

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Borough of Mt. Carmel, :
Petitioner :
 :
v. : No. 1201 C.D. 2010
 : Submitted: January 28, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: April 27, 2011

The Borough of Mount Carmel petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) granting Marian Muldowney’s (Claimant) application for benefits. In doing so, the Board affirmed the Referee’s determination that Claimant, the Borough Treasurer, did not commit willful misconduct, which would render her ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ The Borough contends the Board erred in holding that Claimant did not commit willful misconduct in light of the facts that (1) she entered into an illegal cleaning service contract with the Borough and (2) used a signature stamp without authorization. Because the

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). It states, in relevant part, that “[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.” 43 P.S. §802(e).

Board did not make the factual findings necessary to support the Borough's argument, it lacks merit.

Claimant was employed by the Borough for over 35 years, most recently as the Borough Treasurer and an administrative assistant. From 1995 to 2009, Claimant also provided cleaning services to the Borough. On October 28, 2009, Borough Council held a closed executive session at which it decided to terminate Claimant. Claimant was informed of her termination after the meeting, but she was not given a reason for that decision.

Claimant applied for unemployment compensation benefits and on her application stated that no reason was given for her termination. In response to her application, the Borough stated that Claimant was terminated for "misconduct" but did not provide any details. In the absence of any explanation, the Scranton Unemployment Compensation Service Center found that the Borough did not prove willful misconduct. The Borough appealed and a hearing was conducted before the Referee.

Anthony Matulewicz, President of Borough Council, testified on behalf of the Borough. In July 2008, Matulewicz was elected as President of Borough Council.² In December 2008, as he was reviewing the Borough's 2009 budget, he discovered a \$5,800 line item expense owed to Claimant for cleaning the Borough building. Matulewicz was unable to find a written contract for Claimant's services or any meeting minutes recording the Borough Council's approval of the contract. He terminated the agreement in January 2009, believing

² A signature stamp was prepared for Matulewicz, but he informed Claimant that the stamp was not to be used without his prior approval and he wished to personally sign all checks.

it violated The Borough Code³ and the Public Official and Employee Ethics Act.⁴ Matulewicz testified that Claimant continued in her position as Treasurer and administrative assistant.

In October 2009, Matulewicz discovered that his signature stamp had been used to sign three checks between October and November of 2008, in contravention of his prior directive. Matulewicz admitted that he did not know whether Claimant was the one who actually stamped these checks.⁵

Claimant testified about her agreement to clean the Borough building. She agreed to do the cleaning after the Borough's 1995 bid request yielded responses in excess of \$11,000 per year. She cleaned the building on her own time, either at night or on weekends, and was paid \$60 per week to do so. In 2005, when the Borough moved into a larger building, Claimant's compensation was

³ Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §§45101-48501. Specifically, Matulewicz believed the cleaning services agreement violated Section 1404 of The Borough Code, 53 P.S. §46404, which prohibits a borough employee from entering into a contract with the employing borough where the contract calls for compensation in excess of \$1,000.

⁴ 65 Pa. C.S. §§1101-1113. Specifically, 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).

⁵ See also *Borough of Mount Carmel v. Unemployment Compensation Board of Review* (Pa. Cmwlth., No. 1200 C.D. 2010, filed April 27, 2011), slip op. at 5, which is a companion case that fully describes the checks at issue.

increased to \$110 per week. Neither the original agreement nor her raise was reduced to writing.

Claimant testified that she did not recall ever using Matulewicz's signature stamp without his approval. She testified that she was out on medical leave from November 1, 2008, to January 4, 2009, and could not have stamped two of the checks, which were each dated November 12, 2008.

Carl Frouz, a former member of Borough Council and past Borough Council President, testified on Claimant's behalf. According to Frouz, he and the other members of Borough Council were aware of Claimant's cleaning contract and had approved it. Frouz recalled that in 2005, another member of Borough Council suggested that Claimant be given a raise, and Council approved it. Frouz opined that Claimant's cleaning services could properly be classified under Section 1402 of The Borough Code,⁶ as "professional services" and thus could be contracted for without a competitive bid.

The Referee credited the testimony of Claimant and Frouz and found that she had provided cleaning services since 1995 with Borough Council's knowledge and approval. The Referee refused to penalize Claimant for the Borough's failure to commit the agreement to writing and further held that Claimant's discharge in October 2009 was too remote in time from the January 2009 contract termination to support a willful misconduct discharge. Finally, the

⁶ In relevant part, Section 1402 provides:

The contracts or purchases made by council which shall not require advertising, bidding or price quotations as hereinbefore provided, are as follows:

(5) Those involving personal or professional services.

53 P.S. §46402(d)(5).

Referee held that the Borough did not prove that Claimant used Matulewicz's signature stamp without his permission. Two of the checks at issue were stamped while she was out on medical leave, and the third was for payment of a time sensitive, recurring Borough obligation. The Referee held that Claimant did not commit willful misconduct and affirmed the UC Service Center's grant of benefits. The Borough appealed to the Board.

The Board affirmed the Referee. It found that the members of Borough Council knew of Claimant's agreement to provide cleaning services and that Claimant was unaware her cleaning services may have violated either The Borough Code or the Ethics Act. In any case, the Board agreed with the Referee that the Borough waited too long to discharge Claimant on the basis of the cleaning contract. The Board also agreed with the Referee that the Borough failed to prove that she was even the one who used the signature stamp. The Borough now petitions for this Court's review.⁷

On appeal, the Borough raises several issues for our review, which we reorder and restate.⁸ First, the Borough argues that Claimant engaged in willful misconduct by entering into a contract that violated both The Borough Code and

⁷ Our review is limited to determining whether constitutional rights were violated, whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. *Roberts v. Unemployment Compensation Board of Review*, 977 A.2d 12, 16 n.2 (Pa. Cmwlth. 2009).

⁸ The Borough, in its brief, cites to the transcript of testimony in *Borough of Mount Carmel v. Unemployment Compensation Board of Review* (Pa. Cmwlth., No. 1200 C.D. 2010, filed April 27, 2011), a companion case concerning Joseph K. Bass, the former Borough Manager/Secretary. This testimony was never offered in the case *sub judice*. Therefore, this Court, by order dated December 16, 2010, struck all references to that testimony from the Borough's reproduced record and brief. Accordingly, we hold that the issues raised in the Borough's brief based upon that testimony are waived.

the Ethics Act. Second, the Borough alleges that there was no undue delay in terminating Claimant for the reason of that illegal cleaning contract. Finally, the Borough contends that its evidence proved that Claimant used Matulewicz's signature stamp without his consent on three checks.⁹

Section 402(e) of the Law states that an employee is ineligible for compensation if "his unemployment is due to discharge or temporary suspension from work for willful misconduct connected with his work[.]" 43 P.S. §802(e). "Willful misconduct" is not expressly defined in the Law, but it has been judicially defined as: (1) a wanton or willful disregard of an employer's interests; (2) a deliberate violation of an employer's rules; (3) a disregard of the standards of behavior which an employer can rightfully expect of an employee; or (4) negligence indicating an intentional disregard of the employer's interest or the employee's duties and obligations. *Frumento v. Unemployment Compensation Board of Review*, 466 Pa. 81, 83-84, 351 A.2d 631, 632 (1976). The employer bears the burden of establishing that an employee's actions amount to willful misconduct. *Roberts*, 977 A.2d at 16.

In determining if conduct amounts to "willful misconduct" all of the circumstances surrounding an employee's actions, or noncompliance with the employer's directives, must be considered. *Eshbach v. Unemployment Compensation Board of Review*, 855 A.2d 943, 947-948 (Pa. Cmwlth. 2004). Thus, if an employee's conduct was for good cause, *i.e.*, reasonable or justifiable under the circumstances, it will not amount to willful misconduct. *Rossi v.*

⁹ Claimant, intervenor herein, urges this Court to quash the Borough's brief and dismiss its petition on the grounds that the Borough's brief is defective to the point of precluding meaningful appellate review. We decline to do so since the three issues identified above have been adequately briefed and are capable of review.

Unemployment Compensation Board of Review, 544 Pa. 261, 267, 676 A.2d 194, 197-198 (1996). Moreover, if the employee's conduct was condoned by the employer it will not amount to willful misconduct. *Bivins v. Unemployment Compensation Board of Review*, 470 A.2d 662, 664 (Pa. Cmwlth. 1984).

In assessing a claimant's eligibility for benefits, the Board is the ultimate fact-finding body, empowered to resolve conflicts in evidence, to determine credibility of witnesses, and to determine the weight to be assigned evidence. *Unemployment Compensation Board of Review v. Wright*, 347 A.2d 328, 329 (Pa. Cmwlth. 1975). The Board's findings of fact are conclusive on appeal if supported by substantial evidence in the record. *Rossi*, 544 Pa. at 266 n.4, 676 A.2d at 197 n.4.¹⁰ Whether conduct constitutes willful misconduct is a question of law subject to this Court's review. *Lee Hospital v. Unemployment Compensation Board of Review*, 589 A.2d 297, 299 (Pa. Cmwlth. 1991).

The Borough first contends that Claimant committed willful misconduct by entering into an agreement to clean the Borough building in violation of Section 1404 of The Borough Code¹¹ and Section 1103(f) of the Ethics

¹⁰ Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Watkins v. Unemployment Compensation Board of Review*, 689 A.2d 1019, 1021 (Pa. Cmwlth. 1997).

¹¹ In relevant part, Section 1404 of The Borough Code provides:

[N]o 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 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.

Act.¹² The Borough also argues that the Board erred in finding that Borough Council approved Claimant's contract.¹³

Here, substantial evidence supports the Board's determination that Borough Council was aware of and approved of Claimant's cleaning arrangement. Claimant testified credibly that Borough Council orally agreed to the arrangement in 1995, paid her for 14 years, approved a pay increase in 2005, and paid for her cleaning supplies. Former Council President Frouz corroborated Claimant's historical account. Current President Matulewicz personally signed checks to Claimant for her services. Claimant testified that no one from the Borough ever told there was a problem with the arrangement. Whether the cleaning services contract violated either The Borough Code or the Ethics Act is of no moment. The Borough offered no evidence to demonstrate that Claimant was aware of any impropriety or that the Borough disapproved of her cleaning contract. *See Bivins*, 470 A.2d at 664 (where an employee's conduct is condoned by the employer, it does not constitute willful misconduct). In short, the Board was correct in determining that Claimant did not commit willful misconduct.¹⁴

¹² *See supra* note 4 for text of Section 1103(f) of the Ethics Act, 65 Pa. C.S. §1103(f).

¹³ In support of its position, the Borough asserts that Claimant offered impermissible hearsay testimony from two past Borough Council presidents indicating they sanctioned the agreement for her cleaning services. However, the Borough did not raise this issue in its appeal to the Board, nor did the Borough cite to the testimony in question, or in any way develop this argument, in its brief to this Court. The issue is waived. *See Jimoh v. Unemployment Compensation Board of Review*, 902 A.2d 608, 611 (Pa. Cmwlth. 2006).

¹⁴ Because we agree with the Board that Claimant did not engage in willful misconduct, we need not address the Borough's argument that the Board erred in holding that Claimant's discharge was too remote in time from the discovery of her alleged misconduct. *See Panaro v. Unemployment Compensation Board of Review*, 413 A.2d 772, 774 (Pa. Cmwlth. 1980) (reciting the principle that in willful misconduct cases the alleged infraction that leads to a claimant's discharge cannot be temporally remote from the claimant's dismissal). However, we note that **(Footnote continued on the next page . . .)**

The Borough next argues that it proved that Claimant used Matulewicz's signature stamp without his express consent, thus violating a known work rule. The Borough alleges three checks were stamped in contravention of the work rule: two dated November 12, 2008, and one dated October 16, 2008. The Borough argues that the mere existence of these checks bearing Matulewicz's signature stamp supports a finding that Claimant engaged in willful misconduct because she was the Borough Treasurer.¹⁵ We disagree.

The Board credited Claimant's testimony that she was on medical leave from November 1, 2008, through January 4, 2009, for cancer treatment and could not sign either November 2008 check. With respect to the October 16, 2008, check, the Borough offered only Matulewicz's testimony, and it was equivocal. He could not testify with certainty that it was Claimant who used the stamp or that he had not given her permission to use it. The Board held that the Borough failed to prove that Claimant had anything to do with the October 26, 2008, check, and we agree with that conclusion.

For all of the foregoing reasons, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

(continued . . .)

Claimant's contract for cleaning services was terminated in January 2009, but, without explanation, her employment was never discussed until she was discharged in October 2009.

¹⁵ See also *Borough of Mount Carmel v. Unemployment Compensation Board of Review* (Pa. Cmwlth., No. 1200 C.D. 2010, filed April 27, 2011), slip op. at 5 (companion case, describing the checks at issue).

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ORDER

AND NOW, this 27th day of April, 2011, the order of the Unemployment Compensation Board of Review, dated May 27, 2010, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge