

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carey M. Rankin,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 883 C.D. 2009
	:	
Unemployment Compensation Board of Review,	:	Submitted: September 25, 2009
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: January 22, 2010

Carey M. Rankin (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee’s (Referee) decision denying him benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ The Board found Claimant, a correctional officer, to be ineligible for benefits because he violated the Somerset County Jail Code of Ethics Policy (Policy). The Policy

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

provides for the “intelligent, humane, and impartial treatment of inmates” at the Somerset County Commissioners’ (Employer) jail. (Policy, page 2, (B)(1), Item No. 2 Employer Separation Information.) Claimant argues that:² the Board’s factual findings are not supported by substantial evidence; the Referee improperly admitted a letter into evidence as a business records exception to the hearsay rule; the testimony submitted by Claimant established that his conduct was reasonable in light of the circumstances; and Employer did not apply the same standard of conduct to all of its employees.

Claimant applied for unemployment compensation benefits after becoming separated from his employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(e). Claimant appealed the Service Center’s determination, and an evidentiary hearing was held before the Referee. During the hearing, Claimant testified on his own behalf and presented the testimony of Correctional Officer Renee Leighty, Correctional Officer Jeffrey Barna, and Lieutenant William J. Rump. Vince Pavic, Human Resources Director for Employer, and Thomas Perrin, Warden for Employer’s jail, testified on behalf of Employer. Following the hearing, the Referee affirmed the Service Center’s determination and Claimant appealed to the Board. After conducting a review of the record, the Board issued an opinion in which it made the following findings of fact:

1. The claimant was last employed as a full-time corrections officer by the Somerset County Commissioners at the Somerset County Jail from 2002

² For sake of clarity, this Court has reordered Claimant’s arguments on appeal.

- at a final rate of \$15.05 per hour. His last day of work was August 22, 2008.
2. Correctional officers are responsible for the care, custody, and control of inmates.
 3. Article 5 of the collective bargaining agreement between the employer and the union allows for the employer to determine managerial responsibilities, including the right to determine the policies of the county.
 4. The employer has a Code of Ethics policy that provides for the intelligent, humane, and impartial treatment of inmates.
 5. Although the claimant refused to sign for the employer's policies, the claimant was presented with a copy of the policies and was bound by the employer's policies.
 6. At times, the claimant would work as the chief correctional officer on a shift. When in that position, the claimant would oversee the work of other employees and would give them direction on how to perform their jobs.
 7. On July 18, 2008, the warden received a report that an inmate housed in the basement observation cell was found covered in feces from the top of his back down to his feet. The warden began an investigation.
 8. Another correctional officer reported to the warden that on the evening of July 17, 2008, around 11:05 p.m., another correctional officer requested his assistance in getting the inmate out and cleaning and showering him and moving him to another cell.
 9. It was the correctional officers' duty to shower the inmates. A minimum of two officers were required to shower the inmates.
 10. The inmate was going through withdrawal of intoxicants and could not tend to himself. The inmate had been placed in administrative custody on a 15-minute check, meaning that the correctional officers were to go to the cell and physically check the inmate at least every 15 minutes.
 11. The claimant, who was working as the chief correctional officer at the time, refused to allow the correctional officer to clean and shower the inmate.
 12. The claimant did not inform the incoming 12:00 a.m. to 8:00 a.m. shift of any foul smell or possible medical condition with the inmate.
 13. The claimant did not fill out any incident report regarding a foul smell or possible medical condition with the inmate.
 14. When the warden questioned the claimant about the situation, the claimant admitted that when he was accompanying the nurse on the medication round, he noticed a strong odor of feces emanating from the cell. The claimant told the warden that he did nothing because he thought that it was a medical issue.

15. When the warden asked the claimant why he did not file an incident report, the claimant failed to give an answer.
16. Following its investigation, the employer terminated the claimant's employment for failing to give proper care to an inmate.
17. The lieutenant on the next shift received a three-day suspension without pay for his failure to act. He was not made aware of the situation when he came on shift.
18. The chief on the next shift received a two-day suspension without pay for his failure to act. The claimant had instructed him not to act.
19. Another correctional officer received a two-day suspension without pay.

(Board Findings of Fact (FOF) ¶¶ 1-19.) Based on these findings, the Board determined that Claimant committed willful misconduct by violating Employer's policy to treat all inmates humanely and failed to show good cause for his actions. The Board also found that Claimant did not prove that he was subjected to disparate treatment. Claimant now petitions this Court for review.

Before this Court, Claimant argues that the Board erred when it concluded that he was discharged for willful misconduct.³ Section 402(e) provides that a claimant will not be eligible for unemployment compensation when "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. § 802(e). Although the Law does not define the term "willful misconduct," the courts have defined it as follows:

- a) wanton or willful disregard for an employer's interests; b) deliberate violation of an employer's rules; c) disregard for standards of behavior

³ This "Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

which an employer can rightfully expect of an employee; or d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). Where a claimant is discharged for violation of a work rule, the burden is on the employer to prove that the claimant was made aware of the existence of the work rule and that the claimant violated the rule. Bishop Carroll v. Unemployment Compensation Board of Review, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989). Once the employer meets its burden, the burden then shifts to the claimant to establish good cause for his actions. Id. "A claimant has good cause if his . . . actions are justifiable and reasonable under the circumstances." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208-09 (Pa. Cmwlth. 2006). Whether certain conduct constitutes willful misconduct is a question of law subject to review by the courts. Caterpillar, 550 Pa. at 123, 703 A.2d at 456. In this case, the parties do not dispute that leaving an inmate covered in his own feces would constitute inhumane treatment in violation of Employer's Policy.

Claimant contends that the Board's factual findings are not supported by substantial evidence. Specifically, Claimant contends that the inmate in question did not soil himself during Claimant's shift and, thus, Claimant could not have been aware of this issue in order to remedy it. Claimant testified that: he did not observe anything that would lead him to conclude that the inmate had soiled himself; there were not enough correctional officers available to shower the inmate; and he never prohibited any correctional officer from showering an inmate who "had a bowel movement in his clothes." (Hr'g Tr. at 15-16, December 17, 2008, R.R. at 54a-55a.) Essentially, Claimant asks this Court to adopt his preferred version of the facts.

While Claimant did provide testimony that would support his contentions, the Board found that the facts were contrary to those advanced by Claimant and, in doing so, expressly rejected the testimony of Claimant as not credible. The law is clear that the Board is the ultimate finder of fact and arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). Thus, as long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Here, there is substantial evidence to support the Board's findings that an inmate under Claimant's supervision soiled himself and Claimant would not allow other correctional officers to clean the inmate. The Board credited the testimony of Warden Perrin that, during his investigation of the incident regarding the soiled inmate, Claimant indicated to Warden Perrin that on the evening of July 17, 2008, while escorting the jail nurse for medication rounds, Claimant "noticed a strong odor of feces emanating from the [inmate's] cell." (Hr'g Tr. at 17, November 17, 2008, R.R. at 18a; FOF ¶ 14.) However, Claimant indicated to Warden Perrin that he "did nothing because he thought it was a medical issue, and when ask[ed] why there was no report filed on the [medical issue] incident, he basically never answered that."

(Hr’g Tr. at 16, R.R. at 17a; FOF ¶¶ 12-15.)⁴ Warden Perrin further testified that Officer Barna indicated to him that, on July 17, 2008 at approximately 11:05 p.m., Officer Nicholson approached Officer Barna to request his assistance in showering the inmate and cleaning out the inmate’s cell. (Hr’g Tr. at 15, R.R. at 16a; FOF ¶¶ 8-9.) Warden Perrin stated that Officers Nicholson and Barna did not shower the inmate or clean the inmate’s cell because “[Claimant] refused to allow it to happen.” (Hr’g Tr. at 15, R.R. at 15a.) Warden Perrin’s testimony that Claimant refused to allow Officers Barna and Nicholson to shower the inmate is corroborated by Officer Barna’s testimony. Specifically, Officer Barna testified that either Officer Nicholson or himself asked Claimant for permission to shower the inmate, but Claimant, in Officer Barna’s presence, said not to. (See Hr’g Tr. at 7-8, December 17, 2008, R.R. at 46a-47a; FOF ¶ 11.) At the time that Claimant denied the officers’ request to shower the inmate, Claimant was in charge of the jail and Officers Barna and Nicholson were subordinate to Claimant. (Hr’g Tr. at 15, 19, November 17, 2008, R.R. at 16a, 20a; FOF ¶¶ 6, 11.) Officer Barna testified that he “obeyed the order” given by Claimant. (Hr’g Tr. at 7, December 17, 2008, R.R. at 46a.) Warden Perrin also testified that Chief Officer King, who was the chief correctional officer on the following shift, was ordered by Claimant not to clean the inmate when Claimant’s shift ended and Chief Officer King’s shift began. (Hr’g Tr. at 21-22, November 17, 2008, R.R. at 22a-23a; Board Op. at 5.)

⁴ On cross-examination, Warden Perrin answered in the affirmative when questioned, “Did [Claimant] admit that during his 4:00 to 12:00 shift the subject inmate had defecated himself?” (Hr’g Tr. at 20, R.R. at 21a; see FOF ¶ 7.)

Based on the credible testimony of Warden Perrin, which is corroborated by Officer Barna, the Board made factual findings that Claimant refused to allow an inmate who had defecated himself to be showered. Claimant smelled a strong odor of feces emanating from the cell, but did nothing for the inmate. Claimant did not shower or allow the inmate to be cleaned; Claimant failed to report a possible medical condition with the inmate; Claimant did not report the inmate's condition to Lieutenant Rump on the next shift; and Claimant instructed Chief Officer King on the next shift to not take any action with regard to the inmate. As discussed above, these findings are fully supported by the credible evidence of record. Thus, because Claimant failed to shower or permit other correctional officers to shower the soiled inmate, Claimant committed willful misconduct by violating Employer's Policy.

Claimant's contention that the Board's decision was based solely on hearsay evidence in the form of a September 2, 2008 termination letter from Warden Perrin, which was admitted by the Referee over objection, is erroneous.⁵ Contrary to Claimant's contention, the Board's decision does not rely on the September 2, 2008 termination letter from Warden Perrin but, instead, relies solely on Employer's *testimonial evidence* to support its factual findings and its conclusion of law that Claimant committed willful misconduct. Therefore, even if the letter was hearsay

⁵ At the hearing, there was a dispute as to the date of the termination letter. Claimant argued that the termination letter he received was dated August 22, 2008, not September 2, 2008; however, there was no dispute that the letter Claimant received dated August 22, 2008 was identical to the September 2, 2008 termination letter. Before this Court, Claimant contends that the September 2, 2008 termination letter was improperly admitted over objection because it did not qualify for the business records exception where there was no testimony regarding the preparation and maintenance of the September 2, 2008 termination letter.

and admitted in error, such error would be harmless because the Board did not rely on it to render its decision.

Because Employer satisfied its burden of proving that Claimant violated Employer's Policy by treating an inmate inhumanely, the burden is now on Claimant to show good cause for his actions. Docherty, 898 A.2d at 1208-09. Here, Claimant contends that his actions were reasonable in light of all the circumstances and, thus, not willful misconduct. Claimant contends that there was insufficient manpower to shower the inmate during his shift because there was a new inmate arriving at the jail who received higher priority. Furthermore, Claimant argues that the inmate did not soil himself during Claimant's shift because Claimant and the other correctional officers on duty did not see that the inmate had soiled his clothes. Therefore, Claimant argues that his actions were justifiable under the circumstances.

Contrary to Claimant's assertions that his testimony supports the conclusion that he had good cause for his actions and/or inactions, the Board rejected Claimant's testimony as not credible. The Board made no finding that the reason the inmate was not showered was because of the lack of manpower or time on account of a new inmate admission. Instead, the Board credited the testimony of Warden Perrin and found that Claimant's reason for not taking action after smelling a strong odor of feces on or near the inmate during medication rounds was because he believed the situation was a medical issue. (FOF ¶ 14.) However, even if Claimant believed the inmate had a medical issue, this would not amount to good cause for Claimant's actions and inactions because Claimant failed to report a possible medical issue to the incoming shift upon his departure and failed to record a medical issue as required.

(FOF ¶¶ 12-13.) These findings are supported by the testimony of Lieutenant William J. Rump. Lieutenant Rump testified that he was in charge of the shift after Claimant's shift ended and that Claimant never conveyed to him that he smelled a foul odor coming from the inmate's cell or that the inmate was suffering from a medical condition, even though Claimant was responsible to give said notifications to Lieutenant Rump. (Hr'g Tr. at 29-30, November 17, 2008, R.R. at 30a-31a.) Lieutenant Rump further testified that, if Claimant smelled a foul odor coming from the inmate's cell, Claimant "should have taken care of it," (Hr'g Tr. at 30, R.R. at 31a), by showering the inmate or, at the very least, reporting it. The Board did not credit Claimant's testimony and, thus, Claimant failed to prove good cause for violating Employer's Policy. As such, the Board did not err in determining that Claimant was discharged for willful misconduct and, thus, was ineligible for benefits pursuant to Section 402(e).

Finally, Claimant argues that the Board erred in concluding that Claimant was not subject to disparate treatment because he was the only employee fired. Specifically, Claimant takes issue with the fact that Lieutenant Rump and Chief King were not discharged even though he alleges that they "were more culpable tha[n] Claimant as to the neglect of the inmate." (Claimant's Br. at 25.) Claimant also argues that the basement officers were not discharged even though the "basement[] officers had the responsibility to physically go into the cell and check on the inmate every 15 minutes and at the time of the check record what they observed on the watch report. Neither basement officer reported that the inmate had soiled his clothes." (Claimant's Br. at 24.)

This Court, in Geisinger Health Plan v. Unemployment Compensation Board of Review, 964 A.2d 970, 974 (Pa. Cmwlth. 2009), explained the affirmative defense of disparate treatment by which a claimant may still receive unemployment compensation even though he has committed willful misconduct. In order to prove disparate treatment, a claimant must establish that: “(1) the employer discharged claimant, but did not discharge other employees who engaged in similar conduct; (2) the claimant was similarly situated to the other employees who were not discharged; and (3) the employer discharged the claimant based upon an improper criterion.” Id. Once this showing has been made by the claimant, “the burden then shifts to the employer to show that it had a proper purpose for discharging the claimant.” Id. This Court is mindful, however, that the scope of the affirmative defense of disparate treatment has not expanded so far “that the Board and this Court have become super-employers which must scrutinize every situation in which a claimant alleges merely that he was discharged while another employee was not.” Id. at 975. Just because an employee is terminated for willful misconduct and other employees are not terminated for the same conduct does not prove disparate treatment by the employer. Id.

Based on the record evidence presented, we cannot conclude that Claimant established the first prong of the disparate treatment analysis that Employer discharged Claimant, but failed to discharge other employees who engaged in *similar conduct*. The Board did not credit the testimony of Claimant but, instead, credited the testimony and evidence presented by Employer. The Board found that Claimant admitted to smelling a strong odor of feces on the inmate during his shift, but failed to take any action to ensure that the inmate was properly cared for. The Board found

that Claimant, as the chief correctional officer in charge of the shift, failed to take action to remedy the situation, refused to allow other correctional officers to shower and clean the inmate, failed to record the incident as required, failed to report a “medical issue” to medical staff, and failed to report the incident to Lieutenant Rump, who was the correctional officer in charge of the next shift. Moreover, the Board found that Claimant ordered Chief King, another correctional officer who worked the following shift, to not take any action with regard to the inmate. Claimant’s conduct was not in any way similar to the conduct of Lieutenant Rump, who worked the following shift and was unaware of the incident, and Chief King, who also worked the following shift and was ordered by Claimant to not take action. Although Lieutenant Rump and Chief King were disciplined for their actions or inactions regarding this inmate, they were not terminated because their conduct did not rise to the level exhibited by Claimant.⁶ Furthermore, the evidence credited establishes that two officers who were working and/or present in the basement area during Claimant’s shift requested permission to shower and clean the inmate, but Claimant refused this request. (Hr’g Tr. at 15, November 17, 2008, R.R. at 16a.) Claimant was in charge of the jail during this shift when the inmate was discovered to be in need of a shower and, thus, Claimant’s conduct was not similar to that of the other correctional officers.

Claimant also failed to prove the second prong of the disparate treatment defense by showing that Claimant was *similarly situated* to the other employees who

⁶ Chief King received two days of suspension from work without pay. Lieutenant Rump received three days of suspension from work without pay. (Hr’g Tr. at 27, November 17, 2008, R.R. at 28a.)

were not discharged. As previously discussed, Claimant was in charge of the jail during the shift when the inmate was discovered to have been in need of a shower; Claimant ordered subordinate officers to not shower the inmate; Claimant failed to report or inform Lieutenant Rump of the inmate's suspected "medical condition"; and Claimant failed to record the incident as required. Claimant had the power and responsibility to ensure that Claimant was treated humanely and, by his affirmative actions and conscious inactions, violated Employer's Policy. In other words, Claimant could have remedied the situation earlier so that the inmate was not forced to sit in feces and wear soiled clothes for several hours.

Claimant also fails to allege that Employer discharged him based on an improper purpose. Because Claimant failed to prove all three prongs of the disparate treatment defense, we conclude that the Board did not err in denying Claimant benefits.

Accordingly, the order of the Board is affirmed.

RENÉE COHN JUBELIRER, Judge

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Petitioner	:	
	:	
v.	:	No. 883 C.D. 2009
	:	
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

NOW, January 22, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby affirmed.

RENÉE COHN JUBELIRER, Judge