

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Brent Green, Sr.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2232 C.D. 2010
	:	SUBMITTED: April 29, 2011
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: July 13, 2011**

Brent Green, Sr., petitions for review of the decision of the Unemployment Compensation Board of Review (Board), which reversed the decision of the Referee and concluded that Green was ineligible for benefits under the Unemployment Compensation Law (Law).¹ We reverse.

Green was employed by UPMC Presbyterian Hospital (UPMC) as a Supervisor of Environmental Support from 2006 until he was suspended in February 2009 and eventually discharged. Green was suspended after UPMC

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§ 751 - 914.

received a report that he had been charged with a crime in a non-work-related incident. An investigation revealed that Green had been charged with five crimes: involuntary deviate sexual intercourse of a person less than 16 years of age, aggravated indecent assault of a person less than 13 years of age; indecent assault of a person less than 16 years of age, endangering the welfare of children and corruption of minors. Citing a personnel policy which, on its face, applied to “non-supervisory, non-management staff members” and which authorized discharge of an employee who had been “charged with, and not found innocent of a crime, which would diminish trust in the staff member’s future performance,” UPMC dismissed Green before any disposition of the criminal charges had been reached. Record Item 9, Exhibit 1, at 1, 4.

Still before the resolution of the criminal charges, Green filed for unemployment benefits, which were granted by a Referee. After UPMC appealed, the Board ordered the case stayed until the criminal charges were resolved. A later factual hearing in front of a Referee revealed that all but one of the criminal charges had been dismissed, and that Green had plead *nolo contendere* to the one remaining charge, endangering the welfare of children, a misdemeanor. He received a sentence of three years of probation, was ordered to have no contact with the minor involved in the incident, and to comply with a mental health evaluation if necessary. After considering this information, as well as the merits of UPMC’s appeal, the Board reversed the Referee and found that Green was ineligible for benefits both under Section 402(e) of the Law, 43 P.S. § 802(e), and Section 3, 43 P.S. § 752. An appeal to this court followed.

Green argues that neither Section 3 nor Section 402(e) render him ineligible for benefits. Under Section 402(e), employees discharged for willful

misconduct are ineligible for benefits. Willful misconduct can be established if the employer proves the existence of a reasonable work rule and that the claimant violated the rule. *Arbster v. Unemployment Comp. Bd. of Review*, 690 A.2d 805 (Pa. Cmwlth. 1997). In this case, the Board found that Green violated the work rule which authorized the discharge of a staff member “charged with, and not found innocent of a crime, which would diminish trust in the staff member’s future performance.” Record Item 9, Exhibit 1, at 4. Green argues that this finding is not supported by substantial evidence because the policy document in which this rule is found applies, by its own terms, only to “non-supervisory, non-management staff members.” Record Item 9, Exhibit 1, at 1. Green argues that, as a Supervisor of Environmental Support, the rule simply did not apply to him.

As an initial matter, UPMC asserts that this argument was waived, because it was not raised before the Referee. Green first raised the inapplicability of the policy to him in a letter to the Board after UPMC’s appeal from the Referee’s determination had been filed. *See* Record Item 14, Claimant’s Additional Testimony. In general, issues in unemployment compensation cases must be raised in the earliest possible proceeding, and are waived if not raised in every subsequent proceeding. *See Wing v. Unemployment Comp. Bd. of Review*, 496 Pa. 113, 436 A.2d 179 (1981).

Here, however, the issue was raised before the factual record before the referee was closed. As noted above, the Board remanded for a further hearing, and that hearing occurred more than a year after Green’s counsel sent his letter, with a copy to UPMC’s counsel, pointing out that the policy admitted into evidence (“admitted policy”), by its terms, did not apply to supervisors. Thus, UPMC had ample opportunity to present evidence of the policy applicable to

supervisors or testimony as to why the admitted policy applied to Green. Accordingly, we do not believe the issue has been waived.

Reaching the merits of Green's argument, it is clear that the Board erred in applying the cited policy to him. The policy clearly states that it applies to *non-supervisory staff*, and UPMC offered no evidence as to why it should apply to Green, who UPMC does not dispute is a supervisor. Indeed, when Green was initially discharged, he was informed that he had the right to file a grievance if he so chose, and this grievance procedure was set out in the admitted policy. However, UPMC sent Green a letter shortly thereafter, stating that "because of [his] supervisory status," he was ineligible to file a grievance. Record Item 9, Exhibit 7.² Thus, UPMC failed to meet its burden to prove that Green violated an applicable work rule, and the Board's findings on this issue are not supported by substantial evidence. The Board therefore erred in finding Green ineligible under Section 402(e) of the Law.

It remains to be considered whether the Board erred in concluding that Green was ineligible from collecting benefits based on Section 3 of the Law. Section 3 can operate to disqualify claimants on the basis of off-duty, non-job-related misconduct. Claimants can be found ineligible only if their behavior "(1) is inconsistent with acceptable standards of behavior, and (2) directly reflects upon his or her ability to perform the assigned duties." *Martin v. Unemployment Comp. Bd. of Review*, 713 A.2d 753, 754 (Pa. Cmwlth. 1998) [citing *Unemployment Comp. Bd. of Review v. Derk*, 353 A.2d 915, 917 (Pa. Cmwlth. 1976)]. A criminal conviction is considered conclusive proof of the facts charged, and often is

² UPMC's grievance policy applies to "non-supervisory, non-management staff members," using the exact same language as the disciplinary policy at issue. *Id.*

sufficient to prove the first prong of this test, *Hawkins v. Unemployment Compensation Board of Review*, 695 A.2d 963 (Pa. Cmwlth. 1997), but in evaluating the second prong, a number of factors must be considered, including:

(a) the specific nature of the offense committed by Claimant; (b) the nature of Claimant's assigned duties; (c) whether Claimant's job requires any special degree of trust on the part of the employer; and (d) any other circumstances which may particularly affect Claimant's ability to do his job, including whether the crime occurred on or off Employer's premises, and whether or not it involved any of Employer's other workers or clients.

Se. Pa. Transp. Auth. v. Unemployment Comp. Bd. of Review, 506 A.2d 974, 977 (Pa. Cmwlth. 1986).

In this case, we agree with the Board that Green's plea of *nolo contendere* to the charge of endangering the welfare of a child is sufficient to prove the first prong, but UPMC offered no evidence which would satisfy the second prong by showing that the conviction directly reflects upon Green's ability to perform his assigned duties. In the record, there is scant evidence of the conduct underlying the conviction,³ no evidence whatsoever of Green's duties or the degree of trust placed in him by his employer, and no reasons offered why the conviction would affect Green's ability to do his job. The Board's brief includes a number of citations to the record for the proposition that Green had access to various parts of the hospital, as well as vulnerable patients, including children. These citations,

³ Green testified before the referee that his conviction was the result of an incident in which he attempted to intervene to prevent an imminent physical confrontation between his wife and his teenage stepdaughter. Record Item 25, Remand Hearing Transcript at 5-6. No other evidence regarding the incident is in the record.

however, are to UPMC's counsel's summation before the Referee, which is not evidence.

Had the information contained in counsel's statements been presented in testimony, we might have reached a different result, but based on the record before us, we must conclude that the Board's finding that Green's conviction directly reflects upon his ability to perform his assigned duties is not supported by substantial evidence. The Board, therefore, erred in finding Green ineligible under Section 3 of the Law.

For all the foregoing reasons, we reverse.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Board of Review,	:	
	:	
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ORDER

AND NOW, this 13th day of July 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge