561, 565, 453 S.E.2d 395, 399 (1994). Conversely, where it is clear that the factual findings of the Board of Review are not supported by the evidence, Circuit Courts are instructed to reverse the decision of the Board of Review. See *May v. Chair and Chambers*, 222 W.Va. 373, 664 S.E.2d 714. In the present case, it is undisputed, based on the testimony adduced

before Administrative Law Judge Sayre that the Petitioner never communicated an intention to resign from her position to her employer. Furthermore, the employer sent her the letter stating that she was “terminated” from her position subsequent to her failure to report back to work on Monday, June 4, 2012, when she called in to advise that her baby was ill and that she would be unable to work.

The law requires that, in order to receive unemployment benefits, a claimant must either have been discharged without misconduct on their part, or have resigned their employment for good cause involving fault on the part of the employer. W.Va. Code §21-A-6-1 et. seq. It was established that, under the employee handbook that the Petitioner signed and agreed to, three consecutive absences would be treated as voluntarily resigning employment. *Hearing Transcript*, p. 46-47. The Petitioner was absent on one day of work prior to receiving the termination letter from the Respondent. Had the Petitioner remained absent for the next two days, and had the Respondent not sent the letter, she may very well be considered as having left her employment without good cause involving fault on the part of the employer. However, the Petitioner had not yet taken the final action to resign from her job when she received the termination letter. Therefore, the Petitioner was discharged from her position, but not for misconduct.

Decision

Accordingly, this Court hereby **ORDERS**:

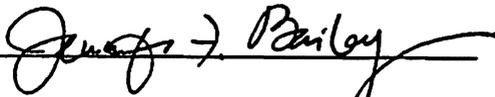
The decision of the Board of Review, WORKFORCE West Virginia, dated September 13, 2012, is **REVERSED**. It is hereby **ORDERED** that the Petitioner is eligible to receive unemployment compensation, effective from June 5, 2012, the date of her termination.

It is further **ORDERED** that the Circuit Clerk distribute certified copies of this Order to

all parties or counsel of record.

The Court notes the objection of the party or parties aggrieved by this Order. This is a Final Order.

Entered this 23rd day of April, 2013.


JENNIFER F. BAILEY, Judge

Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF LINCOLN
I, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY OF THE COURT
FILED IN SAID COUNTY OF SAID COURT THIS 26
DAY OF April 2013
Cathy S. Batson CLERK
CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA