SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5106-15T1

LAURA J. FREDA,

Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR,
AND ATHENIA MASON SUPPLY,
INC.,

Respondents.

Argued October 16, 2017 – Decided February 26, 2018

Before Judges Messano, Accurso, and Vernoia.

On appeal from the Board of Review, Department of Labor, Docket No. 084,204.

Sarah Hymowitz argued the cause for appellant (Legal Services of New Jersey, attorneys; Sarah Hymowitz and Melville D. Miller, on the briefs).

Peter H. Jenkins, Deputy Attorney General, argued the cause for respondent Board of Review (Christopher S. Porrino, Attorney General, attorney; Melissa D. Schaffer, Assistant Attorney General, of counsel; Adam K. Phelps, Deputy Attorney General, on the brief).

> Respondent Athenia Mason Supply, Inc. has not filed a brief.

PER CURIAM

Laura J. Freda was employed by respondent, Athenia Mason Supply, Inc. (Athenia), from June 13, 2013 to January 28, 2016, when her supervisor, Thomas Kievit, terminated her. The Deputy Director denied Freda's application for unemployment benefits, and she appealed. After a telephonic hearing, the Appeal Tribunal (Tribunal) affirmed the Deputy's decision, finding and concluding:

> Substantial evidence provided during the hearing established that the claimant was discharged for theft. Although the total value of the items was minimal, the claimant's actions were still theft. Giving the customer items which he had not purchased was a deliberate, intentional and malicious act . . . and was substantially certain to cause the employer financial harm. Therefore, the claimant is disqualified for benefits under N.J.S.A. 43:21-5(b) . . . as the discharge was for severe misconduct connected with the work.

Freda immediately requested a reopening of the hearing. See N.J.A.C. 1:12-18.4(a)(3) (permitting a motion for reopening when "[t]he party is seeking to amend the . . . Tribunal decision due to a mistake in law or computation thereby affecting the legal conclusion of the . . . Tribunal.").

Freda contended the Tribunal failed to consider N.J.A.C. 12:17-10.1(f), which places the burden of proof on the employer

"to show through written documentation that the employee's actions constitute misconduct." She noted there was no written documentation offered by Athenia at the hearing. Freda also argued the Tribunal's findings of fact were "inaccurate and biased in favor of the employer." Lastly, Freda contended there was insufficient evidence that her conduct was "intentionally wrong or malicious" and therefore the Tribunal could not find she committed "severe misconduct." See N.J.A.C. 12:17-2.1 (2015) ("'Severe misconduct' means an act which (1) constitutes 'simple misconduct' . . .; (2) is both deliberate and malicious; and (3) is not 'gross misconduct.'").

The Tribunal denied Freda's request for a reopening, and Freda appealed to the Board of Review (Board). She contended the Tribunal erred in not reopening the case and reiterated the legal arguments made to the Tribunal. The Board acknowledged receipt of the appeal in a written notice that also provided: "please take notice that the Board hereby exercises its authority pursuant to N.J.S.A. 43:21-6(e) to take jurisdiction over any and all issues arising from the . . . Tribunal decision regarding the determination(s) of the deputy/director." (emphasis added).

The Board's July 6, 2016 final decision concluded the Tribunal had not abused its discretion in denying Freda's request for reopening. The Board never addressed the Tribunal's decision

denying Freda unemployment benefits because of severe misconduct connected with the work. This appeal followed.

Before us, Freda essentially reiterates the arguments made to the Tribunal and the Board. The Board argues that our review is limited to only the denial of Freda's request to reopen the hearing, not the merits of the Tribunal's decision.[1] It contends we should dismiss the appeal because Freda failed to present any legal argument why the Tribunal's refusal to reopen was an abuse of discretion.

Initially, we reject the Board's position that Freda's appeal is limited to the denial of her reopening request. The Tribunal's decision "shall be deemed to be the final decision of the [Board], unless further appeal is initiated pursuant to [N.J.S.A. 43:21-6(e)]." N.J.S.A. 43:21-6(c). Freda filed a timely appeal.

N.J.S.A. 43:21-6(e) provides:

> The [Board] may on its own motion affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it.
>
> [(emphasis added).]

[1] Athenia has not participated in the appeal.

The Board itself invoked its full jurisdiction under this section when it notified Freda of its receipt of her appeal, and that the Board would "take jurisdiction over any and all issues arising from the . . . Tribunal decision regarding the determination(s) of the deputy/director."

We discussed the scope of the Board's authority under section 6(e) many years ago in Charles Headwear, Inc. v. Board of Review, 11 N.J. Super. 321, 328 (App. Div. 1951), where we said:

> The Board had the power under [N.J.S.A.] 43:21-6(e), which it exercised in the present case, to assume jurisdiction of any claim pending before the appeal tribunal and to hold a hearing thereon. The intent of the statute is that a claim shall go forward in its entirety in each successive step in its consideration. There is no statutory compulsion to remand a claim at any stage of its progress toward final determination. The deputy and the appeal tribunal are, in effect, merely representatives or agents of the Board which is the ultimate fact-finding body. Neither the statute nor procedural due process requires a hearing at any particular stage as long as a hearing is accorded before the final order becomes effective.
>
> [(emphasis added).]

In this case, the Board's final decision denied Freda consideration by "the ultimate fact-finding body," whether she committed severe misconduct connected to the work, even though she acted in the timely fashion required by the statute. The Board must have clearly understood that Freda was challenging the merits

of the Tribunal's decision, and certainly could have considered her appeal as amended so as to incorporate the Tribunal's earlier decision. See Von Ouhl v. Bd. of Review, 254 N.J. Super. 147, 153 (App. Div. 1992) (citing Hopkins v. Bd. of Review, 249 N.J. Super. 84, 89-90 (App. Div. 1991)).

Because the Board never addressed the merits of Freda's appeal, we remand the matter to the Board. Remand is appropriate for another reason.

In Silver v. Board of Review, 430 N.J. Super. 44, 48-49 (App. Div. 2013), we traced the history of the statutory misconduct disqualification, and attempts by the Department of Labor and Workforce Development (the Department) to craft regulations in response to changes in the statute. Although the Legislature decided in 2010 to add to the statute "severe misconduct" as an intermediate level of misconduct — between simple and gross misconduct — the Department had not yet adopted regulations defining the term. Id. at 53-55. Severe misconduct was undefined in N.J.S.A. 43:21-5(b), except by a non-exhaustive list of examples.

We noted the Department's ongoing rulemaking. Id. at 56. At the time, N.J.A.C. 12:17-10.2(a) only defined "misconduct":

> 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 standards of behavior which the employer has the right to expect of an employee.
>
> [Silver, 430 N.J. Super. at 52-53 (emphasis added) (quoting N.J.A.C. 12:17-10.2(a) (2003)).]

We held that "[u]ntil any new definition is promulgated by rule, the definition contained in the present version of N.J.A.C. 12:17-10.2(a) controls, except to the extent it is superseded by the 2010 amendment of the statute." Id. at 55. As a result, misconduct, whether simple or severe, required "wil[l]fulness, deliberateness, intention, and malice." Id. at 58.

The Department's ongoing rulemaking we referred to in Silver resulted in regulations that we reviewed in In re N.J.A.C. 12:17-2.1, 450 N.J. Super. 152, 164 (App. Div. 2017). In particular, the 2015 amendments defined simple misconduct as

> an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior that the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.
>
> [Id. at 165 (emphasis added) (quoting N.J.A.C. 12:17-2.1 (2015)).]

The regulations defined severe misconduct as an act of "simple misconduct" that "is both deliberate and malicious." Id. at 164 (emphasis added) (quoting N.J.A.C. 12:17-2.1 (2015)). The regulations further defined "malicious" as "an act . . . done with the intent to cause injury or harm to another or others or when an act is substantially certain to cause injury or harm to another or others." Ibid. (quoting N.J.A.C. 12:17-2.1 (2015)).

We concluded

> the regulations the Department adopted in 2015 fail to make th[e] critical distinction between simple negligence, on the one hand, and intentional, deliberate, or malicious conduct, on the other hand, at least not consistently. Unfortunately, the literal wording of N.J.A.C. 12:17-2.1 defining and utilizing the term "simple misconduct" confusingly blends concepts of negligence with intentional wrongdoing that cannot be sensibly understood or harmonized.
>
> [Id. at 168.]

As a result, we set aside the regulatory definition of "simple misconduct," which effectively also set aside the definition of "severe misconduct," and ordered the Department to promulgate new regulations within 180 days. Id. at 173. We stayed our decision in the interim.

The Department has yet to adopt new regulations. This court issued an order on November 27, 2017, that granted the Department a further stay until March 1, 2018. In re N.J.A.C. 12:17-2.1, No.

A-4636-14 (order granting time and extending stay) (App. Div. Nov. 27, 2017). The order further provided that the "invalidated" regulations would "continue to be operative" until March 1, 2018, but if the Department failed to adopt new regulations by March 2, 2018, "the nullified provisions shall become unenforceable . . . and the Department and claimants shall be guided by the applicable statutes and case law." Ibid.

We are rapidly approaching the deadline for the Department's adoption of new regulations. Against this unsettled landscape, and because, as mentioned earlier, the Board never considered the merits of Freda's appeal in the first instance, we choose not to exercise original jurisdiction, see Rule 2:10-5, and reluctantly remand the matter to the Board. We do not retain jurisdiction.

Reversed and remanded.