

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Craig Troy Bennett aka :  
Sgt. or CO II., : No. 710 C.D. 2014  
 : Submitted: December 12, 2014  
 Petitioner :  
 :  
 v. :  
 :  
 Unemployment Compensation :  
Board of Review, :  
 :  
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: March 4, 2015

Craig Troy Bennett (Claimant) petitions for review, *pro se*, of the April 1, 2014, order of the Unemployment Compensation Board of Review (UCBR) reversing the decision of a referee to grant Claimant unemployment compensation (UC) benefits. The UCBR determined that Claimant was ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law)<sup>1</sup> due to his discharge from work for willful misconduct. We reverse.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law provides that an employee shall be ineligible for benefits for any week “[i]n which his unemployment is due to his discharge . . . from work for willful misconduct connected with his work.” 43 P.S. §802(e).

Claimant was employed as a Corrections Officer II by the Pennsylvania Department of Corrections (Employer) from April 19, 1993, through June 7, 2013. (UCBR's Findings of Fact, No. 1.) On June 7, 2013, Claimant was discharged for inadequate supervision of inmates because he allowed them to search, inventory, and pack other inmates' property. (*Id.*, No. 2.)

On June 9, 2013, Claimant filed a claim for UC benefits, which was denied by the local service center. (Referee's Decision, 10/23/13, at 1.) On July 31, 2013, Claimant appealed to the referee. (*Id.*) On September 30, 2013, due to the unavailability of its witness, Thorton Felder, Employer requested a continuance, which the referee denied. (UCBR's Findings of Fact, No. 12; Continuance Request, 9/30/13, at 1.)

On October 1, 2013, the referee held a hearing at which Claimant and Employer's representative appeared. (Referee's Decision, 10/23/13, at 1.) The referee admitted 15 exhibits into evidence, including a copy of the Code of Ethics handbook, Claimant's termination letter, and an investigative report. (N.T., 10/1/13, at 4-5.) On October 23, 2013, the referee reversed the service center's determination and granted Claimant UC benefits, concluding that Employer failed to prove that Claimant engaged in willful misconduct. (Referee's Decision, 10/23/13, at 2.) Employer appealed to the UCBR.

The UCBR ordered a remand hearing for the referee to take evidence on its behalf to complete the record because the transcript of the referee's hearing was

incomplete.<sup>2</sup> The UCBR instructed the referee to receive testimony from Felder regarding his nonappearance at the referee's initial hearing and to receive testimony and evidence from Felder on the merits. (UCBR Remand Order, 12/9/13, at 1.)

At the remand hearing, Claimant and two witnesses for Employer appeared along with Employer's representative. (UCBR's Decision, 4/1/14, at 2.) Felder testified that he failed to appear at the October 1, 2013, referee's hearing because his mother suffered a stroke. (UCBR's Findings of Fact, Nos. 9-10, 12; N.T., 1/10/14, at 2.) Felder remained at the hospital with his mother from September 28, 2013, through October 4, 2013. (UCBR's Findings of Fact, No. 11.) The UCBR found Felder credible in establishing good cause for his nonappearance at the initial referee hearing. (UCBR's Decision, 4/1/14, at 2.)

Employer then presented the testimony of Claudine Smith, a witness who was not present at the initial referee's hearing but whose testimony was not objected to by Claimant. Smith's testimony revealed that Claimant had filed a grievance with his union contesting his discharge. (UCBR's Findings of Fact, No. 3.) Claimant, the union, and Employer entered into a pre-arbitration agreement (Agreement), which converted Claimant's discharge into a 12-day suspension from June 10, 2013, through June 25, 2013. The Agreement provided that Claimant would

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<sup>2</sup> The transcript of the October 1, 2013, referee's hearing ends abruptly during Claimant's testimony, prior to any testimony regarding why Claimant was discharged. (N.T., 10/1/13, at 8; UCBR Data Services Memo, 11/10/13, at 1.)

receive back pay from June 25, 2013, through October 22, 2013, and return to work on October 23, 2013.<sup>3</sup> (*Id.*, Nos. 4-5.)

Smith further testified that Claimant failed to return to work on October 23, 2013, or anytime thereafter. (*Id.*, No. 6.) On January 6, 2014, Claimant submitted a resignation letter stating that he retired effective October 23, 2013. (*Id.*, No. 7.) Employer considered Claimant absent without authorization from October 23, 2013, through January 6, 2014.<sup>4</sup> (*Id.*, No. 8.)

The UCBR determined that, for the week ending June 15, 2013, because “[C]laimant agreed to the suspension, [he] admits that his conduct resulting in the suspension was attributable to willful misconduct.” (UCBR’s Decision, 4/1/14, at 3.) The UCBR denied Claimant UC benefits pursuant to section 402(e) of the Law. Claimant now petitions this court for review.<sup>5</sup>

Initially, Employer argues that Claimant waived all of the issues in his petition for review because he failed to raise them in his brief and that Claimant

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<sup>3</sup> The Agreement was not submitted into evidence and is not part of the record before this court.

<sup>4</sup> We note that no testimony was taken at the referee’s initial hearing or the remand hearing regarding why Claimant was discharged, whether Employer had work rules, or whether Claimant violated any of Employer’s work rules. (*See* N.T., 10/1/13, at 1-8; N.T., 1/10/14, at 1-17.)

<sup>5</sup> Our review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

waived all of the issues in his brief because he failed to raise them in his petition for review. We disagree.

In his petition for review to this court, Claimant contends that the UCBR erred in: remanding this case to the referee to take additional evidence; determining that Felder's testimony was credible; and determining that Employer fired Claimant for willful misconduct.<sup>6</sup> Claimant argues in his brief that the UCBR erred in reversing the referee and finding that Claimant engaged in willful misconduct.

Claimant asserts in both his petition for review and his brief that the UCBR erred in determining that he committed willful misconduct. Thus, Claimant preserved that issue for this court's review. Therefore, the issue of Claimant's willful misconduct was not waived and will be addressed.

"Willful misconduct" is defined as: (1) a wanton and willful disregard of the employer's interests; (2) a deliberate violation of the employer's rules; (3) a disregard of the standards of behavior that an employer rightfully can expect from its employees; or (4) negligence that manifests culpability, wrongful intent, evil design, or an intentional and substantial disregard of the employer's interests or the employee's duties and obligations. *Oliver v. Unemployment Compensation Board of Review*, 5 A.3d 432, 438 (Pa. Cmwlth. 2010) (*en banc*). When an employee is discharged for violating an employer's work rule, the employer bears the burden of

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<sup>6</sup> Because Claimant failed to address the first two claims in his brief to this court, they are waived. See *Diehl v. Unemployment Compensation Board of Review*, 4 A.3d 816, 826 (Pa. Cmwlth. 2010).

proving the existence of the rule and the employee's violation of the rule. *Walsh v. Unemployment Compensation Board of Review*, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The burden then shifts to the employee to show good cause for his actions, i.e., that his conduct was justified or reasonable under the circumstances. *Id.*

In this case, the UCBR found that Employer discharged Claimant on June 7, 2013, for inadequate supervision of inmates because he allowed them to search, inventory, and pack other inmates' property. (UCBR's Findings of Fact, No. 2.) Further, the UCBR found that Claimant entered into an agreement with his union and Employer, wherein Claimant's discharge was converted to a 12-day suspension. (*Id.*, No. 4.) The UCBR reasoned that because "the claimant agreed to the suspension, the claimant admits that his conduct resulting in the suspension was attributable to willful misconduct."<sup>7</sup> (UCBR's Decision, 4/1/14, at 3.) Therefore, the UCBR found Claimant ineligible for UC benefits pursuant to section 402(e) of the Law. (*Id.*)

However, there is no testimony or evidence in the record to support the UCBR's determination that Claimant admitted to engaging in willful misconduct. A claimant's agreement with an employer to change a termination into a suspension is not an admission of the conduct that resulted in the suspension. It is merely a settlement between the parties. Without the Agreement being admitted into evidence and testimony regarding the content of the Agreement, the UCBR cannot assume that

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<sup>7</sup> We note that there was no testimony regarding whether the Agreement contained an admission of guilt by Claimant. (*See* N.T., 1/10/14, at 1-17.)

Claimant admitted in the Agreement that he violated Employer's rules and, therefore, engaged in willful misconduct.

Further, Employer failed to present any testimony regarding its work rules or Claimant's violation thereof. Because Employer failed to meet its initial burden of proving that Claimant committed willful misconduct, the burden never shifted to Claimant to show just cause for his actions.<sup>8</sup>

Accordingly, we reverse.

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>8</sup> We note that the UCBR failed to find that Employer had a work rule or that Claimant violated a work rule. Further, the UCBR only made one credibility determination, finding Felder's testimony credible as to why he was unable to attend the initial referee's hearing. Felder did not testify as to the merits. (*See* UCBR's Decision, 4/1/14; N.T., 1/10/14, at 1-17.)

