IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eric Achey,	:	
Petitioner	:	
	:	
v.	:	No. 268 C.D. 2011
	:	Submitted: July 8, 2011
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: September 2, 2011

Eric Achey (Claimant) petitions for review of the December 30, 2010, order of the Unemployment Compensation Board of Review (UCBR) reversing the decision of a referee to award Claimant unemployment compensation benefits. The UCBR determined that Claimant was ineligible for benefits because his discharge was the result of willful misconduct under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant worked full-time for Modern Steel Construction Corporation (Employer) from April 1, 2005, through his termination on July 27, 2010. (UCBR's

[1] 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 compensation for any week in which his unemployment is due to his discharge for willful misconduct connected with his work. 43 P.S. §802(e).

Findings of Fact, No. 1.)[2] Before the July 4, 2010, holiday, Employer reminded all employees that, in order to receive holiday pay, they had to work the day before and the day after the holiday. (UCBR's Findings of Fact, No. 2.) Claimant received permission from Employer to take a vacation during the week of the July 4th holiday. However, he did not ask whether he would be paid for that vacation time. (UCBR's Findings of Fact, No. 3.) Claimant was not paid for his week off because he did not work the day before and the day after the holiday and because he had exceeded his allotted two weeks' paid vacation. (UCBR's Findings of Fact, No. 4.)

On July 21, 2010, Claimant called Employer's president to ask why he did not receive holiday or vacation pay for the week of July 4, 2010. (UCBR's Findings of Fact, No. 5.) The president explained to Claimant that he did not qualify for holiday pay and he was not entitled to receive more paid vacation than his co-workers received. (UCBR's Findings of Fact, No. 6.) Claimant spoke loudly to the president and ended the conversation by saying, "You will regret this." (UCBR's Findings of Fact, No. 7.)

On July 22, 2010, Employer's vice president told Claimant that he should take the day off to figure out what he was doing and that he should contact the president to discuss the pay situation. (UCBR's Findings of Fact, No. 8.) Claimant told the vice president that he could not afford to take the day off and that, if he left work, he would view it is as a discharge and file for unemployment benefits.

[2] It is unclear from the record what Claimant's position was. The referee found that Claimant was a "full-time programmer," (Referee's Findings of Fact, No. 1), but the UCBR did not make a finding as to Claimant's job title. At the hearing, Claimant described his position as "electro mechanical maintenance," (N.T., 9/21/10, at 4), but Employer testified that Claimant had no official job title, (*id.* at 5).

(UCBR's Findings of Fact, No. 9.) Claimant worked until his shift ended at 3:30 p.m. (UCBR's Findings of Fact, No. 10.) Claimant did not contact the president to discuss the pay situation. (UCBR's Findings of Fact, No. 11.)

In 2008, Claimant had volunteered to upload his own personal software to Employer's computer at no charge. (UCBR's Findings of Fact, Nos. 12, 14.) Claimant uploaded Microsoft Office 2000, Print Shop, Adobe Reader, and Auto CAD to Employer's computer. (UCBR's Findings of Fact, No. 13.)

On July 22, 2010, after the vice president left the office, Claimant uninstalled all four software programs from Employer's computer. (UCBR's Findings of Fact, No. 16.) Claimant did not notify Employer that he intended to uninstall the software. (UCBR's Findings of Fact, No. 17.)

When the vice president returned to the office and attempted to access certain documents on the computer, he discovered that the software had been uninstalled. (UCBR's Findings of Fact, No. 18.) Claimant admitted that he uninstalled the software, telling the vice president, "The system [is] mine. I can do anything I want with it." (UCBR's Findings of Fact, No. 19.) Employer was unable to access its work product without the software. (UCBR's Findings of Fact, No. 20.)

On July 27, 2010, Employer discharged Claimant for removing the software without notice to Employer, thereby disrupting Employer's business. (UCBR's Findings of Fact, No. 21.)

Claimant filed a claim for unemployment benefits, which was denied by the local service center. Claimant appealed to the referee, who held an evidentiary hearing and reversed the service center's decision. The referee concluded that Claimant's act of removing the computer software was not willful misconduct, stating, "While claimant may have chosen an unprofessional way to go about retrieving his property, it was his property and he has the right to be in possession of his own property." (Referee's Decision/Order at 2.)

Employer timely appealed to the UCBR, which reversed. The UCBR concluded that Claimant's act of uninstalling the software without notice to Employer demonstrated a disregard of the standards of behavior that an employer can rightfully expect from its employees and an intentional disregard of employer's interests. Claimant now petitions for review of that decision.[3]

Claimant asserts that Employer failed to meet its burden of proving that he committed willful misconduct by substantial evidence.[4] We disagree.

"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

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

[4] In his brief, Claimant also asserts that the UCBR improperly considered additional evidence submitted by Employer after the hearing. Because Claimant failed to raise this claim in his petition for review, it is waived. *See Diehl v. Unemployment Compensation Board of Review*, 4 A.3d 816, 826 (Pa. Cmwlth. 2010), *appeal granted*, __ Pa. __, 20 A.3d 1192 (2011).

employees; or (4) negligence that manifests culpability, wrongful intent, or evil design, or an intentional 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). The employer has the burden of proving that it discharged an employee for willful misconduct. *Id.*

In this case, the UCBR determined that Claimant's act of uninstalling the computer software was in retaliation for Employer's refusal to give him vacation and holiday pay to which Claimant believed he was entitled. One day after telling the president, "You will regret this," Claimant waited until the vice president left the office to uninstall the software. Claimant admitted that, at the time, he knew that Employer could not access its files without the software. (N.T., 9/21/10, at 43.) The UCBR believed Employer's testimony that the removal of the software without prior notice disrupted Employer's business because Employer could not access important files and documents. Furthermore, Claimant failed to establish good cause for covertly uninstalling the software. The UCBR found as follows:

> While the Board recognizes that the claimant paid for these software programs and permitted the employer to use them at no charge, the claimant failed to establish good cause for uninstalling the programs without giving prior notice to the employer and thereby impeding the employer's work. The Board does not find credible the claimant's testimony . . . that he uninstalled the programs because he believed that he was facing imminent discharge due to the employer's financial situation and his disagreement with the president.

(UCBR's Decision & Order at 4.)

We agree with the UCBR that Claimant's retaliatory behavior demonstrated an intentional disregard of Employer's interests and a disregard of the standards of behavior that Employer had the right to expect of its employees. Moreover, Claimant's dissatisfaction with Employer's holiday and vacation pay policies did not constitute good cause for his conduct. Therefore, the UCBR properly concluded that Claimant was discharged for willful misconduct.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eric Achey, Petitioner	:	
v.	:	No. 268 C.D. 2011
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 2nd day of September, 2011, we hereby affirm the December 30, 2010, order of the Unemployment Compensation Board of Review.

ROCHELLE S. FRIEDMAN, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eric Achey,	:	
Petitioner	:	
	:	
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Unemployment Compensation Board of Review,	:	Submitted: July 8, 2011
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HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY JUDGE COHN JUBELIRER **FILED: September 2, 2011**

While I agree with the majority's decision to affirm the Unemployment Compensation Board of Review's (Board) order finding Eric Achey (Claimant) ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law),[1] I disagree that Claimant waived the issue of whether the Board improperly considered additional evidence submitted by Employer after the record was closed based on Claimant's failure to raise this claim in his Petition for Review (PFR). See

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

Achey v. Unemployment Compensation Board of Review, No. 268 C.D. 2011, slip op. at 4 n.4 (Pa. Cmwlth. August 31, 2011), (citing Diehl v. Unemployment Compensation Board of Review, 4 A.3d 816, 826 (Pa. Cmwlth. 2010), appeal granted, __ Pa. __, 20 A.3d 1192 (2011)). Accordingly, I would reach that issue.

Prior to filing the PFR, Claimant sent a pro se letter to this Court indicating his interest in appealing the Board's order and specifically challenging the Board's decision, which he alleged considered additional evidence submitted by Employer after the record was closed. The pro se letter was the very first correspondence Claimant had with this Court and provides, in relevant part:

> I am writing this letter to appeal to the Commonwealth Court of Pennsylvania to reverse the decision of the Unemployment Compensation Board of Review of December 30, 2010. (See item #1)
>
> The owners of Modern Steel Construction Corp. . . . were allowed to submit a 60-page document refuting the decision that was made in my favor, by referee Marilyn Gunden on Sept. 28, 2010. This document contains many libelous and outright false statements, which **I was given no opportunity to refute.**
>
> The instructions on the petition for appeal that accompanied this slanderous document states that if the board finds a problem with the original hearing, it will direct the referee's office to schedule [an] additional hearing. (See item #2).
>
> However, instead they just reversed the referee's decision out of hand. In their findings of fact are items and statements, which only appear in this latest document. *This document should not have been considered as part of the existing record.*
>
> . . . .
>
> As instructed by the court clerk I am submitting this letter to begin the appeals process.

(Pro Se Letter from Claimant to Commonwealth Court (filed January 26, 2011) (second emphasis added).) In response to this pro se letter, this Court sent a letter to Claimant indicating that according to the Pennsylvania Rules of Appellate Procedure, Claimant had to file a PFR to perfect his appeal and "include a *general* statement of objections to the order or determination." (Letter from Commonwealth Court to Claimant (February 2, 2011) at 1 (emphasis added).) This Court further noted that the postmarked date of the pro se letter would "be preserved as the date of filing your appeal." (Letter from Commonwealth Court to Claimant (February 2, 2011) at 2.) Claimant subsequently filed a pro se PFR in which he alleges that the order of the Board should be reversed because:

> The Board[']s decision finds me in violation of Section 402(e) of [the] Law. This is based on the testimony of the Employer. The burden of proof has not been met by the Employer. No proof has been shown that I violated the terms of Section 402(e) of [the] Law.
>
> I believe the record will show that I was careful not to damage company files and/or the operating system of the computer from which I responsibly uninstalled my personal software.

(Petition for Review.) Unfortunately, this pro se PFR failed to include a detailed and *specific* description of the objection that Claimant previously had outlined in his pro se letter to this Court. However, I would read that letter together with his pro se PFR and conclude that Claimant did preserve this issue because he had raised that objection to this Court in his pro se letter. I would, therefore, reach the question of whether the Board erred by considering evidence that was not a part of the record before the Referee. While I would reach the issue, I would not conclude that the Board erred because, although the Board did make new findings of fact, the record

made before the Referee contained substantial evidence to support those findings.[2] Therefore, I ultimately concur with the majority's order affirming the Board.

Although the majority opinion's interpretation of Rule 1513 of the Pennsylvania Rules of Appellate Procedure as requiring the specific inclusion of issues in a PFR filed in this Court's appellate jurisdiction is supported by precedent, I question whether that interpretation continues to be necessary. First, I do not believe the text of Rule 1513 requires such specificity. Interpreting Rule 1513 as mandating such a high level of specificity has resulted in numerous waivers of issues when either counsel or pro se litigants draft a PFR solely based on the text of Rule 1513, without researching the requirements elsewhere. Second, although there were historical reasons for the development of the specificity requirements, I believe that

[2] There is substantial evidence of record to support the findings that Claimant's actions of removing the software from Employer's computers impeded Employer's ability to work. (See Claimant's Br. at 12.) Specifically, in the documents attached to Employer's Questionnaire, the President of Employer indicated that Claimant "fulfilled his threat and sabotaged the Company computer to intentionally inflict harm." (Letter from Employer to UC Service Center (August 5, 2010), Item No. 3.) Additionally, Employer included a letter from his counsel to Claimant indicating that Claimant's "actions have jeopardized the company's interests, including the inability to perform work on certain projects and the inability to submit certain bids that could result in enormous financial damages for which you will be held personally responsible." (Letter from Employer's counsel to Claimant (July 30, 2010), Item No. 3.) As part of Employer's consultant interview, the President of Employer again indicated that because Claimant deleted software from Employer's computers, Employer was "unable to access any files, unable to retrieve documents or pull up bids. It was a malicious act and costly to the company. We are still trying to restore our data, costs incurred up to $7,000." (Employer Consultant Interview, August 19, 2010, Item No. 5.) In addition, at the hearing before the Referee, the President of Employer testified that because Claimant deleted software from the computers, Employer was not able to produce any work for a period of time, (Hr'g Tr. at 23-24); that Employer was not able to access the work product that Claimant deleted in any other way, (Hr'g Tr. at 27); and that Employer was unable to print drawings for projects that were time sensitive, (Hr'g Tr. at 28).

those reasons have diminished over time, while the incidents of waiver have increased. Therefore, I believe that the current balance of harms favors not requiring such specificity. Finally, I do not believe that permitting a general statement of appeal in a PFR would compromise the Court's ability to exercise appropriate and thorough appellate review.

The text of Rule 1513(d) does not, on its face, require the specificity described by the majority opinion. Rule 1513(d) provides as follows:

> **(d) Content of appellate jurisdiction petition for review.** An appellate jurisdiction petition for review shall contain: (1) a statement of the basis for the jurisdiction of the court; (2) the name of the party or person seeking review; (3) the name of the government unit that made the order or other determination sought to be reviewed; (4) reference to the order or other determination sought to be reviewed, including the date the order or other determination was entered; (5) *a general statement* of the objections to the order or other determination; and (6) a short statement of the relief sought. A copy of the order or other determination to be reviewed shall be attached to the petition for review as an exhibit. The statement of objections will be deemed to include every subsidiary question fairly comprised therein. No notice to plead or verification is necessary.
>
> Where there were other parties to the proceedings conducted by the government unit, and such parties are not named in the caption of the petition for review, the petition for review shall also contain a notice to participate, which shall provide substantially as follows:
>
> > If you intend to participate in this proceeding in the (Supreme, Superior or Commonwealth, as appropriate) Court, you must serve and file a notice of intervention under Rule 1531 of the Pennsylvania Rules of Appellate Procedure within 30 days.

Pa. R.A.P. 1513(d) (emphasis added). While there are many requirements attendant to a PFR in this Court's appellate jurisdiction, the rule does not require the specificity

that the content of a PFR in the Court's original jurisdiction should require. Rule 1513(e) provides the content of a PFR in original jurisdiction as follows:

> **(e) Content of original jurisdiction petition for review.** A petition for review addressed to an appellate court's original jurisdiction shall contain: (1) a statement of the basis for the jurisdiction of the court; (2) the name of the person or party seeking relief; (3) the name of the government unit whose action or inaction is in issue and any other indispensable party; (4) *a general statement of the material facts upon which the cause of action is based*; and (5) a short statement of the relief sought. It shall also contain a notice to plead and be verified either by oath or affirmation or by verified statement.

Pa. R.A.P. 1513(e) (emphasis added). There is a need for more specificity in a PFR filed in our original jurisdiction because such pleading "is simply another name for a complaint[, which] . . . . is a fact pleading requiring sufficient detail to establish a cause of action." 20A G. Ronald Darlington, et. al., Pennsylvania Appellate Practice § 1513:1, at 73 (2010–11 ed.)[3] A PFR in this Court's original jurisdiction is filed "where for example a petitioner seeks to compel action by the state government and contends there is no adequate administrative remedy for the injury [and is] identical to a complaint in equity, mandamus, or any other form of action that would exist if the matter were commenced in a court of common pleas." Id. at 74. By contrast, a PFR in this Court's appellate jurisdiction should not require the same level of specificity necessary for a PFR in our original jurisdiction and should more closely resemble a notice of appeal. The reason the courts have required more specificity in a PFR is "*to permit the conversion of an appellate document to an original jurisdiction*

[3] We note, however, that the text of the rule regarding the content of a PFR in our original jurisdiction may not, on its face, require the specificity that is involved in drafting a complaint.

pleading and vice versa should such action be necessary to assure proper judicial disposition." Pa. R.A.P. 1513 Note (emphasis added).

The requirement that a PFR be specific developed for historical reasons, as described in the Note to Rule 1502 (identifying PFR practice as "the exclusive procedure for judicial review of a determination of a government unit"), as follows:

> This chapter recognizes that the modern label "appeal" has little significance in connection with judicial review of governmental determinations in light of the long history in this Commonwealth of relatively complete exercise of the judicial review function under the traditional labels of equity, mandamus, certiorari and prohibition. If the simple form of notice of appeal utilized in Chapter 9 (appeals from lower courts) were extended to governmental determinations without any requirement for the filing of motions for post-trial relief, a litigant who incorrectly selected the appeal label, rather than the equity, mandamus, replevin, or prohibition, etc. label, would probably suffer dismissal, because the court would be reluctant to try a proceeding in the nature of equity, mandamus, replevin, or prohibition, etc. in the absence of a proper pleading adequately framing the issues.
>
> The solution introduced by these rules is to substitute a new pleading (the petition for review) for all of the prior types of pleading which seek relief from a governmental determination (including governmental inaction). Where the reviewing court is required or permitted to hear the matter de novo, the judicial review proceeding will go forward in a manner similar to an equity or mandamus action. Where the reviewing court is required to decide the questions presented solely on the record made below, the judicial review proceeding will go forward in a manner similar to appellate review of an order of a lower court. However, experience teaches that governmental determinations are so varied in character, and generate so many novel situations, that on occasion it is only at the conclusion of the judicial review process, when a remedy is being fashioned, that one can determine whether the proceeding was in the nature of equity, mandamus, prohibition, or statutory appeal, etc. The petition for review will eliminate the wasteful and confusing practice of filing multiple "shotgun" pleadings in equity,

> mandamus, prohibition, statutory appeal, etc., and related motions for consolidation, and will permit the parties and the court to proceed directly to the merits unencumbered by procedural abstractions.

Pa. R.A.P. 1502 Note. Thus, the combination of a new pleading, the PFR, the varied character of governmental determinations, and the lack of precedent at that time, justified the need to have an appellate jurisdiction PFR be as specific as an original jurisdiction PFR in case a transfer was necessary, even at the end of judicial deliberation.

However, as time has passed, PFR practice is no longer new or novel, and there is a body of law regarding appellate review of governmental determinations, as well as judicial review of governmental actions within this Court's original jurisdiction. Thus, as the Note to Rule 1501 recognizes,

> [W]hile such original jurisdiction forms of action are still available, their proper usage *is now the exception rather than the rule because appellate proceedings have become the norm.* Thus, the need to rely on Rule 1503 to convert an appellate proceeding to an original jurisdiction action and vice versa *arises less often*. Moreover, the emphasis on a petition for review as a generic pleading that permits the court to simultaneously consider all aspects of the controversy is diminished. The primary concern became making the practice for appellate proceedings more apparent to the occasional appellate practitioner. Accordingly, the rules have been amended to more clearly separate procedures for appellate proceedings from those applicable to original jurisdiction proceedings.
>
> The responsibility of identifying the correct type of proceeding to be used to challenge a governmental action is initially that of counsel. Where precedent makes the choice clear, counsel can proceed with confidence. Where the choice is more problematic, then counsel should draft the petition for review so as to satisfy the directives for both appellate and original jurisdiction proceedings. Then the court can designate the proper course of action regardless of counsel's earlier assessment.

Pa. R.A.P. 1501 Note (emphasis added).

In instances where a less specific PFR is filed in this Court's appellate jurisdiction and the matter should have been filed as an original jurisdiction action requiring a more specific PFR, there are several options available to remedy the lack of specificity. If the mistake is caught at filing, the Court can contact the petitioner, advise him or her of the mistake, hold the filing date, and ask for a more specific filing, as the Court did in this case. If, however, the mistake is not caught until much later, the Court would need to determine whether amendment would be permitted.

However, as described above, the current status of PFR practice reveals that more PFRs are filed in this Court's appellate jurisdiction and, due to the requirement for specificity in *all* PFRs, more petitioners are at risk of waiving their issues than are petitioners who should have filed a specific PFR in this Court's original jurisdiction. Given the current situation, requiring such specificity in an appellate PFR does not improve the appellate process; rather, it creates a "waiver trap" for parties who may not specifically articulate all the issues appropriate for appeal at that early stage.

Finally, allowing the filing of a general PFR in this Court's appellate jurisdiction will not adversely affect our ability to provide effective appellate review. At the time a petitioner files the appellate PFR, the agency has already issued its adjudication and, consequently, there is no benefit to the agency's decision-making

process by the filing of a specific PFR.[4] In contrast, appellate review could benefit more by giving a petitioner the time to obtain the transcript, review the documentation and adjudication, and then develop the issues on appeal in the brief filed with this Court. The respondent will then have the opportunity to respond to the arguments that are made in the brief. Thus, I believe the balance of harms favors rethinking the specificity requirements in a PFR filed in the Court's appellate jurisdiction.

Accordingly, for the foregoing reasons, I concur in the result reached by the majority.

RENÉE COHN JUBELIRER, Judge

[4] This is unlike the situation involved in an appeal from a trial court's order, where the trial court may not have written an opinion in support of its order at the time the appellant files his or her notice of appeal.