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CIRCUIT COURT ORDER/OPINION
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Appeal Docket No: 190282H

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29 (1) (b) Section of the Act

Date: 12/8, 2008

R. Douglas Daligga, Director
MES - Board of Review

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

ROBERT MOWATT, JR.,

Appellant,

v. File No. 08-000001-AE-2

VILLAGE OF BIRCH RUN AND
STATE OF MICHIGAN, DEPARTMENT OF
LABOR & ECONOMIC GROWTH,
UNEMPLOYMENT INSURANCE AGENCY,

Appellees.

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OPINION AND ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 20th day of August 2008:

PRESENT: HONORABLE ROBERT L. KACZMAREK, Circuit Judge.

This matter comes before the Court on Appellant's Appeal from the June 27, 2007 decision by the Michigan Employment Security Commission Board of Review finding him disqualified from receiving unemployment benefits.

BACKGROUND

On January 23, 2006, Appellant Robert Mowatt, Jr. ("Claimant") was discharged from his employment as Chief of Police by Appellee Village of Birch Run ("Village") due to his failure to sign and acknowledge a performance improvement plan ("Plan") that had been crafted by his employer to improve his job performance in certain areas. Following a hearing on the matter, the Administrative Law Judge ("Referee") rendered her December 8, 2006 decision that Claimant's failure to comply with this directive of his employer did not amount to disqualifying misconduct. Rather, the Referee opined that at

most the failure to comply evidenced only unsatisfactory conduct or an error in judgment. On appeal, the Michigan Employment Security Commission Board of Review's ("Board of Review") June 27, 2007 decision reversed the Referee, determining that the refusals to sign the Plan rose to the level of disqualifying misconduct. The Board of Review's Order of November 29, 2007 denied Claimant's Petition for Rehearing. Claimant filed this appeal in Circuit Court on January 2, 2008.

DISCUSSION

A. Standard of Review

A reviewing court may reverse a decision of the Michigan Employment Security Board of Review only if it finds that the decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. MCL 421.38(1). Board of Review decisions so made "are invulnerable to judicial meddling." *Hoffman v. S.O.S. Consol., Inc.* 45 Mich.App. 163, 166 (1973). Substantial evidence is that evidence which reasonable minds would accept as adequate to support a decision. It is more than a mere scintilla but may be less than a preponderance of the evidence. *In re Kurzyniec Estate*, 207 Mich.App. 531, 537 (1994). Additionally, appellate "review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Mich. Employment Relations Comm'n v. Detroit Symphony Orchestra*, 393 Mich. 116, 124 (1974). If the record is equivocal, the decision must be affirmed. *Broyles v. Aeroquip Co.*, 176 Mich.App. 175 (1989).

B. Board of Review Findings of Fact

1.) Outright Refusal

Plaintiff first argues that a review of the whole record fails to support the Board of Review's decision that Claimant refused to sign the Plan, [1] but instead only reflects that he needed clarification and could not sign the document as written. However, the Court's review of the whole record demonstrates substantial evidence that supports the Board's findings that Claimant refused despite the fact that multiple opportunities had been given to the Claimant to discuss the Plan. The record demonstrates Claimant was first asked to sign the Plan at a Village Council meeting on December 5, 2005 and ultimately never signed it. Testimony from Village Manager Paul Moore supports the Board's findings that Claimant had met with the Village Manager five times regarding the Plan, and that changes were in fact made to the Plan to address his concerns. (CR 40-41; 110). Consistent with the Board's findings, and the Village Manager's testimony, Claimant admitted that he did not sign the Plan when asked by the Manager following those meetings. (CR 155).

Also in accordance with the Board's findings, Village President Marianne Nelson testified that she had personally encouraged Claimant to work with the Village Manager towards changes that would still uphold the goals of the Plan but make the him "feel more comfortable" with it. (CR 136). The Board's finding that "on occasion" she asked Claimant if there was anything she could do to assist in getting the Plan signed, and was informed by him that "there was not anything" she could do, is also directly grounded in her testimony. (CR 135). Reasonable minds would accept the above evidence as adequate to support the Board of Review's factual findings. Therefore, the Court will not

[1] The Court notes the Referee also factually found that Claimant had refused to sign the Plan and referred to it as "act of insubordination" in making her legal conclusions. (CR 178-179).

disturb the Board of Review's finding that Defendant refused to sign the Plan given the competent, material, and substantial evidence which supports that conclusion.

2.) Rationale for Refusal

Appellant also objects to the Board of Review finding that Claimant refused to sign the Plan as he viewed it as a "contract." Having considered the matter, the Court is not persuaded that the Board of Review's finding was improper. The Referee did indicate on the record that she would not consider Claimant's answer that he would not sign the Plan as it was a "contract" due to a concern the Village's attorney had personal knowledge of the statement as a result of her pre-discharge representation of the Village. (CR 161-162). However, no potential attorney-witness issues occasioned by the prior representation actually became ripe at the hearing as the employer's attorney was never called to offer testimony as a witness. Moreover, it is well-established that an attorney's questions are not themselves evidence, and Claimant's affirmative response to the question posed negated any possible specter that rebuttal testimony might be necessary.[2] Although a degree of deference is to be afforded a Referee's findings of fact when they involve witness credibility,[3] the Board of Review is nonetheless independently empowered by statute to affirm, modify, set aside, or reverse the findings of fact and decision of a referee based "on evidence previously submitted." MCL 421.34. Thus while the Referee may have chosen to disregard the Chief's testimony, it was submitted. Consequently, the Board of Review was within its independent authority to accept Claimant's sworn statement in making its findings of fact.

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[2] The Court also notes that the employer's attorney did offer to rephrase in order to leave any reference to herself out of the question. (CR 161). Furthermore, the attorney's prior involvement had already been referenced by the witness during direct examination. (CR 147).

[3] *Helm v. University of Michigan*, 147 Mich.App. 135 (1986).

C. Alleged Incomplete Record

Claimant also asserts that the Board of Review would have reached a different decision had the Village not erroneously failed to submit Exhibit 10 to the Board on appeal.[4] The Court finds this argument without merit as a complete record, including a copy of all exhibits submitted at the hearing, would have been transmitted to the Board of Review by the Referee during the appeal process. The applicable rule from Michigan's Administrative Code provides:

> R 421.1308 Record of proceedings; transmittal to board following notification of appeal; copies of referee hearing transcripts.
>
> Rule 308. The record of proceedings before a referee, including the referee hearing transcript together with supporting exhibits, shall be promptly transmitted to the board of review following notification of an appeal to the board. Copies of referee hearing transcripts shall be mailed to the parties or to their attorneys or agents of record without cost to them.
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> Michigan Administrative Code R. 421.1308 (emphasis added).

Plainly, the responsibility for transmitting a copy of the record[5] to the MESC Board of Review lies with the referee, as well as the responsibility for sending a copies of the hearing transcripts to the parties. Claimant has made no suggestion that the Referee failed to transmit Exhibit 10 to the Board of Review with the rest of the record. Moreover, that the Board of Review was in possession of Exhibit 10 as part of their record is evidenced by the fact that the Board has included Exhibit 10 in the certified

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[4] Claimant states that the Village's exhibit cover sheet explained that it did not have a copy of Exhibit 10. The hearing transcript confirms that the Village counsel had not seen the document prior to its admission during cross-examination. (CR 114).

[5] R..421.1303(2) defines the record created by the referee:

> The record made by the referee is the transcript of the referee hearing, the exhibits marked and received at the referee hearing, and written argument submitted to the referee if the other parties present at the hearing have been served a copy of the argument and have been given an adequate opportunity to respond to it.

record which they have transmitted to this Court. (CR 174-176). Therefore, the Court determines that there is no evidence that the Board of Review was without Exhibit 10 when it rendered its decision.

D. Disqualifying Misconduct

A claimant is statutorily barred from receiving unemployment benefits where the employee was "discharged for misconduct connected with the individual's work..." MCL 421.29(1)(b). Our Supreme Court has elaborated on the definition of disqualifying misconduct as:

> [C]onduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.
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> *Carter v. Employment Security Commission*, 364 Mich. 538, 541 (1961)

When the issue is misconduct, the employer bears the burden of proof. *Bell v. Employment Security Commission*, 359 Mich. 649 (1960). To meet that burden, the employer must show by a preponderance of the evidence that a claimant engaged in misconduct. *Fresia v. Miller*, 7 Mich.App. 58 (1967).

In proving misconduct, it is well-established that "[a] single incident of misconduct may fall within the statutory meaning of misconduct." *Tuck v. Ashcraft's Market, Inc.*, 152 Mich.App. 579, 589 (1986). However, "while misconduct may justify an employee's discharge... not every such breach rises to the level of misconduct sufficient to disqualify the employee for unemployment benefits." *Id.* This is because

"[m]any acts of an employee might meet with the displeasure of disapproval of an employer and... in a sense, be considered misconduct warranting discharge from employment." *Reed v. Employment Security Comm.*, 364 Mich. 395, 397 (1961). The statute, however, "expressly limits disqualification to misconduct connected with [the individual's] work." *Id.* at 398. Thus, only when the "violation bear[s] some reasonable application and relation to the employee's task, can the breach be said to be misconduct." *Id.* at 397.

Here, Claimant argues that the Board of Review erred in reversing the Referee's finding that that his conduct did not amount to disqualifying conduct under the statute. However, under the facts found by the Board, Claimant's refusal to sign the Plan, despite multiple meetings and opportunities to do so, supports a conclusion that Claimant made a conscious, willful, and deliberate decision. Whether or not Claimant agreed with the necessity or means, the Village had decided improvement plan to advance certain aspects of Claimant's job performance was in its best interests. Complaint's opposition to the improvement plan was thus contrary to the Village's best interests and the standards of behavior which an employer has the right to expect of its employee. In this regard, the Court agrees with the persuasive authority cited by Appellees that the "outright refusal, absent evidence of an inability or incapacity to perform, shows a willful disregard of the employer's interests" and that a claimant had an obligation to at least try to do what has been asked. *Williams v. Hughes Plastics, Inc.*, Berrien County Cir. Ct. No. 86-3082-AE-Z (December 10, 1987). The misconduct at issue also bears a reasonable relation to the employee's task as the improvement Plan was part of an effort to improve job performance and set forth tasks for the Claimant was to accomplish. Therefore, the Court

determines that the Board of Review's decision that Claimant's insubordination was disqualifying misconduct, within the meaning of the statute, is not contrary to law.

CONCLUSION

Accordingly, the Court **DENIES** the appeal and **AFFIRMS** the decision of the Board of Review.

It is so ordered.

ROBERT L. KACZMAREK
Circuit Judge
10th Judicial Circuit

Dated: August 20, 2008.