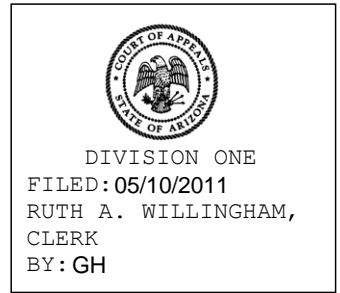


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



BETTY B. CRUZ,) 1 CA-UB 10-0001
)
Appellant,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC)
SECURITY, an Agency,) (Not for Publication -
) Rule 28, Arizona Rules
and) of Civil Appellate Procedure)
)
AMERICANS FOR A BETTER TOMORROW,)
)
)
Appellees.)
)

Appeal from the Appeals Board of the Department of Economic
Security of the State of Arizona

A.D.E.S. Appeals Board No. U-1101444BR

AFFIRMED

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W E I S B E R G, Judge

¶1 Betty Cruz appeals from the Arizona Department of Economic Security ("ADES") Appeals Board decision denying her claim for unemployment benefits on the ground that she voluntarily quit her employment without good cause. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Cruz had been employed by Americans for a Better Tomorrow ("AFBT") since March 2006. E. Goddard was the CEO of AFBT. In November 2006, Cruz began working under a federal grant as an abstinence education counselor under the immediate supervision of J. Leveen.

¶3 According to Goddard's testimony at the Appeal Tribunal hearing, federal auditors of AFBT told her to institute procedures for written evaluations of employees' performance, rather than making "verbal corrections." Goddard said there were "two instances that [AFBT] needed to correct with Ms. Cruz." Goddard prepared two memoranda dated August 12, 2008, and scheduled a meeting that afternoon with Cruz and Leveen to discuss them.

¶4 One memo stated that Cruz had prepared a presentation to a donor that Cruz knew required Goddard's prior approval. Because Cruz finished the project after hours, she had not

obtained Goddard's approval before presenting it to the donor. The memo indicated that Cruz needed to improve in areas of "diligence and time-management," but noted that "the purpose of this memo is to be a reminder and motivator for Ms. Cruz to be the top-notch employee she has the capacity to be." The other memo stated that Cruz had been unable to locate a key she had been given to a building in which AFBT had previously leased space. The memo indicated that "Ms. Cruz is ready and willing to take responsibility for changing the locks, if that proves necessary."

¶15 Goddard testified that the purpose of the meeting was to make Cruz aware that "these were serious issues." Goddard did not intend to discharge, suspend or demote Cruz. When Goddard began discussing the memos, Cruz became "visibly upset." Goddard assured Cruz that the meeting was not to terminate her, but to correct her behavior. Goddard said she asked Cruz to sign the memos "to acknowledge them and [to acknowledge] that she understood the seriousness of it," but Cruz refused to either read or sign the memos. She told Goddard at least twice that "she would rather resign than sign the memos." When Cruz told Goddard she thought she was being treated differently than other employees, Goddard apologized to Cruz for "any perceived slight."

¶16 Although Cruz admitted she had failed to obtain prior approval for the donor presentation and did not possess the office key, Goddard would not have terminated Cruz for those reasons or for refusing to sign the memos. Admittedly, Goddard did not specifically tell Cruz that she would not be terminated if she did not sign the memos. However, after Cruz refused to sign them, Goddard "encouraged her not to resign," told her that she merely wanted to "correct behavior" and that "she had great potential working [for] the community." Goddard expressed her appreciation for Cruz's work, saying that "she had done many great things in the community" and again stated that the meeting was "not about termination." Goddard offered Cruz a severance package because she "cared for Ms. Cruz and her daughter," but Cruz said "she had more dignity than to take our money." Cruz then walked out of the meeting.

¶17 On August 13, 2008, Leveen wrote a memorandum to Cruz's file, admitted as an exhibit at the hearing, to memorialize the August 12 meeting. Leveen corroborated Goddard's testimony and stated that "When Ms. Cruz was asked to sign the memos to acknowledge that they had been presented to her and placed in her file, she refused. She declared that she would be resigning, effective immediately." Leveen continued, "Mrs. Goddard expressed her desire that Ms. Cruz remain an employee and praised Ms. Cruz's efforts as an employee. Mrs.

Goddard restated that this meeting was to correct behavior, not a termination meeting." Leveen stated that, "Ms. Cruz reiterated her desire to leave, based on what she described as unfair treatment" and that after she refused the severance package, she "restated her intentions to leave, left Mrs. Goddard's office, packed her things, turned in her office key, and vacated the . . . office."

¶18 According to Cruz's testimony, when she went into Goddard's office, Goddard told Cruz that she could sense that something was wrong and that Cruz was "harboring ill feelings." She asked Cruz, "Well, tell me how you feel." Cruz told Goddard that she felt she had been singled out and treated unfairly. Goddard replied that she was unaware that Cruz had felt "resentment" toward her for "many years" and told her, "if you were harboring such feelings, I don't want you to return."

¶19 They discussed the missing key and although Cruz had given the key to a former employee and intended to get it back from her, she did not tell that to Goddard. Because Cruz knew this was a serious issue, she said she was willing to accept full responsibility. Cruz alleged she was unable to obtain the required approval for the donor project because she had learned of it the day before the presentation, was not allowed to work on the outside project during regular working hours, and had to complete it at home.

¶10 She said that when Goddard told her about the content of the memos, she was upset and would not look at them or sign them because they were not correct. However, Cruz denied telling Goddard that she would rather resign than sign the memos. Cruz said that after Goddard told her not to return, Goddard offered her a severance package, but that she refused it because she felt Goddard was trying to "belittle" her.

¶11 Cruz stated that when she left the meeting, Leveen followed her and asked for her keys to the new building, and that she did not take her personal items when she left. Cruz said she had no doubt that Goddard had discharged her. Cruz did not, however, ask Goddard or Leveen if she had been terminated, but just "assumed it." Cruz acknowledged she was emotional and crying during the meeting.

¶12 An ADES deputy determined that Cruz was eligible for unemployment benefits, and AFBT challenged that determination. Following a hearing on December 8, 2008, the Appeal Tribunal set aside the deputy's determination and concluded that Cruz voluntarily quit AFBT without good cause.¹ The Appeal Tribunal found that AFBT had two concerns about Cruz's work performance,

¹The Appeal Tribunal initially issued a decision on December 30, 2008. On review, in February 2009, the Appeals Board remanded the matter because the Appeal Tribunal's decision did not make a determination regarding whether the separation was a quit or a discharge. On remand, in May 2009, the Appeal Tribunal issued its final decision.

but that Cruz would not have been discharged or disciplined because of those concerns; that Goddard prepared two memos addressing the issues and called the August 12, 2008 meeting to discuss the memos; that Goddard asked Cruz to sign the memos to document that such discussion had taken place; that without reading the memos, Cruz said she would rather resign than sign them; that Goddard expressed her desire that Cruz remain an employee, but Cruz restated her intention to resign, left, gathered her personal belongings and turned in her key. The Appeal Tribunal found that Cruz did not have good cause for voluntarily quitting and that her actions in refusing to read or discuss the memos were not those "of a reasonably prudent worker desirous of maintaining employment."

¶13 Cruz pursued an administrative appeal. She claimed she had never expressed her intention to resign and was led to believe that if she did not sign the memos, she would no longer be employed. She also requested that the Appeals Board consider new evidence of a transcript of Goddard's testimony in connection with a discrimination complaint filed with the City of Phoenix by a former AFBT employee. The Appeals Board affirmed the Appeal Tribunal's decision, adopting its findings of fact, reasoning, and conclusions of law. The Appeals Board noted that the Appeal Tribunal found the employer's testimony more credible than that of Cruz and concluded that "we do not

find substantial evidence in the record to overturn the Appeal Tribunal's assessment of credibility." The Appeals Board also declined to exercise its discretion to supplement the record. It determined that Cruz did not show either that she could not have presented such information at the Appeal Tribunal hearing with the exercise of due diligence or that the facts established some unusual circumstance that would justify supplementing the record. Cruz timely requested judicial review by this court. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993 (Supp. 2010).

DISCUSSION

¶14 Cruz claims the Appeals Board, in affirming the decision of the Appeal Tribunal, improperly weighed the evidence in support of ABFT and that ABFT failed to meet its burden of proving that Cruz voluntarily quit her employment without good cause. She also claims the Appeals Board erred by affirming the Tribunal's decision without considering Arizona Administrative Code ("A.A.C.") R6-3-50138, and abused its discretion in refusing her request to supplement the record with new evidence.

¶15 We uphold the findings of fact of the Appeals Board unless they are arbitrary, capricious, or demonstrate an abuse of discretion. *Castaneda v. Ariz. Dep't of Econ. Sec.*, 168 Ariz. 491, 494, 815 P.2d 418, 421 (App. 1991). We will affirm the board's decision as long as a "reasonable interpretation of

the record" supports it. *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545, 898 P.2d 492, 494 (App. 1995). We view the evidence in the light most favorable to upholding the decision of the appeals board and will affirm if the decision is supported by substantial evidence. *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). Where there is a "conflict of testimony," we "affirm the appeal tribunal's decision because the credibility of witnesses is a matter peculiarly within the province of the trier of fact[]." *Anamax Mining Co. v. Ariz. Dep't of Econ. Sec.*, 147 Ariz. 482, 486, 711 P.2d 621, 625 (App. 1985). We are not bound by the legal conclusions of the appeals board and may independently determine whether it properly interpreted the law. *Avila*, 772 P.2d 602.

Voluntary Quit Without Good Cause

¶16 Under A.R.S. § 23-775(1) (Supp. 2010), "an individual who has left work voluntarily without good cause" shall be "disqualified for benefits." For purposes of this statute, "left work voluntarily" means that "a worker terminated the worker-employer relationship and intended to do so." A.A.C. R6-3-5005(A)(2). The separation from employment is a quit "when the worker acts to end the employment and intends this result," whereas the separation is a discharge "when the employer acts to end the employment and intends this result." A.A.C. R6-3-

50135(A)(1)(a),(b). The "critical factor" in determining whether the separation is a quit "is the volition of the employee." *Pettypool v. Ariz. Dep't Econ. Sec.*, 161 Ariz. 167, 171, 777 P.2d 230, 234 (App. 1989). To that end, ADES considers the parties' remarks, actions, intentions and who initiated the separation. A.A.C. R6-3-50135(A)(2). "A party's expression of criticism . . . does not by itself constitute notice of intent to quit or to discharge." A.A.C. R6-3-50135(A)(3). When a worker "states that he did not leave voluntarily, and the employer maintains he did, the burden of proof shifts to the employer to establish that there has been a quit." A.A.C. R6-3-50190(B)(2)(c). Also, "the burden of proof rests upon the individual who makes a statement" and "[i]f a statement is denied by another party, and not supported by other evidence ,it cannot be presumed to be true." A.A.C. R6-3-50190(B)(2) and(B)(2)(a).

¶17 Although the parties disagree in major respects on what occurred at the August 12 meeting, and AFBT had the burden to prove that Cruz quit, there was substantial evidence to support the Board's determination that Cruz voluntarily quit. Goddard testified she had no intention of discharging Cruz and prepared the memos at the suggestion of federal auditors. She called the meeting to discuss the content of the memos with Cruz for the purpose of correcting two aspects of her performance.

Goddard asked Cruz to sign the memos to acknowledge that she had received them. Cruz, however, refused to read or sign the memos. Goddard testified that Cruz told her at least twice that she would rather resign than sign the memos.

¶18 Although Cruz believed the criticisms were unjustified and that she was being unfairly singled out, Goddard attempted to assure Cruz that she was not being terminated and that she was a valuable employee. After Cruz said for a second time that she would rather resign than sign the memos, Goddard offered her a severance package because she was concerned for Cruz and her daughter. Believing the offer to be an affront, Cruz refused the severance package, left the meeting, turned in her key, took her personal belongings and left.

¶19 On appeal, Cruz argues that even assuming she told Goddard she would rather resign than sign the memos, she claims the statement "was an emotional expression of her frustration at Goddard's repeated demands that she sign what she believed were unreasonable disciplinary memos." Contrary to Goddard's testimony, Cruz claims Goddard instructed her not to return. We, however, do not reweigh the evidence, resolve conflicts in testimony or make credibility determinations. *See Rogers v. Ariz. Dep't of Econ. Sec.*, 132 Ariz. 138, 141, 644 P.2d 292, 295 (App. 1982) (arguments regarding weight to give conflicting testimony properly addressed to the trier of fact, not this

court). Furthermore, Cruz's reliance on A.A.C. R6-3-50190(B)(2)(a) is misplaced because Goddard's statements were corroborated by the admissible statements of Leveen in her August 13 memorandum.² Also, contrary to Cruz's assertions, it was not an indisputable fact that Cruz was given the "illusory" choice between signing the memos or being terminated. See *Pettypool*, 161 Ariz. at 170-71, 777 P.2d at 233-34 (citing *Green v. Bd. of Review of Indus. Comm'n*, 728 P.2d 996 (Utah 1986)). The Appeal Tribunal determined and the Appeals Board agreed that Goddard's version of the August 12 meeting was more credible than Cruz's account. This finding is neither arbitrary, capricious nor does it demonstrate an abuse of discretion.

¶20 Once an employer establishes that a worker voluntarily quit, the worker has the burden of proving that he left "for nondisqualifying reasons." A.A.C. R6-3-50190(B)(2)(b). The "commonly accepted test of "good cause" is, "What would the reasonable worker have done under similar circumstances?" A.A.C. R6-3-50210(A). "A reasonable worker will not quit impulsively," will take steps to "adjust the grievance" and will "attempt to maintain the employment except when this is impossible or impractical." A.A.C. R6-3-50210(C). If a worker

²Evan if Goddard's testimony had not been corroborated and could not be presumed to be true under A.A.C. R6-3-50190(B)(2)(a), this does not preclude the trier-of-fact from finding it to be true.

believes the employer intends to discharge her, she "shall take steps, prior to leaving, to find out if [she] is, in fact, to be discharged." A.A.C.R6-3-50135(C). If she fails to do so and she is not to be discharged, then she "leaves work voluntarily." *Id.*

¶21 Here, Goddard reasonably requested that Cruz read and sign the memos. Cruz acted unreasonably by refusing to read them and indicated she would rather resign than sign the memos. Although she assumed she was being discharged, she made no attempt to clarify if such was the case. She expressed her indignation at what she perceived to be unfair criticism, but made no attempt to resolve her grievances or maintain her employment. Cruz has not shown that maintaining employment would have been impossible or impractical. There is substantial evidence that Cruz voluntarily quit her employment without good cause.

Failure to Consider R6-3-50138

¶22 Cruz claims the Appeals Board erred in affirming the Appeal Tribunal's determination that Cruz voluntarily quit without good cause without considering A.A.C. R6-3-50138. ADES claims Cruz waived the issue because she did not raise it below and that in any event, there was substantial evidence to support the Board's finding that Cruz quit without good cause as defined in A.A.C. R6-3-50138. Although Cruz did not cite that

regulation, because her allegations and arguments were sufficient to come within its purview, there was no waiver.

¶123 Under that regulation, a worker "may leave because of disciplinary action taken against him by his employer." He leaves without good cause if either "[t]he event which resulted in the disciplinary action was within his control or [s]he was responsible for the event." A.A.C. R6-50138(A)(1),(2). The worker leaves with good cause if she "makes a reasonable attempt to adjust [her] grievance prior to leaving and the disciplinary action was . . . unreasonable." A.A.C. R6-3-50138(B)(2).

¶124 Cruz claims that she was "repeatedly asked to sign two unreasonable disciplinary memos." Then, "when she tried to adjust her grievance with Goddard, she was instructed not to return" and "realized that any further attempts would be futile." But to the extent the memos constituted disciplinary action, Cruz acknowledged she was required to obtain prior approval for the donor project and took full responsibility for the missing key. Further, even assuming the disciplinary action regarding the donor project was unreasonable because Cruz was unable to obtain prior approval, Cruz made no attempt to resolve her grievance with Goddard prior to leaving. Cruz could have expressed her concerns and corrected anything in the memos that was misleading. Although Cruz claims that after Goddard told her not to return, any attempts to resolve her grievances would

have been futile, the record does not support her contention. There is substantial evidence that Cruz voluntarily quit without good cause under R6-3-50138.

Refusal to Consider New Evidence

¶25 Cruz also argues that the Appeals Board abused its discretion in refusing to consider new evidence of Goddard's testimony in a hearing before the Phoenix Equal Opportunity Department ("EOD") regarding a discrimination complaint against AFBT. She challenges the Board's finding that she could have obtained such evidence with due diligence because the Appeal Tribunal hearing occurred on December 8, 2008, but the EOD hearing did not occur until March 5, 2009. She also contends the new evidence showed an inconsistency in Goddard's testimony at the two hearings about when the federal auditors instructed her to begin using written reprimands, and that such inconsistency could have been used to impeach her credibility.

¶26 The Appeals Board may order the taking of additional evidence when it reviews an appeal tribunal's decision. A.R.S. § 23-671(E)(2), (F), -672(C) (Supp. 2010). A petition for review to the Appeals Board may be based on "[n]ewly discovered evidence which could not with reasonable diligence have been discovered and produced at time of original hearing." A.A.C. R6-3-1504(A)(1)(c). The decision of the Appeals Board whether to consider new evidence is reviewed for an abuse of discretion.

Avila, 160 Ariz. at 250, 772 P.2d at 604. Although the new evidence may not have been available to Cruz at the Appeal Tribunal hearing, the EOD hearing transcript does not reveal material discrepancies between Goddard's testimony at these hearings that would have resulted in a different credibility assessment and have changed the Appeals Board's findings and conclusions. The Appeals Board did not abuse its discretion in declining to consider the new evidence.

CONCLUSION

¶27 For the foregoing reasons, we affirm the decision of the Appeals Board.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
DONN KESSLER, Presiding Judge

/s/ _____
DIANE M. JOHNSEN, Judge