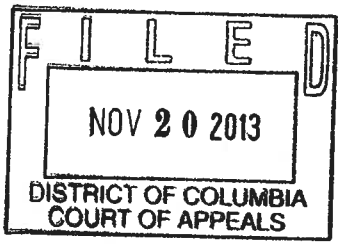
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12-AA-1639

BEHAVIORAL RESEARCH ASSOCIATES, INC., PETITIONER,

v.

MARK A. LOVE, RESPONDENT.



Petition for Review of a Decision
of the Compensation Review Board of the
District of Columbia Department of Employment Services
(OAH- DOES-1073-12)

(Submitted November 12, 2013 Decided November 20, 2013)

Before MCLEESE, *Associate Judge*, and NEWMAN and FERREN, *Senior Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Behavioral Research Associates (BRA) seeks review of an administrative law judge's order affirming Mark Love's eligibility for unemployment benefits. BRA contends that the evidence is insufficient to support the judge's factual findings and conclusions. We affirm.

I. Facts and Proceedings

BRA provides care for mentally disabled individuals placed in its facilities by the District of Columbia. BRA hired Love to serve as a direct care staff counselor. In June 2012, Love's employment was terminated and he filed for unemployment compensation. BRA responded that Love had been discharged for misconduct, disentitling him to benefits under D.C. Code § 51-110. A Department of Employment Services claims examiner concluded that Love was not disqualified from obtaining benefits because he had received "permission from his supervisor before he left and his shift was covered by another employee." Thus, BRA had not proved job related misconduct. BRA sought review by an administrative law judge (ALJ) at the Office of Administrative Hearings (OAH).

At the hearing, Love's supervisor, Andrea Graham, testified on behalf of BRA that during Love's orientation, he was informed of the following policy:

> **Leaving while on duty** — At no time are you to leave the facility while you are on duty unless authorized by management. If there is an emergency[,] management must be contacted and proper coverage must be established and in the facility prior to you leaving the premises. Failure to do so will result in immediate termination of your employment by means of Job abandonment.

Violation of this policy could result in suspension or termination of employment. Graham further testified that on May 31, 2012, Love was assigned to work from 4:00 p.m. until 12:00 a.m. at BRA's Burns Street facility. During a staff meeting at the beginning of this shift, Graham was notified that the residents at Burns Street must be evacuated to a hotel to permit treatment of the facility for bedbugs. The evacuation was successfully completed. While Graham was returning BRA's van to the Burns Street facility she received a call from her own supervisor, Annette House, informing her that House had arrived at the hotel. Upon phoning another employee at the hotel to "make sure everything was correct" Graham was informed that Love was gone.

Graham testified that after learning Love was gone, she called and told him "you need to get back to that hotel because you need to be there." At that point, she said, Love refused to return. Graham denied having any conversation with Love about substituting another employee for the end of his shift that night.

House also testified. She said that she had arrived at the hotel around 11:00 p.m. to make sure that all the staff were there and everything was going well. She learned that Love was not present although assigned to the shift. She then called Graham and told her to return to the hotel. Upon Graham's arrival, House asked, "[W]here is Mr. Love?" To which Graham replied, showing surprise, "[H]e's not here?" Graham then "went in to ask the staff to find out where was he [sic]."

House learned from another BRA employee, Angela Cannon[1] that Love had spoken with her earlier about working the end of his shift, although Cannon told

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[1] Angela Cannon is also referred to as Angela Cox throughout the record.

House that she did not know who had given Love authorization to leave early. House had Cannon complete an unsworn written statement confirming that Love had approached Cannon during the 4:00 p.m. meeting about taking over his shift at 10:00 p.m., which she did. The last sentence of her statement added that "[t]his was not discussed with management." BRA subsequently terminated Love's employment for "job abandonment," citing BRA's policy for "Leaving while on duty."

Love disputed Graham's testimony. He testified that Graham had been present when he asked Cannon to cover his shift for him. Love also testified that he had called Graham at 10:30 p.m. before turning his shift over to Cannon, and that Graham had confirmed that this was "okay." Love added that BRA's leave policy did not specify that requests for leave be written, but he acknowledged that employees generally put such requests in writing "to cover each other."

In support of his testimony, Love introduced a sworn affidavit from Michael Green, another former BRA employee, who stated that he had heard Love ask Cannon to cover for him at the 4:00 p.m. meeting. The affidavit also attested that Love had told Green that Graham was aware of the coverage. Finally, the affidavit stated that Green had been in the room with Love when he had called Graham to inform her that Cannon was at the hotel and that Love was leaving for the night.

After the hearing, the ALJ issued a final written order concluding that BRA had failed to meet its burden to demonstrate Love's misconduct. Confronted with the two contradictory accounts, the ALJ found Love's "scenario" was "more plausible" and affirmed the claims examiner's determination that Love was eligible for benefits.

II. Discussion

In seeking review, BRA argues that the ALJ erred in finding that Love had approval to leave early on May 31, 2012, because this finding is not supported by substantial evidence. BRA further contends that Love, in any event, was disqualified from receiving benefits because he did not follow the policy, alleged to be mandatory, that a request for substitution be made in writing.

A. Standard of Review

We review the ALJ's final order to determine whether it is "supported by substantial evidence in the record considered as a whole or whether the decision is arbitrary, capricious or an abuse of discretion." *Cooper v. District of Columbia Dep't of Emp't Servs.*, 588 A.2d 1172, 1174 (D.C. 1991). Specifically, we must "determine whether (1) OAH made findings of fact on each materially contested issue of fact, (2) substantial evidence supports each finding, and (3) OAH's conclusions flow rationally from its findings of fact." *Hamilton v. Hojeij Branded Food, Inc.*, 41 A.3d 464, 472 (D.C. 2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ferreira v. District of Columbia Dep't of Emp't Servs.*, 667 A.2d 310, 312 (D.C. 1995) (citation omitted). We will affirm findings of fact supported by substantial evidence "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Id.* In examining the findings, we give due deference to the credibility determinations of the ALJ, who had the opportunity to hear and evaluate the testimony and related evidence presented. *See Kennedy v. District of Columbia*, 654 A.2d 847, 856 (D.C. 1994). However, we review *de novo* the ALJ's ultimate legal conclusion that Love's actions did not constitute misconduct. *See Hamilton*, 41 A.3d at 472.

B. Statute and Regulations

A terminated employee who satisfies the basic requirements of the District of Columbia Unemployment Compensation Act is presumed to be eligible for unemployment benefits. D.C. Code § 51-109 (2012 Repl.); *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009). But an individual will be disqualified from receiving benefits if discharged for misconduct, D.C. Code § 51-110 (b) (2012 Repl.), which the employer has the burden of proving. 7 DCMR § 312.2; *Odeniran*, 985 A.2d at 424-25. Misconduct may be "gross" or "simple," 7 DCMR § 312.3, but even simple misconduct requires that the employee act "with 'intentionality' of its equivalent" (*e.g.*, "conscious indifference" or "reckless disregard") to violate employer rules. *Scott v. Behavioral Research Assocs.*, 43 A.3d 925, 931 (D.C. 2012).[2]

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[2] BRA argued before the ALJ, and renews the argument here, that Love had committed "gross misconduct." We review with an eye to both levels of misconduct because a finding of either would disrupt Love's benefits. 7 DCMR § 312.1 *et seq.*

C. Analysis

We begin with the ALJ's factual findings. He found ("a more plausible scenario") that:

> Ms. Graham approved [Love's] request for a shift substitute — perhaps not thinking the matter through completely because of the hectic situation that day — and then realized, belatedly, when Ms. House was in the hotel lobby, that [Love's] absence would be problematic from Ms. House's perspective. Ms. Graham's testimony about her call with [Love] did not, surprisingly, focus on her concern that [Love] was absent without leave[,] but[] rather, her desire that he return to the hotel. Had she been entirely surprised about his absence, she might have been expected to focus more keenly on the fact that he was absent without leave.

The ALJ acknowledged the contrary position presented by Graham and supported by Cannon's written note, but found it less persuasive. Instead, the ALJ credited Love's testimony, as supported by Green's affidavit.[3]

BRA argues that the ALJ erred in making his factual findings because other scenarios were "equally plausible." Our review, however, is limited to determining whether the ALJ's finding was supported by substantial evidence. We will not disturb supported findings regardless of other plausible factual determinations that the ALJ could have made, but did not make, from contrary evidence. *See Ferreira*, 667 A.2d at 312. On our review of the record, we find substantial evidence to support the ALJ's factual finding that Love received oral permission to leave early, and we will not disturb that finding.

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[3] The ALJ acknowledged the potential bias Green may have had against BRA because he had been discharged for sleeping on the job the same night that Love was absent from the hotel. However, the ALJ made specific findings as to why he still found the affidavit credible — that it was "more explicit and more supportive of Claimant's position" than Cannon's brief, unclear statement was for BRA — and we will not disturb the ALJ's determination of which statement he found more credible. *See Ferreira*, 667 A.2d at 312.

BRA next argues that, even if Love had oral permission to leave early, he committed misconduct nonetheless by not complying with the required procedure — written permission — for substitution. The ALJ concluded, to the contrary, that formal written permission was not always required for shift changes. The evidence produced at the hearing provides substantial support for this conclusion. The "Leaving while on duty" policy, quoted above in Part I., does not mention a writing requirement. Moreover, House, who deals with all human resources issues at BRA and makes sure that all policies are implemented, testified that she had never seen a BRA policy requiring coverage changes to be made in writing. Love testified that the employees generally put substitution requests in writing, but that this was not a formal requirement. Finally, supervisor Graham acknowledged that she had made a different, non-written shift change that same night "because this was an emergency situation." We therefore will not disturb the ALJ's determination that there was no mandatory policy for formal written coverage requests, and that even if there were, it was relaxed on May 31, 2012, because, according to the ALJ, that was a "particularly unusual and confusing day."

Finally, we examine *de novo* whether Love committed misconduct based upon the facts found by the ALJ. To justify a misconduct ruling, gross or simple, BRA must have proved by a preponderance of the evidence that Love intentionally violated a consistently enforced company policy. 7 DMCR §§ 312.2, 312.7; *Scott*, 43 A.3d at 929 n.5, 931. Taking the ALJ's factual findings that Love obtained oral permission to leave early, and that a policy of requiring written permission was not consistently enforced (if ever it existed), we conclude that BRA has not carried its burden. Because BRA failed to produce evidence that Love intentionally violated a consistently enforced policy, we may not overturn the ALJ's ruling that Love is "qualified to receive unemployment benefits."

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For the foregoing reasons, the final order of the Office of Administrative Hearings is hereby

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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