



from what was expected of Claimant in his employment with the Borough, we affirm the Board.<sup>2</sup>

On December 18, 1981, Claimant was hired as the Borough Manager and Secretary. On October 28, 2009, after a closed executive session, the Borough Council informed Claimant that his employment had been terminated but refused to give him the reason for this action. Claimant applied for unemployment compensation benefits. In response to his application, the Borough responded that it had dismissed Claimant for willful misconduct but did not provide any details. In the absence of any explanation by the Borough, the UC Service Center granted Claimant benefits.

The Borough appealed. It asserted that Claimant had acted improperly in several ways. Claimant had paid the Borough Treasurer to clean the building even though the cleaning contract had not been bid; used the Borough Council President's signature stamp to sign Borough checks without permission; and, in 2008, wrote himself a check for 80 hours of unused personal leave without Borough Council approval. A hearing was held before a Referee.

Megan Dorkoski, who worked in the Borough office, testified on behalf of the Borough. She testified that Claimant instructed her to use the Borough Council President's stamp on approximately ten occasions in the latter part of 2008 to sign checks. She did not recall the payees of the checks or the circumstances under which she used the stamp. In January 2009, she asked the

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<sup>2</sup> The Borough Treasurer, Marian Muldowney, was also terminated by Employer on October 28, 2009. Employer has filed a separate petition for review to this Court as to the Board's determination that Employer failed to establish that Muldowney committed willful misconduct. *See Borough of Mt. Carmel v. Unemployment Compensation Board of Review* (Pa. Cmwlth., No. 1201 C.D. 2010, filed April 27, 2011).

Borough Council President, Anthony Matulewicz, about the use of his signature stamp, and he told her he would deal with the situation.

Matulewicz also testified for the Borough. Matulewicz joined the Borough Council on January 7, 2008, and became its President in July of 2008.

Once on Borough Council, Matulewicz identified a problem with the handling of employee salary information because that information was given to the budget committee but not to the entire Borough Council. Matulewicz also noted that the budget did not list individual salaries but aggregated them by department. Matulewicz asked Claimant to change the budget to show each individual salary, but Claimant responded that to do so would require a new software program. This prompted Matulewicz to “let it go.” Reproduced Record at 20.<sup>3</sup>

Matulewicz then discovered that the Borough Treasurer, Marian Muldowney, had a second job cleaning the Borough building, for which she was paid \$500 monthly. Claimant explained to Matulewicz that the former Borough Council President, Jack Hook, had hired the Treasurer to do this job in 1993 or 1994 by oral agreement.

Matulewicz, who is an attorney, then determined that Section 1404 of the Borough Code<sup>4</sup> prohibits a borough employee from entering into a contract

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<sup>3</sup> While Employer provided a reproduced record, it did not renumber the pages of the hearing transcript. The page number provided is to the original.

<sup>4</sup> Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §46404. Section 1404 of the Borough Code is titled “Penalty for Personal Interest in Contracts or Purchases,” and provides, in relevant part:

Except as otherwise provided in this act, no borough official either elected or appointed, who knows or who by the exercise of reasonable diligence could know, shall be interested to any appreciable degree either directly or indirectly in any purchase made or contract entered into or expenditure of money made by the

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with the employing borough where the contract calls for compensation in excess of \$1,000. He also learned that Section 1402(a.1) of the Borough Code<sup>5</sup> requires any contract over \$4,000 to be placed on the basis of price quotations. Given these circumstances, the Borough solicitor informed Matulewicz that the cleaning contract appeared to be illegal. Matulewicz also decided that the cleaning contract violated the Public Official and Employee Ethics Act (Ethics Act).<sup>6</sup> In January of 2009, Matulewicz terminated the cleaning contract.

Matulewicz testified about problems with Claimant's use of personal time. In 2008, Claimant received ten personal days, which he took in the form of cash compensation. Matulewicz signed the check; however, when he did so, he did not know Claimant's contract did not expressly authorize Claimant to take his

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borough or relating to the business of the borough, involving the expenditure by the borough of more than one thousand dollars (\$1000) in any calendar year....

53 P.S. §46404.

<sup>5</sup> It provides, in relevant part:

Written or telephonic price quotations from at least three qualified and responsible contractors shall be requested for all contracts that exceed four thousand dollars (\$4,000) but are less than the amount requiring advertisement and competitive bidding....

53 P.S. § 46402(a.1).

<sup>6</sup> Public Official and Employee Ethics Act, 65 Pa. C.S. §§1101-1113. Section 1103(f) of the Ethics Act states, in relevant part:

**Contract.** – No public official or public employee or his spouse . . . shall enter into any contract valued at \$500 or more with the governmental body with which the public official or public employee is associated . . . unless the contract has been awarded through an open and public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded. In such a case, the public official or public employee shall not have any supervisory or overall responsibility for the implementation or administration of the contract.

65 Pa. C.S. §1103(f).

personal days in the form of additional compensation. Claimant did not have a written employment agreement with the Borough. Matulewicz discussed the matter with Claimant, who explained that the Borough's written contract with the police department authorized the officers to "cash in" their unused time. Claimant followed that procedure.

Finally, Matulewicz testified about the use of his signature stamp on Borough checks. Checks had to be signed by the Borough Secretary, *i.e.*, Claimant; the Borough Treasurer; and the Borough Council President, Matulewicz. A stamp was prepared for Matulewicz's signature. In July of 2008, Matulewicz informed Claimant that the stamp was not to be used without his prior approval.

Matulewicz offered into evidence three checks showing his signature in stamped form. The first was a check dated November 12, 2008, in the amount of \$120 and made out to Charles Muldowney, in payment of his health insurance. The second, also dated November 12, 2008, was in the amount of \$450 and made out to the Treasurer, Marian Muldowney, for cleaning services. The third was dated October 16, 2008, in the amount of \$12.49, and made out to PP&L. Matulewicz conceded that all three checks were appropriate, but he objected to them because he had not authorized the use of his signature stamp. Matulewicz stated that there was a fourth check in the amount of \$150,000 in payment on a tax anticipation note, which was also signed with his signature stamp and without his approval. He discovered this check two months after Claimant was terminated; he did not have a copy of this check to present into evidence.

Claimant then testified. As to the salaries listed in the budget, Claimant explained that he prepared a salary schedule listing each individual salary and gave it to the budget committee, which was made up of three Borough Council

members. Once it was reviewed, it was incorporated into the Borough's working budget by the committee. He stated that the budget had been prepared that way from 1981 through 2008. Further, the budget meetings were open to the public, and the salary schedule itself was available as a public document.

As to the cleaning contract, he explained that in 1994 the woman who had been cleaning the Borough building for some time retired. The Borough sought quotes, and they ranged from \$11,000 to \$15,000. The former Borough Council President discussed the matter with Marian Muldowney, who agreed to do the cleaning job at approximately half the quoted rates. Because the Borough Council discussed the cleaning contract in executive session, it was not contained in the minutes. However, Claimant testified that he was personally present at the session when Muldowney was hired, and he verified that she did the cleaning of the Borough building from 1994 until Matulewicz terminated her cleaning contract in January of 2009.

Regarding his personal days, Claimant explained that he has been receiving ten personal days a year for at least 15 years. The written contract with the police provided ten personal days, and the written contract with non-uniform personnel provided 15 holidays. He explained that it had been long-standing practice that he and the police chief receive the benefit of both contracts. Thus, they each received 15 holidays and ten personal days.

Claimant then testified about the three checks that were submitted into evidence. He had no memory of them, noting that they were written over one year before the hearing. Further, he had no idea that the checks were even an issue in his termination until the hearing before the Referee.

Claimant acknowledged that Matulewicz had instructed him not to use the signature stamp without approval. He stated that on several occasions he had needed Matulewicz's signature at a time when Matulewicz was not present in the office and telephoned Matulewicz for permission to use the stamp. Claimant had no recollection of the \$150,000 check. He stated that he did not remember ever using the stamp on a check in that amount, but if he had, he would have called Matulewicz first. He did recall that on one occasion the payroll needed to go out while Matulewicz was on vacation. In that instance, he telephoned the Borough solicitor, who gave him permission to use the stamp.

The Referee awarded Claimant unemployment compensation. The Referee found that Claimant testified credibly that he followed procedures established before Matulewicz's election to Council. No evidence was presented that Claimant was ever advised that the Borough's cleaning contract may have violated the Borough Code or Ethics Act. The Referee found Claimant testified credibly that on some occasions he used the signature stamp but only after telephone contact with Matulewicz. The Referee concluded that the Borough did not prove willful misconduct by Claimant.

The Borough appealed to the Board. Although the Borough did not identify the reasons for Claimant's dismissal on the separation form, the Board decided that, based on the record, the reasons were: Claimant's handling of salary information; Claimant's compensation for unused personal time; Claimant's use of the signature stamp; and the cleaning contract.

The Board credited Claimant's testimony that he handled salary information in accordance with long-standing practice and had not been instructed to change the practice. The Board rejected the Borough's claim that there was

anything untoward about Claimant's receipt of cash compensation for unused personal days, noting that it was consistent with prior practice. As to the signature stamp, the Board found that there was no evidence that Claimant was even the person that used the stamp on the checks in question, and it credited Claimant's testimony that whenever he needed to use the signature stamp, he contacted Matulewicz for approval. Because the check for \$150,000 was not discovered until after Claimant was terminated, the Board found that it could not have formed a basis for the termination. Similarly, Claimant's admission that he used the stamp, with the approval of the solicitor, involved only payroll checks which were not cited by the Borough. As to the cleaning contract, the Board found that the agreement was between the Borough Treasurer and Borough Council, not Claimant. However, if the cleaning contract somehow implicated Claimant, the Borough waited too long, *i.e.*, over ten months, to act upon it.

Concluding that the Borough failed to offer competent evidence of willful misconduct, the Board affirmed the Referee. The Borough now appeals to this Court.<sup>7</sup>

On appeal, the Borough lists seven issues for our review.<sup>8</sup> Its brief also challenges the award of compensation to Marian Muldowney and cites to

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<sup>7</sup> Our scope of review is limited to determining whether constitutional rights were violated, errors of law were committed or if the necessary findings of fact were supported by substantial evidence. *Ductmate Industries, Inc. v. Unemployment Compensation Board of Review*, 949 A.2d 338, 341 n.2 (Pa. Cmwlth. 2008). However, "[w]hether an employee's action constitutes willful misconduct is a question of law subject to judicial review." *Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review*, 814 A.2d 1286, 1288 (Pa. Cmwlth. 2003).

<sup>8</sup> The Borough did not provide seven separate argument sections as to the seven issues listed, as required by PA. R.A.P. 2119(a). It provides:

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testimony presented in her own Referee hearing.<sup>9</sup> The Borough attached the transcript of her testimony to the reproduced record in this case and has filed the identical brief in this case and in the Muldowney appeal.

The Board responded to the Borough's brief and reproduced record with two motions: (1) to strike Muldowney's transcript from the reproduced record on Claimant's case and (2) to strike the Borough's brief. In response the Borough moved to consolidate the two cases. This Court denied the motion; however, we granted the motion to strike the Muldowney testimony from the reproduced record in this appeal. The Board's motion to strike the brief was granted, in part, by striking the arguments in the brief relating to Muldowney.

The Borough's brief is problematic. Almost all of the evidence referenced in its brief comes from the Muldowney testimony, which has been stricken. Although the Borough has raised seven issues, only those raised in its appeal to the Board have been preserved. *See* PA. R.A.P. 1551(a).<sup>10</sup> The

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- (a) **General rule.** The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

PA. R.A.P. 2119(a).

<sup>9</sup> Muldowney was not presented as a witness by either party in Claimant's case.

<sup>10</sup> It provides, in relevant part, as follows:

- (a) **Appellate jurisdiction petitions for review.** Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:
- (1) Questions involving the validity of a statute.
  - (2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.

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Borough's appeal to the Board covered: (1) Claimant's alleged use of the signature stamp on checks without approval; (2) Claimant's alleged use of the signature stamp with approval from the solicitor; (3) Claimant's failure to rebid an existing cleaning contract; and (4) Claimant's receipt of compensation for personal leave without Borough Council approval. Certified Record, Section 14. Of these four issues, only the first three are addressed in the argument section of the Borough's brief to this Court. Accordingly, we will limit our review to those three issues.

We begin with a review of the law on willful misconduct. Although not defined in the Law, the courts have established that it means the following:

- (1) an act of wanton or willful disregard of the employer's interest;
- (2) a deliberate violation of the employer's rules;
- (3) a disregard of standards of behavior which the employer has a right to expect of an employee; or
- (4) negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

*Altemus v. Unemployment Compensation Board of Review*, 681 A.2d 866, 869 (Pa. Cmwlth. 1996). It is the employer's burden to establish that a claimant's conduct constituted willful misconduct. *Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review*, 814 A.2d 1286, 1288 (Pa. Cmwlth. 2003). Where willful misconduct is based upon the violation of a work

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- (3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit.

PA. R.A.P. 1551(a).

rule, the employer must establish the existence of the rule, its reasonableness, and that the employee was aware of the rule. *Bishop Carroll High School v. Unemployment Compensation Board of Review*, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989). Once employer meets this burden, the burden shifts to the claimant to prove that the rule was unreasonable or that he had good cause for violating the rule. *Gillins v. Unemployment Compensation Board of Review*, 534 Pa. 590, 601 n.3, 633 A.2d 1150, 1156 n.3 (1993).

We consider, first, the claim that Claimant used Matulewicz's signature stamp on three checks without his prior approval.<sup>11</sup> This argument fails because the Board did not find Matulewicz credible on this point but did credit Claimant's testimony that he had obtained approval before using the stamp. "Matters of credibility and evidentiary weight are within the province of the Board..." *BK Foods, Inc. v. Unemployment Compensation Board of Review*, 547 A.2d 873, 875 (Pa. Cmwlth. 1988). The Borough's argument is nothing more than a challenge to the credibility determinations of the Board, which are beyond an appellate court's authority to revisit.

The Borough next argues that the Board erred in concluding that Claimant's use of the signature stamp on the payroll checks was not willful misconduct. It argues that the Borough solicitor's approval was not sufficient. However, the Borough never challenged a payroll check and, thus, the validity of the solicitor's authority is irrelevant. As noted above, the Borough cannot use an

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<sup>11</sup> We do not consider the \$150,000 check because, as found by the Board, Employer did not discharge Claimant for using the signature stamp on that check. *Ductmate Industries, Inc.*, 949 A.2d at 344 n.5 (in order to deny benefits, the act an employer asserts constitutes willful misconduct must actually be the act the claimant was terminated for committing).

act for which Claimant was not disciplined as the basis for proving willful misconduct. Thus, the second allegation of error lacks merit.

The Borough's third, and final, argument is that Claimant committed willful misconduct by allowing a cleaning contract to continue where that contract violated the Borough Code and the Ethics Act. It also argues that the Board misstated the facts by finding that the contract was approved by Borough Council. Claimant counters that he did not award the contract and did not benefit from it.<sup>12</sup> The Board counters that the cleaning contract was terminated ten months before Claimant's firing, making the contract, and whatever Claimant's involvement had been in that contract, irrelevant.

First, the Borough is incorrect that the Board misstated the facts. Claimant testified that he was present when Borough Council, in an executive session, hired the Borough Treasurer to clean the Borough building. Accepting Claimant's version of the facts is not misstating them.

Second, the Borough did not produce any evidence to support its claim that Claimant violated the Borough Code and the Ethics Act. Claimant was not a party to the cleaning contract or to any side agreement with the Borough. Section 1404 of the Borough Code, 53 P.S. §46404, is directed to borough officials who have a personal interest in a contract, and Claimant had none. Section 1402(a.1) of the Borough Code, 53 P.S. §46402(a.1), requires price quotes for contracts that exceed \$4,000. Assuming, *arguendo*, that the cleaning contract violated this statute, the Borough did not present evidence that Claimant knew of this requirement or that his job duties required him to keep the Borough contracts in compliance with the applicable statutes. Finally, Section 1103(f) of the Ethics

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<sup>12</sup> Claimant filed an Intervenor's brief in this case.

Act, 65 Pa. C.S. §1103(f), provides that a public employee cannot enter into a contract with his employer that is valued at \$500 or more, unless the contract is awarded in an open and public process; again Claimant was not a party to the cleaning contract and was not required to monitor compliance with the Ethics Act.

In sum, we conclude that the Board did not err, and the order of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

