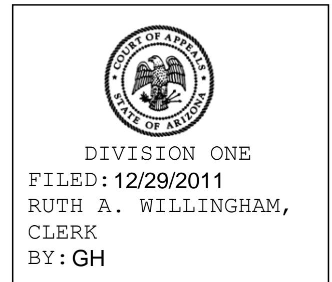
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/29/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IRENE F. RANKHORN,	No. 1 CA-UB 10-0363
Appellant,	DEPARTMENT E
v.	**MEMORANDUM DECISION**
ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an Agency,	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
and	
QUIK MART STORES, INC.,	
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-1190576-BR

REVERSED AND REMANDED

Irene F. Rankhorn — Tucson
Appellant *in Propria Persona*

Thomas C. Horne, Attorney General — Phoenix
By Carol A. Salvati, Assistant Attorney General
Attorneys for Arizona Department of Economic Security

J O H N S E N, Judge

¶1 Irene F. Rankhorn appeals the decision of the Appeals Board of the Arizona Department of Economic Security ("ADES") disqualifying her from unemployment insurance benefits. For the reasons that follow, we reverse and remand for a new hearing.

FACTS AND PROCEDURAL HISTORY

¶2 Rankhorn had worked for two years as assistant manager of a Quik Mart store in Tucson before quitting on March 31, 2010. An ADES deputy found she quit voluntarily without good cause and disqualified her from receiving unemployment benefits. Rankhorn filed an administrative appeal.

¶3 Rankhorn and two representatives of Quik Mart testified at the Appeal Tribunal hearing. Rankhorn admitted she quit her job, but explained that "several incidents" over the three weeks immediately preceding her departure drove her to do so. Rankhorn recounted being told by her supervisor on March 10 to lie to a Health Department inspector, asserted that Quik Mart cut her weekly hours and pay over the last three weeks of March and explained that her supervisor had offered her a manager position on March 4 but Quik Mart later gave the job to an outsider without letting her know in advance and without explanation.[1] She submitted a copy of her resignation letter, in

[1] Rankhorn also complained that on March 11 a co-employee failed to pass on a telephone message that a relative had called to tell her of a death in her family. Because Rankhorn does not explain why the co-employee's conduct should be attributed to

which she had asserted that she had been "treated different" by Quik Mart and "push[ed] out" because she had told her supervisor she "would not lie to a public official." Quik Mart's representatives at the hearing disputed each of these grounds. Rankhorn's supervisor testified he never told Rankhorn to lie, that "she wasn't really cut back" although she was scheduled for "a couple less hours" weekly after the new manager began work, and that he never offered (nor did he have authority to offer) the store manager position to Rankhorn.

¶4 During the hearing, the Tribunal allowed Rankhorn an opportunity to cross-examine both witnesses for Quik Mart; it did not, however, ask either of the witnesses the written questions Rankhorn had filed prior to the hearing. The Tribunal admitted several work schedules Rankhorn provided, but did not address them and explicitly stated, "I'm not quite sure why that is in here." Although the Tribunal acknowledged that Rankhorn had five witnesses waiting on the phone at the time of the hearing, it closed evidence and ended the hearing without calling any of them to testify and without explaining its failure to do so. The transcript of the hearing ends with Rankhorn asking, "Judge? Hello?" and receiving no response.

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the employer, we decline her assertion that it constitutes or contributes to good cause for her decision to terminate employment under the unemployment insurance statutes.

¶5 The Appeal Tribunal affirmed the deputy's decision denying benefits, finding that Rankhorn "left work voluntarily without good cause." The Tribunal explained that Rankhorn's "disappointment" with not receiving the promotion to manager did not constitute good cause to quit and concluded that the other grounds raised by Rankhorn did not constitute good cause.

¶6 Rankhorn petitioned for review of the decision, arguing on several grounds that she had not received "a fair hearing." The Appeals Board affirmed, expressly adopting the Tribunal's findings of fact, reasoning and conclusions of law. On Rankhorn's request for further review the Board again affirmed, stating that "[t]he essential elements of due process were observed."

¶7 Rankhorn then requested review by this court. We granted her application for appeal pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993(B) (2011).[2]

DISCUSSION

¶8 Rankhorn argues on appeal she "did not receive a fair tr[ia]l" because the Appeal Tribunal did not allow her "to use all [her] means to prove" her case, effectively denying her a meaningful opportunity to be heard. We generally will affirm the Board's decision if, viewing the evidence in the light most

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[2] Absent material alterations after the relevant date, we cite a statute's current version.

favorable to upholding the decision, it is supported by any reasonable interpretation of the evidence. *Prebula v. Ariz. Dep't of Econ. Sec.*, 138 Ariz. 26, 30, 672 P.2d 978, 982 (App. 1983). We review *de novo*, however, the Board's legal conclusions and constitutional claims raised on appeal. *Rice v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 199, 201, 901 P.2d 1242, 1244 (App. 1995) (legal conclusions); *Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, 528, ¶ 6, 19 P.3d 1241, 1244 (App. 2001) (constitutional claims).

¶9 An unemployment claimant who has voluntarily left a job must show good cause for quitting. Ariz. Admin. Code ("A.A.C.") R6-3-50190(B)(2)(b). Good cause exists if, from the perspective of a reasonable worker in similar circumstances, the claimant's reasons would justify leaving the employment. A.A.C. R6-3-50210(A).

¶10 A claimant appealing a deputy's denial of benefits has a right to a "fair hearing." A.R.S. § 23-773(B) (2011); A.R.S. § 23-671(D) (2011). The claimant is entitled to an opportunity to present evidence in accordance with principles of procedural due process. A.R.S. § 23-674(A) (2011) ("[O]pportunity shall be afforded all parties to present evidence and argument . . . ."). The constitutional right to procedural due process in an administrative hearing requires nothing less than an "opportunity to be heard . . . in a meaningful manner." *Salas*

v. Ariz. Dep't of Econ. Sec., 182 Ariz. 141, 143, 893 P.2d 1304, 1306 (App. 1995). We reverse for a violation of due process only if the error resulted in prejudice, impairing the substantial rights of a party. *Emp't Sec. Comm'n v. Doughty*, 13 Ariz. App. 494, 496, 478 P.2d 109, 111 (1970); *see County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 598, ¶ 12, 233 P.3d 1169, 1177 (App. 2010) (due process error reversible only if party is prejudiced); *cf.* Ariz. Const. art. 6, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done.").

¶11 At the Appeal Tribunal hearing, Rankhorn testified she had quit in part because her supervisor had instructed her to lie to the health inspector. Moreover, as noted, the Tribunal admitted as evidence Rankhorn's resignation letter, which explained that she "was cut hours [and] treated different[ly] because I told my superior I could not and would not lie to a public official." Her letter continued, "I feel as though everything that could have been done to push me out was." Rankhorn's supervisor denied instructing her to deceive the health department.

¶12 The Tribunal, and later the Appeals Board, discounted Rankhorn's complaint about being instructed to lie. They concluded the alleged order turned out to be "only theoretical"

because the health department inspector did not visit the store and ask about the matter about which Rankhorn alleged she was instructed to lie.

¶13 A reason for leaving employment "consistent with well defined public policy" constitutes good cause for a voluntary quit. A.A.C. R6-3-50210(B). An employer's instruction to an employee to conceal alleged wrongdoing from public inspectors violates public policy. *See Lloyd v. AMF Bowling Ctrs., Inc.*, 195 Ariz. 144, 146, ¶¶ 10-11, 985 P.2d 629, 631 (App. 1999) (describing public policy in context of at-will employment and wrongful termination); *cf.* A.A.C. R9-8-107 (requiring employer to remedy non-critical food-code violations within no more than 90 days (incorporating by reference U.S. Food and Drug Administration Food Code (1999) at ¶ 8-406.11(A))). Arizona recognizes that "an employer should not be able to use the threat of [adverse employment action] to coerce employees into . . . concealing wrongdoing." *Lloyd*, 195 Ariz. at 146, ¶ 11, 985 P.2d at 631. Moreover, an employer may not retaliate against an employee for refusing to accede to the employer's demand to deceive regulators. *Cf.* A.R.S. § 23-1501(3)(c)(i)-(ii) (2011) (Arizona public policy precludes retaliatory firing for employee's refusal to violate Arizona law or for employee's reasonable disclosure of employer's violation of law).

¶14 Given these principles, it is immaterial that it turned out that Rankhorn was not called upon to comply with her supervisor's alleged instruction to lie to the health inspector. The Tribunal and the Appeals Board therefore erred by discounting Rankhorn's allegation because she did not have to carry out the alleged request to lie.

¶15 We note that the Appeal Tribunal explicitly found, and the Appeals Board adopted as a finding of fact, that Rankhorn "did not offer any evidence to show that her supervisor had instructed her to lie to the health department." But Rankhorn's own testimony constituted such evidence. *See* A.A.C. R6-3-50190(A)(1) (oral statement by claimant is acceptable evidence).

¶16 Moreover, the Tribunal closed the record and ended the hearing without calling any of Rankhorn's witnesses and without explaining its failure to do so.[3] The Tribunal may exclude "incompetent, irrelevant, immaterial and unduly repetitious evidence." A.R.S. § 23-674(D). There is nothing in the record, however, compelling the conclusion that the testimony of Rankhorn's witnesses would have been incompetent, irrelevant, immaterial or unduly repetitious. To the contrary, Rankhorn described at least three of the five witnesses she sought to

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[3] The Tribunal offered a belated explanation in "a final note" to its decision, stating that "these witnesses were not called to testify" because "the reasons [Rankhorn] gave for the job separation were personal to her," suggesting the Tribunal found their potential testimony irrelevant.

call at the hearing as having knowledge possibly related to the health department incident. According to Rankhorn's pre-hearing disclosure, one co-worker witnessed "all events" at the store, another "was witness and was at work with me when I helped the Health Department" and a third was "witness to H.D." The Tribunal's failure to call any of Rankhorn's witnesses denied her the "opportunity to be heard . . . in a meaningful manner," violating her right to procedural due process of law. *See Salas*, 182 Ariz. at 143, 893 P.2d at 1306.

¶17 Not only did the Tribunal fail to call Rankhorn's witnesses to testify, it also failed to ask the Quik Mart witnesses the questions Rankhorn submitted prior to the hearing. Two weeks before the Appeal Tribunal hearing, ADES sent Rankhorn a Notice of Hearing setting the hearing time and detailing instructions for preparing for the hearing. The Notice stated, "You also have the right to send relevant written questions to me [the Tribunal]. I will ask these questions if they are received before the hearing. Even if you send questions, I urge you to attend and testify." Pursuant to that instruction, Rankhorn provided written questions for cross-examination of Quik Mart's witnesses. The questions sought to impeach the supervisor's testimony about Rankhorn's potential promotion to manager, examined Quik Mart's policies and procedures for

promotion from within and addressed the circumstances surrounding the reduction in Rankhorn's scheduled work hours.

¶18 Where, as here, "important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). On review, the Appeals Board correctly noted that Rankhorn had been given an opportunity at the hearing to cross-examine the Quick Mart witnesses herself. Nevertheless, "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Id.* at 268-69. Although Rankhorn asked a few questions of a Quik Mart witness, she stopped immediately after the Tribunal mildly reprimanded her for her style of questioning. The pre-hearing instructions the Tribunal sent to Rankhorn had informed her that "[the Tribunal] *will* ask [the] questions if they are received before the hearing." (Emphasis added.) An unemployment claimant reasonably may rely on ADES's written assurances that the Tribunal "will ask [the] questions" rather than attempt to ask the questions herself. Because the Tribunal did not do so in this case, Rankhorn was deprived of the "opportunity to be heard . . . in a meaningful manner." *See Salas*, 182 Ariz. at 143, 893 P.2d at 1306.

¶19 On appeal, ADES contends Rankhorn's claims of error are irrelevant because her real reason for quitting was her

reduced hours, coupled with the company's decision not to promote her. It argues the Board's no-good-cause determination was proper because Rankhorn did not comply with her obligation to attempt to adjust those grievances. Although Rankhorn indeed testified that her "biggest" reason for quitting was that she did not receive the promotion to manager, she never testified that it was her sole reason. As we have explained, the supervisor's alleged instruction to lie to the health inspector could provide an alternative basis for a good-cause determination.

¶20 Further, the alleged withdrawal of the promised promotion was just one component in Rankhorn's claim that Quik Mart retaliated against her when she refused her supervisor's direction to lie to the health inspector. Rankhorn maintains she was "treated different because I told my superior I could not and would not lie to a public official" and that "ever[y]thing that could have been done to push me out was."[4] The three issues – the health department issue, her reduced hours and her failure to receive the promotion – are related in Rankhorn's contention that she had good cause to quit her job. Indeed, her allegation of retaliatory action by her employer may bear on the feasibility of attempting to adjust grievances. *See*

[4] We note that, on this theory, Rankhorn's time sheets and schedules may be relevant to show that she alone was targeted for reduced hours as part of the alleged retaliatory scheme.

A.A.C. R6-3-50210(C)-(D) (requirement that worker attempt to adjust grievance before voluntary quit is waived if "impracticable or impossible, or would obviously not be fruitful").

¶21 Finally, ADES contends that Rankhorn has failed to show prejudice resulting from any procedural violations. On this record, we cannot assume that, had the questions Rankhorn wanted to ask been asked and had the witnesses she wanted to call been called, the outcome would have remained the same.

CONCLUSION

¶22 For these reasons, we reverse and remand for rehearing.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
LAWRENCE F. WINTHROP, Judge