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IN THE
COURT OF APPEALS OF INDIANA

R.M.,	)	
	)	
Appellant-Claimant,	)	
	)	
vs.	)	No. 93A02-1004-EX-364
	)	
REVIEW BOARD OF INDIANA and COMPANY,	)	
	)	
Appellees-Employers.	)	

APPEAL FROM REVIEW BOARD OF THE INDIANA
DEPARTMENT OF WORKFORCE DEVELOPMENT
Cause No. 10-R-135

February 24, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Claimant, R.M., appeals the decision by the Review Board of the Indiana Department of Workforce Development (Review Board) that R.M. was discharged for just cause and thus is not eligible for unemployment benefits.

We affirm.

ISSUES

R.M. raises two issues on appeal which we consolidate and restate as:

(1) Whether a promise made by R.M.'s Employer can be enforced through promissory estoppel; and

(2) Whether the Review Board's decision that R.M was discharged for just cause by his Employer is supported by the evidence.

FACTS AND PROCEDURAL HISTORY

As stated by the Review Board, the facts in the instant cause are as follows:

> The Employer is a state government agency. [R.M.] worked for the Employer full-time as an Inspector for Fire Building Safety. [R.M.] was employed by the Employer from July 1998 until his resignation on April 27, 2009. [R.M.] resigned in lieu of being discharged.
>
> [R.M.] was responsible for inspecting buildings and ensuring that they met fire safety standards as provided under Indiana Code. [R.M.] submitted reports to the Employer detailing the results of his inspections for the various sites he visited. In 2008, the Employer enacted a policy that required inspectors to leave copies of their reports at each site with a person in charge of that site. The Employer also had a policy that required inspectors to sign-in at inspection sites if a sign-in opportunity was available. The Employer has these policies so that the person in charge of a particular site will have a record of an inspector's visit should any concerns arise later.

Sometime in early 2009, the Director of Fire and Building Code Enforcement received allegations from other employees that [R.M.] was not working as reported and was often at home when he claimed to be working. The Director of Fire and Building Code Enforcement also received a complaint from the Plant Manager of a grain processing plant that [R.M.] had never visited his site. The Plant Manager also did not have copies of the inspection reports [R.M.] submitted to the Employer for his site. The Director of Fire and Building Code Enforcement contacted Human Resources regarding these reports and began an investigation. The Employer discovered that [R.M.] failed to perform inspections at two (2) separate grain sites, a grain processing plant and a correctional facility.

[R.M.] reported to the Employer that he inspected buildings at the grain processing plant on May 1, 2007; May 23, 2007; June 26, 2007; and August 7, 2007. The Employer contacted the Plant Manager for the grain processing plant in response to his complaint. The Plant Manager advised the Employer that [R.M.] was not at the site on the dates reported. All visitors are required to report to the plant's guard building and sign-in before entering the facility. [R.M.] did not sign-in at the guard building on any of the dates indicated. Only persons with credentials issued by the plant are authorized to enter the facility without signing in at the guardhouse. [R.M.] did not inspect any buildings at the grain processing plant.

The Employer also contacted the Director of Construction Services for [Indiana Department of Correction] [IDOC]. [R.M.] performed inspections at the correctional facility on January 26, January 29, February 2, February 4, and March 10, 2009. On January 26, February 4, and March 10, 2009, [R.M.] signed in at the facility. [R.M.] did not sign-in for his visits on January 29 and February 2, but the Safety Manager's records indicate his arrival and departure time for both dates. [R.M.] was not required to officially sign-in for January 29 or February 2 because he only observed outside structures and was accompanied by an IDOC employee during the inspections. Anytime [R.M.] reported to the facility to conduct an inspection, it was IDOC policy that the Safety Manager be notified of his presence.

The Employer's records as reported to it by [R.M.] indicated that [R.M.] also inspected buildings at the correctional facility on January 27 and 28, 2009 and February 3, 2009. The Safety Manager did not have records that [R.M.] was at the facility on those dates and did not accompany [R.M.] on any inspections for those dates. Per IDOC policy, the correctional facility's Safety Manager is always notified any time someone arrives to perform an inspection. The Safety

Manager was not notified that [R.M.] reported to the facility for inspections on January 27 and 28, 2009 and February 3, 2009.

The Employer's suspicions regarding the allegations against [R.M.] were raised further when the Director of Fire and Building Code Enforcement reviewed the list of buildings [R.M.] included in his inspection reports. One of the buildings [R.M.] reported inspecting was a large warehouse, over 200,000 square feet in size. Even if [R.M.] only inspected the outside of the structure, it would take him several hours to complete a thorough inspection of the warehouse. [R.M.] indicated in his report that he inspected multiple buildings during that trip, which based on the size of the warehouse, was highly unlikely. The Director of Fire and Building Code Enforcement had personal knowledge regarding the size of the buildings located at the correctional facility. She performed the correctional facility's building inspections prior to its opening. The buildings she inspected included the warehouse and the other buildings indicated in [R.M.'s] reports.

On April 16, 2009, the Director of Fire and Building Code Enforcement, the Deputy Director of Fire and Building Safety, and the Field Supervisor met with [R.M.]. The meeting [w]as conducted as a fact-finding meeting in furtherance of the Employer's investigation. [R.M.] was also notified of the allegations against him and the Employer's findings up to that point. [R.M.] denied the allegations and contended that he performed the inspections as reported. The status of [R.M.'s] employment was not discussed.

On April 17, 2009, [R.M.] received a phone call from the Field Supervisor. The Field Supervisor advised [R.M.] that he could resign from his position with the Employer or be discharged. If [R.M.] chose to resign, he would be able to resign with benefits. If [R.M.] was discharged, he would not receive benefits. [R.M.] tendered his resignation to the Employer on April 27, 2009.

At the Administrative Law Judge hearing, [R.M.] contended that there were no sign-in records for the grain processing plant because he gained access through a construction entrance using his credentials as an inspector for the Employer. He also contended that there were not sign-in records for the correctional facility because he only inspected outside buildings. [R.M.] further contended that the Employer's policy regarding leaving copies of the inspection reports at each site was not uniformly enforced. [R.M.] alleged that a more senior employee never followed this policy.

[R.M.] also provided his personal calendar notes for the dates of January 26, 27, and 28, 2009 to show that he <u>did</u> go to the correctional facility and perform

> inspections on January 27 and 28. His personal notes indicated that inspections were performed on January 27 but none were performed on January 28. For January 28, [R.M.] noted "12 [inches] Snow Sullivan Co declared Snow EMERGENCY." [R.M.] also included an e-mail from the facility's Safety Manager stating that the facility was on lock-down on January 28, 2009 due to heavy snowfall. The Safety Manager's email further stated that [R.M.] "did not call or visit" the facility on January 27 or 28, 2009.
>
> Because the parties presented conflicting versions of the events leading to [R.M.'s] separation, the Review Board must make a credibility determination. The Review Board does not find [R.M.] credible. [R.M.] contends he inspected facilities at the grain processing plant but proffers no proof of his presence other than the contention that he was able to gain access through an alternate entrance with his credentials as an inspector for the Employer. However, only persons with credentials issued by the plant are excused from signing in at the guard house, and [R.M.] did not have credentials issued by the plant. The Plant Manager also furnished copies of the sign-in logs for the dates [R.M.] reported that he was at the plant, but [R.M.'s] name is not on any of them. Therefore, [R.M.] did not perform inspections at the grain processing plant on May 1, 2007; May 23, 2007; June 26, 2007; and August 7, 2007.
>
> Furthermore, the conflicts in [R.M.'s] own testimony and evidence regarding inspections performed at the corrections facility on January 27 and 28 cannot be reconciled. The information contained in [R.M.'s] Exhibit 3 only further supports the Employer's suspicions that he did not perform the inspections as reported. [R.M.] failed to offer any explanation regarding the date of February 3, 2009. Consequently, the Review Board finds the Employer to be more credible.

(Appellant's App. pp. 2-5).

Consequently, in its Order of January 11, 2010, the Review Board concluded that the Employer discharged R.M. for just cause and therefore, R.M. is not entitled to unemployment benefits.

R.M. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

The Indiana Unemployment Compensation Act provides that any decision of the Review Board shall be conclusive and binding as to all questions of fact. Ind. Code § 22-4-17-12(a). Review Board decisions may, however, be challenged as contrary to law, in which case the reviewing court examines the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of fact. I.C. § 22-4-17-12(f). "Under this standard, we review determinations of specific or basic underlying facts, conclusions or inferences drawn from those facts, and legal conclusions. *Brown v. Indiana Dept. of Workforce Dev.*, 919 N.E.2d 1147, 1150 (Ind. Ct. App. 2009).

When reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings. *Id*. Our review of the Review Board's findings is subject to a substantial deference standard of review. *Id*. We neither reweigh the evidence nor assess witness credibility and we consider only the evidence most favorable to the Review Board's findings. *Id*. We will reverse the decision if there is no substantial evidence to support the Review Board's findings. *Id*.

II. *Promissory Estoppel*

R.M. now contends that the Review Board's decision was contrary to law because it failed to apply the doctrine of promissory estoppel with respect to the Field Supervisor's promise that R.M. would be entitled to benefits if he resigned. Specifically, R.M. interprets

these "benefits" to mean unemployment benefits. He maintains that relying on that promise, he submitted his resignation and applied for unemployment benefits.

In *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570, 581 (Ind. 2007), our supreme court noted that promissory estoppel is not generally applicable against government entities for the actions of public officials. "If the government could be estopped, then dishonest, incompetent or negligent public officials could damage the interests of the public. At the same time, if the government were bound by its employees' unauthorized representations, then government itself could be precluded from functioning." *Id*. (citing *Samplawski v. City of Portage*, 512 N.E.2d 456, 459 (Ind. Ct. App. 1987)).

Nevertheless, every general rule is subject to exceptions and thus "estoppel may be appropriate where the party asserting estoppel has detrimentally relied on [a] governmental entity's affirmative assertion or on its silence where there was a duty to speak." *Biddle*, 860 N.E.2d at 581. But the government will not be estopped in the absence of clear evidence its agents made such representations. *Id*. Moreover, a party asserting promissory estoppel must establish five elements: (1) a promise by the promissory (2) made with the expectation that the promisee will rely thereon (3) which induces reasonable reliance by the promise (4) of a definite and substantial nature and (5) injustice can be avoided only by enforcement of the promise." *Id*.

The record reflects that at the hearing before the administrative law judge, R.M.'s Field Manager testified that he offered R.M. the opportunity to resign with benefits but he clarified that "we didn't really discuss the benefits. I advised [R.M.] to talk to [] the

personnel person for our department." (Appellant's App. p. 26). While we agree with R.M. that the promise of "benefits" might have been an incentive to resign his position, this promise without any further explanation with respect to its content fails to be of a definite and substantial nature as contemplated by our supreme court in *Biddle*. Therefore, we cannot conclude that the Review Board acted contrary to law by refusing to apply the doctrine of promissory estoppel.

III. *Just Cause*

Next, R.M. claims that there is no evidence to support the Review Board's conclusion that he was discharged from his employment for just cause. The purpose of the Unemployment Compensation Act is to provide benefits to those who are involuntarily out of work, through no fault of their own, for reasons beyond their control. *Wasylk v. Review Bd. of Indiana Employment Sec. Div.*, 454 N.E.2d 1243, 1245 (Ind. Ct. App. 1983). The employer bears the initial burden of establishing that an employee was terminated for just case. *Coleman v. Review Bd. of Indiana Dept. of Workforce Dev*. 905 N.E.2d 1015, 1019-20 (Ind. Ct. App. 2009). Just cause includes discharge for any breach of duty in connection with work which is reasonably owed an employer by an employee. Ind. Code § 22-4-15-1(d)(9). If an employer meets this burden, the claimant must present evidence to rebut the employer's *prima facie* showing. *Barnett v. Review Bd. of the Ind. Emp. Sec. Div.*, 419 N.E.2d 249 (Ind. Ct. App. 1981). *Id*.

R.M. presents us with a dual argument, focusing separately on the Review Board's findings with respect to the grain processing plant and its findings regarding the inspections

at the correctional facility. Specifically, with respect to the grain processing plant, R.M. points to the contradicting evidence where he submitted copies of his personal calendar reflecting his attendance at the plant versus the plant manager's sign-in sheets which do not contain R.M.'s signature. Turning to R.M.'s visits at the correctional facility, R.M. alleges that the Review Board ignored competent evidence it should have considered. In essence, R.M.'s allegation centers on the change in claim by his Employer. "Instead of addressing whether [R.M.] was at the facility on January 27, 2009, [the Employer] changed her accusation and contended that [R.M.] could not have physically performed the building inspections in the time indicated in his reports." (Appellant's Br. pp. 20-21).

Distilling R.M.'s argument to its bare bones, it becomes clear that he contests the weight given by the Review Board to certain evidence and witnesses. As we have stated numerous times before, our review of the Review Board's findings is subject to a substantial deference standard of review and as such, we neither reweigh the evidence nor assess witness credibility. *See Brown*, 919 N.E.2d at 1150. Moreover, in its findings, the Review Board specifically addressed this contradictory evidence presented by the Employer and R.M. The Review Board explicitly stated

> Because the parties presented conflicting versions of the events leading to [R.M.'s] separation, the Review Board must make a credibility determination. The Review Board does not find [R.M.] credible. [R.M.] contends he inspected facilities at the grain processing plant but proffers no proof of his presence other than the contention that he was able to gain access through an alternate entrance with his credentials as an inspector for the Employer. However, only persons with credentials issued by the plant are excused from signing in at the guard house, and [R.M.] did not have credentials issued by the plant. The Plant Manager also furnished copies of the sign-in logs for the dates [R.M.] reported that he was at the plant, but [R.M.'s] name is not on any

> of them. Therefore, [R.M.] did not perform inspections at the grain processing plant on May 1, 2007; May 23, 2007; June 26, 2007; and August 7, 2007.
>
> Furthermore, the conflicts in [R.M.'s] own testimony and evidence regarding inspections performed at the corrections facility on January 27 and 28 cannot be reconciled. The information contained in [R.M.'s] Exhibit 3 only further supports the Employer's suspicions that he did not perform the inspections as reported. [R.M.] failed to offer any explanation regarding the date of February 3, 2009. Consequently, the Review Board finds the Employer to be more credible.

(Appellant's App. p. 5).

We decline R.M.'s invitation to reweigh the evidence and reconsider the credibility of witnesses. Consequently, we affirm the Review Board's decision.

CONCLUSION

Based on the foregoing, we conclude that the Review Board properly decided that R.M. had been terminated for just cause and therefore was not eligible to receive unemployment benefits.

Affirmed.

ROBB, C.J., and BROWN, J., concur.