

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                           |   |            |                              |
|---------------------------|---|------------|------------------------------|
| John Perretta,            | : |            |                              |
|                           | : | Petitioner |                              |
|                           | : |            |                              |
|                           | : |            |                              |
|                           | : | v.         | No. 588 C.D. 2011            |
|                           | : |            | SUBMITTED: September 9, 2011 |
| Unemployment Compensation | : |            |                              |
| Board of Review,          | : |            |                              |
|                           | : | Respondent |                              |

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: October 28, 2011**

John Perretta (Claimant), *pro se*, petitions this court for review of the order of the Unemployment Compensation Board of Review which affirmed the referee’s determination that Claimant committed willful misconduct and was ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).<sup>1</sup> After review, we affirm.

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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 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 . . . .”

Claimant was employed by ARG Resources Inc. (Employer), as a restaurant manager at Arby's from October 28, 2002 through October 21, 2010 earning \$38,000.00. When Claimant arrived for his shift on October 10, 2010, the day manager, Amber Gibbons, was busy on the back line cooking. Claimant volunteered to count her cash drawers. One of the drawers showed an overage of approximately ten dollars.<sup>2</sup> Under Employer's policy, any cash overage or shortage exceeding \$10 is a documentable offense that may lead to termination. Employer's policy also provides that whoever counts the money in the drawer is accountable and must put their initials in the computer as the person who counted the cash drawers. Employer questioned Ms. Gibbons about the overage and learned that Claimant, and not Ms. Gibbons, had counted the cash drawers that day. Claimant admitted that he counted the cash drawers on the day in question and that he might have put Ms. Gibbon's initials in the computer to indicate that it was her shift and therefore she was responsible for the cash drawers. Employer terminated Claimant for violating its policy against falsifying or attempting to falsify a company record or report, including time reports. After the UC Center denied benefits, Claimant appealed and a hearing was held before the referee on December 16, 2010, at which Claimant and Allison Boyd, Employer's District Manager, testified.

Ms. Boyd testified that after an investigation, Employer terminated Claimant for falsification of a company document or record. Ms. Boyd explained that after the General Manager became aware of the cash overage on October 10,

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<sup>2</sup> Ms. Boyd, Employer's District Manager, testified that the amount was \$12.56, while both the referee and the Board found the amount to be \$10. Given that Employer testified that the money was not the issue in Claimant's termination, this discrepancy is irrelevant.

2010, he questioned the Shift Manager, Amber Gibbons, whose initials were given as the manager who had counted the drawer. When it was determined that Claimant had been the one who counted the cash drawers that day, Ms. Gibbons phoned Claimant and asked him why he had put her initials in the computer instead of his own. Ms. Boyd testified that Claimant told Ms. Gibbons that he accidentally put her initials into the computer. Ms. Boyd explained that any overage or shortage over \$5 is a documentable offense, “meaning they would be given a corrective action on a piece of paper.” Hearing of December 16, 2010, Notes of Testimony (N.T.) at 9-10. She further testified that while an overage may lead to termination, in this case, they would have only written up the manager, Ms. Gibbons, because it was her initials that were in the computer as having counted the drawer with the overage. Ms. Boyd explained that while Ms. Gibbons should have counted the cash drawers that day as the Shift Manager in charge at the time, there is no company policy requiring that she had to be the one to count the cash drawers, and that “any Manager . . . that’s, like an actual Manager in the restaurant is permitted to count any of the cash drawers down as long as obviously they’re putting, you know, the right person in the computer that actually counted it down.” *Id.* at 13. Ms. Boyd stated that if Claimant had put in his own initials that day, he would have only been documented for the overage and not terminated. Ms. Boyd testified that Claimant admitted that he had counted the drawer because Ms. Gibbons was running late, and that he stated that “he thought he would put [Ms. Gibbons’] initials into the computer since she was . . . on shift at the time.” *Id.* Finally, Ms. Boyd testified that she believed that Claimant put Ms. Gibbons’ initials into the computer because he “didn’t want to get written up for [the overage].” *Id.*

Claimant testified that when he arrived for his shift on October 10, he saw that Ms. Gibbons was busy and that he offered to count the two cash drawers for her. Claimant stated that after counting the drawers, one drawer was approximately \$13.84 dollars short and the other drawer was \$15.00 over, which he concluded was a “bounce-back” between the drawers. *Id.* at 16. Claimant explained that since the two employees’ drawers were side by side, there was essentially no cash shortage or overage and neither employee would need to be written up as a result. Claimant further testified that after the drawer is counted, a receipt gets printed and stapled to the daily paperwork, which is then kept on-file for one year. Claimant stated that both he and the two employees signed the cash drawer receipts for that day with their initials. Claimant testified that while he “apparently miss-keyed or entered [Ms. Gibbons’] initials” he stated that he was “not 100 percent sure that I entered her initials because I haven’t seen any records to show that yet.” *Id.* Claimant stated that he explained to Ms. Gibbons that there was no cash problem because there was a bounce-back from another drawer. Claimant testified that he subpoenaed the cash till records to prove that he had taken responsibility for counting the drawers by signing the receipts. Claimant acknowledged that he looked for these cash till records after he was terminated, but could not find them because they were “missing” or they were “not there.” *Id.* at 17. Claimant testified that during his tenure as a manager, he was told on one occasion that Employer wanted the initials of the manager who was in charge of the shift entered into the computer to show that it was their shift regardless of whether they counted the cash drawers. Claimant stated that was why the person who actually counted the drawers would then sign the printed cash receipts, thereby indicating who was actually responsible for counting the drawers.

The referee found that Claimant was discharged for falsifying company records by entering Ms. Gibbons' initials in the computer rather than his own, and that Claimant failed to establish good cause for his actions. The referee concluded that Claimant was ineligible for unemployment compensation benefits due to his willful misconduct. Claimant appealed to the Board. The Board, after making its own findings of fact, affirmed the referee. After the Claimant's request for reconsideration was denied, he appealed to this court.<sup>3</sup>

The issues presented by Claimant in this appeal are whether the Board erred in finding that he committed willful misconduct by purportedly signing another manager's initials in the computer, even though he signed his own initials to the paper copy of the cash receipts; and whether he was prejudiced and denied due process by Employer's failure to produce the subpoenaed paper copy of the cash receipts for October 10, 2010, which would have proven that his actions were reasonable under the circumstances.<sup>4</sup>

Willful misconduct has been defined as the wanton and willful disregard for an employer's interests; the deliberate violation of an employer's rules; the disregard for standards of behavior which an employer can rightfully expect of an employee; or negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations. *Frumento v.*

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<sup>3</sup> Our review in unemployment compensation cases is limited to determining whether findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. *Deal v. Unemployment Comp. Bd. of Review*, 878 A.2d 131 (Pa. Cmwlth. 2005).

<sup>4</sup> Although Claimant raised additional issues in his Petition for Review, he failed to present any argument in support of these issues or develop them any further in his brief. As such, these issues are waived. *Rapid Pallet v. Unemployment Comp. Bd. of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998).

*Unemployment Comp. Bd. of Review*, 466 Pa. 81, 351 A.2d 631 (1976). In order to show willful misconduct based upon the violation of a work rule, an employer must establish the existence of the rule, its reasonableness, the employee's awareness of the rule, and employee's violation of the rule. *Melomed v. Unemployment Comp. Bd. of Review*, 972 A.2d 593 (Pa. Cmwlth. 2009). Once an employer has met its burden, the burden shifts to claimant to show that he had good cause for his actions, i.e., that his actions were justifiable and reasonable under the circumstances. *Perez v. Unemployment Comp. Bd. of Review*, 736 A.2d 737 (Pa. Cmwlth. 1999).

Claimant argues that the Board erred in concluding that his conduct rose to the level of willful misconduct because Employer did not produce any evidence that he falsified a company record. Claimant maintains that it is unclear whether there was even a violation of the policy at all. According to Claimant, because the cash drawers are the responsibility of the manager on duty, it is not a violation of Employer's policy against falsification of a company record to enter that manager's initials in the computer, if the purpose of the policy is purely a record keeping function, i.e. to keep track of who was managing the shift at the time. However, if Employer's policy has an adoptive function, that is, if its purpose is to document responsibility for counting the cash drawers, Claimant argues that the fact that he signed the printed paper copy of the cash receipts fulfills this function because he acknowledged responsibility for counting the drawers, and there still would be no violation.

Next, Claimant argues that Employer was unable to produce the allegedly falsified record at the hearing, claiming that it was unable to print it, and it submitted only a written statement in which he stated only that he "might have

[entered Ms. Gibbons' initials], I'm not 100 percent certain." Claimant's Brief at 10. Claimant avers that not only is this statement equivocal, it is not an admission and is not enough to support the finding that he falsified a company record. Moreover, Claimant argues that even if this evidence shows that he committed some type of misconduct, he proved that his actions were justified and reasonable under the circumstances. Specifically, Claimant argues that he admitted that he counted the cash drawers, regardless of whether he entered Ms. Gibbons' initials in the computer, and that he signed his own initials on the printed paper copy of the cash receipts, thus evidencing his intent to take responsibility for counting the cash drawers and his lack of intent to deceive Employer. Finally, Claimant asserts that both he and Ms. Boyd, Employer's witness, testified that there was no money missing from the company and therefore the company suffered no harm from the alleged record falsification.

Unfortunately, Claimant's argument misses the point. Employer's witness, Ms. Boyd, testified that company policy required the person who actually counted down the cash drawers to enter his or her initials in the computer. Ms. Boyd testified that as part of Employer's policy of writing up cash overages or shortages, they begin their investigation by speaking to the manager whose initials are in the computer as having counted the drawers in question. Once it became clear that Ms. Gibbons had not counted the drawers that day, Employer was prompted to further investigate the matter and discovered, by Claimant's own admission, that he counted the drawers. Moreover, while Claimant disputes whether or not he even entered Ms. Gibbons' initials, he also testified that if he did so, it was to indicate that Ms. Gibbons was the shift manager on duty at the time. In his statement to Employer, Claimant admitted that "[w]hen I entered it in the

back office I put Amber's initials in the back office because it was a drawer from the opening shift." Original Record, Item 3, Employer's Separation Information.<sup>5</sup> Ms. Boyd also testified that Claimant should have been aware of this policy, as it was in Employer's Cash Policy as well as Claimant's Team Member Handbook. If Claimant had entered his own initials in the computer as required by policy, according to Ms. Boyd, Employer's investigation would have begun and ended with Claimant and he would have only received a written warning. It is irrelevant whether or not Claimant signed the printed copies of the cash receipts, as he avers, because it was his failure to enter his own initials in the computer to acknowledge and document that he was the manager responsible for counting the cash drawers which violated Employer's policy and led to his termination. Employer's witness testified that it was this conduct, and nothing else, which led to Claimant's termination. The Board determined that Employer "credibly established that the claimant placed the initials of another manager in the computer records regarding an overage which is a violation of the employer's policy." Board's Decision and Order, February 17, 2011, at 3. The Board also found that Claimant had not "credibly establish[ed] good cause for his action of violating the employer's policy." *Id.* Where an employer proves both the existence of the rule or policy, claimant's awareness of the rule or policy and his or her violation of the rule or policy, employer has met its burden of proving claimant's conduct rose to the level of willful misconduct. *See Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008). Accordingly, we conclude that there is substantial

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<sup>5</sup> We also note that on Claimant's Internet Initial Claim Form, which is part of the record, he stated, "I entered the initials of the morning manager, but I signed the paper when I counted the drawer." Original Record, Item 2.



competent evidence to support the finding that Claimant violated a known policy of Employer and failed to establish good cause for his actions.

Next, we consider Claimant's contention that he suffered extreme prejudice and was denied due process of law because the Board failed to enforce a subpoena against Employer for the printed copies of the cash till receipts for October 10, 2010. Claimant avers that he needs these documents to prove that he took responsibility for counting the cash drawers on the day in question thereby proving that he did not intentionally deceive Employer and that his actions were justified and reasonable under the circumstances.

The essential elements of due process in an administrative proceeding are notice and an opportunity to be heard. *Groch v. Unemployment Comp. Bd. of Review*, 472 A.2d 286 (Pa. Cmwlth. 1984). In claims involving an unrepresented claimant, the claimant is entitled to assistance from the fact finder in the development of his case, such as advising the claimant of his rights and aiding him in examining and cross-examining witnesses, and giving him every assistance compatible with the impartial discharge of its official duties. *See* 34 Pa. Code §101.21. In addition, Section 506 of the Law, 43 P.S. §826, provides that, “[t]he department and the board shall have power to issue summons or subpoenas to compel the attendance of witnesses and the production of . . . papers . . . and other records deemed necessary as evidence in connection with a disputed claim[.]”

The standard the Board (or the referee) should follow when issuing a subpoena is whether or not it will lead to relevant and probative evidence. *Alston v. Unemployment Comp. Bd. of Review*, 967 A.2d 432 (Pa. Cmwlth. 2009). In this case, although the subpoena was issued by the referee at Claimant's request, he testified that Employer refused to accept service of the subpoena. Employer's

witness, Ms. Boyd, testified that the printed cash receipts Claimant was seeking were missing and had been missing before Claimant's employment was terminated. Specifically, Ms. Boyd stated in response to Claimant's question that, "[y]ou looked for them the day of your termination and you know as well as I do that we could not find them. You went back and looked for them as well as myself." N.T. at 14. Furthermore, Ms. Boyd did not dispute the fact that Claimant may have signed the printed cash receipts, but testified that the cash overage was not the reason he was disciplined. Rather, Ms. Boyd testified that Claimant was "terminated for falsifying someone else's initials into the computer which you admitted to doing, which is a terminable offense according to the Team Member Handbook." *Id.* at 15. Moreover, as the Board concluded, Employer's failure to produce documents which no longer existed and which were not relevant to the reason for Claimant's discharge, did not affect the outcome of the proceeding. We conclude that the Board did not violate Claimant's due process rights by failing to enforce the requested subpoena.

Accordingly, the Board's order is affirmed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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| Unemployment Compensation | : |                   |
| Board of Review,          | : |                   |
|                           | : |                   |
| Respondent                | : |                   |

**ORDER**

AND NOW, this 28th day of October, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge