

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

THIET NGO,

HON. CALVIN L. BOSMAN

Appellant,

OPINION AND ORDER
File No. 99-35034-AE

v

NABISCO INC/LIFESAVERS and
DEPARTMENT OF CONSUMER and
INDUSTRY SERVICES-UNEMPLOYMENT
AGENCY,

Appellees.

Claimant Thiet Ngo appeals the August 30, 1999 decision of the Employment Security Board of Review (Board), which reversed the Administrative Law Judge's (ALJ) ruling and found claimant disqualified from unemployment compensation benefits under the misconduct provision of Section 29(1)(b) of the Michigan Employment Security Act (the Act), MCL 421.1 *et seq.*; MSA 17.510 *et seq.*

The following facts are taken from the certified record submitted by the Board. Claimant began working full-time for Nabisco Incorporated/Lifesavers (Employer) on October 23, 1995 (R, 6). He was working as a belt attendant when he was terminated on January 20, 1999 (R, 6-7, 15). The Employer terminated claimant's employment for a violation of plant rules prohibiting the removal of company property from the premises without proper written authorization (R, 8).

On January 16, 1999, two security guards found claimant leaving the premises with two fifty-count boxes of lollipops under a Burger King bag in his lunch box (R, 10-11). Claimant did not have a receipt for the lollipops, but stated that he had purchased them at the company store (R, 10-11).

Claimant told the security guards that he might have a receipt in his locker, but a search of his locker found no such receipt (R, 11). Claimant indicated that he must have thrown away the receipt (R, 11).

After investigating the incident, the Employer gave claimant the opportunity to explain the situation, but, according to the Employer, claimant did not provide any information substantiating his claim that he purchased the lollipops at the company store (R, 11). The Employer then suspended and subsequently terminated claimant's employment for violation of Plant Rule 7 which prohibits:

Misusing or removing from the premises of this Company property, records or other material without proper written authorization.
[R, 8, 11-12].

Mr. Tropilo testified for the Employer that the suckers at issue were in fact for sale at the company store (R, 12). He also testified that claimant did not have with him the bag that the suckers would have been placed in after sale at the company store (R, 12). Furthermore, the suckers found in claimant's possession were not wrapped in cellophane like those for sale at the company store (R, 12). Claimant explained the missing cellophane by testifying that he simply removed it to get access to the lollipops to snack on (R, 18). However, a count of the lollipops revealed that none were missing from either box (R, 21).

After hearing testimony on behalf of the Employer and from claimant, the ALJ found claimant eminently credible. The ALJ specifically believed claimant's testimony that he had previously purchased the lollipops at the company store and that he had been cleaning out his locker on a Saturday when he discovered the lollipops under some dirty linen and decided to take them home. The ALJ found claimant's testimony that he must have thrown away the receipt for the lollipops credible. Accordingly, the ALJ ruled that claimant was not disqualified under the misconduct provisions of Section 29(1)(b) of the Act.

The Employer appealed the ALJ's decision to the Board which found claimant incredible and reversed the ALJ in a two-to-one decision.

The issue in this matter is whether the Board erred in reversing the decision of the ALJ. The Act provides that the circuit court

may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect to that order or decision as justice may require, *but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.* *** [MCL 421.38(1); MSA 17.540(1)] [Emphasis added].

Case law reiterates the statutory review standard. That is, this Court must affirm the decision of the review board if supported on the whole record by competent, material and substantial evidence and if it is not contrary to law, even if this Court might reach a different result if sitting in the place of the administrative agency. See *Murphy v Oakland City Health Dep't*, 95 Mich App 337, 339-340; 290 NW2d 139 (1980). Justice Black, in his concurring opinion in *Peaden v Employment Security Comm*, 355 Mich 613, 629; 96 NW2d 281 (1959), set forth the limited scope of judicial review of administrative decisions such as the one currently before this Court as follows:

Unless the reviewing court is able to point out, and then define, some controlling rule of law which, in its application to the findings of the given administrative agency, quite unfounds the conclusion such agency has reached, it is the duty of the court to affirm that the agency has exercised its judgment within the area of discretion entrusted to it by legislative authority.

Stated simply, if there is a rational basis for the conclusions of the Board, this Court must affirm its decision. See *id.*

Section 29(1)(b) of the Act provides:

- (1) An individual is disqualified for benefits if he or she:
 - (b) Was discharged for misconduct connected with the individual's work or for intoxication while at work unless the discharge was subsequently reduced to a disciplinary layoff or suspension.

The employer has the burden of proving disqualifying misconduct by a preponderance of the evidence. *Lasher v Mueller Brass Co*, 62 Mich App 171, 177; 233 NW2d 513 (1975); *Fresta v Miller*, 7 Mich App 58, 63-64; 151 NW2d 181 (1967); see also *Bell v Appeal Board of the Michigan Employment Security Commission*, 359 Mich 649, 651; 103 NW2d 584 (1960).

Misconduct is defined by *Carter v Employment Security Commission*, 364 Mich 538, 541; 111 NW2d 817 (1961) as:

[C]onduct evincing such wilful 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 of the employee's duties and obligations to his employer.

In reversing the ALJ's decision, the Board found that claimant should be disqualified for misconduct as his dishonesty is conduct deviating from that which the Employer has a reasonable right to expect or is a willful disregard for the Employer's interest.

Claimant contends that the Board did not afford due deference to the referee's assessment of credibility given that the referee was in a unique position to hear and observe the witnesses first hand. Claimant cites *Michigan Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 127; 223 NW2d 283 (1974) for the proposition that evidence supporting a review board's conclusion is less substantial when it disagrees with an experienced impartial examiner who has observed the witness. Given this case law, claimant contends that there is insufficient evidence in the

record for the Board to conclude that the Employer established by a preponderance of the evidence that the boxes of lollipops belonged to the Employer and were not purchased by claimant. This Court disagrees.

Although this Court finds that the evidence presented in this case is such that reasonable minds may differ as to the outcome, this Court does not decide the issue de novo. Rather, this Court's review is limited to whether the decision of the Board is unsupported by competent, material and substantial evidence on the record. See MCL 421.38(1); MSA 17.540(1).

The Board found that claimant was leaving the facility with two boxes of company product hidden under a fast food lunch bag during a random spot check by the Employer's security guards. The product was available at the company store and claimant acknowledged that this is where he got it. Claimant could not produce a receipt for the product. The Board found that at this point, the Employer had established that claimant attempted to improperly remove the product from the company premises in violation of written company policy.

The Board disagreed with the ALJ's credibility finding: the ALJ found claimant credible while the Board did not. Although the Board accepted many of the findings of fact of the ALJ, it reached a different conclusion based on these same facts. The Board is authorized to do exactly that by section 34 of the Act, MCL 421.34; MSA 17.536, which provides that the Board may "... affirm, modify, set aside, or reverse *the findings of fact and decision of the referee* ..." [Emphasis added]. In *Linski v Employment Security Comm*, 358 Mich.239, 241; 99 NW2d 582 (1959), the Court stated that it accepts "the findings of fact of the appeal board where there is evidence in the record to support them ..." In the instant case, the Board found that the fact that claimant does not know when he bought the suckers, but bought them to snack on, so removed the cellophane from *both*

boxes, yet did not eat one sucker, then tried to remove them from the Employer's facility without a receipt in violation of company policy, compels a finding that claimant is not credible.

"Substantial evidence" is defined in *Russo v Dep't of Licensing & Reg*, 119 Mich App 624, 631; 326 NW2d 583 (1982), as that which a reasonable mind would accept as adequate to support a conclusion; it is more than a scintilla but may be substantially less than a preponderance. This Court finds that the decision of the Board is reasonable in that it is supported by substantial evidence found in the record notwithstanding the opinion of the Court in *Detroit Symphony, supra*, that the evidence supporting the review board's conclusion is less substantial when it disagrees with the referee. In this case, although it may be *less* substantial, it is not *insubstantial*. Furthermore, the Board's decision is not contrary to law for the reason that a finding that claimant dishonestly handled the Employer's property constitutes misconduct, no matter how small the amount involved. Stealing is stealing, regardless of the monetary value at issue. In sum, this Court finds ample evidence in the record to support the findings of fact and conclusions of the Board in the instant case.

NOW, THEREFORE, IT IS ORDERED THAT the decision of the Board is AFFIRMED in accordance with the Court's foregoing opinion.

It is so ordered.

Dated: June 9, 2000



Calvin L. Bosman, Circuit Court Judge