NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. E08-195

TODD COOK APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES and GARVER ENGINEERS APPELLEES	**Opinion Delivered** JUNE 3, 2009 APPEAL FROM THE BOARD OF REVIEW, [NO. 2008-BR-1228] REVERSED AND REMANDED

JOHN B. ROBBINS, Judge

Appellant Todd Cook was employed as a land surveyor and party crew chief for appellee Garver Engineers from January 2003 until his termination in May 2008. Subsequent to his termination, Mr. Cook applied for unemployment benefits. The Board of Review denied benefits pursuant to Ark. Code Ann. § 11-10-514(a) (Supp. 2007), which provides in pertinent part:

> (a)(1) If so found by the Director of Workforce Services, an individual shall be disqualified for benefits if he or she is discharged from her or his last work for misconduct in connection with the work.
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> . . . .
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> (3) Except as otherwise provided in this section, disqualification for misconduct shall be for eight (8) weeks of unemployment as defined in § 11-10-512.

On appeal from the Board's decision, Mr. Cook argues that the Board erred in finding that he violated a company policy or engaged in any misconduct. We agree and we

reverse.

The findings of the Board of Review are conclusive if they are supported by substantial evidence. *Arkansas Midland R.R. v. Director*, 87 Ark. App. 311, 191 S.W.3d 544 (2004). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.*

Tatiana Herrington is the Human Resources Director for Garver Engineers and testified on its behalf. Ms. Herrington testified that Mr. Cook was terminated because he received a second DWI, which he received while off-duty. Ms. Herrington stated that driving a truck is part of Mr. Cook's job duties. She stated that it is necessary for him to drive because he is the party chief and the crew is required to drive to different survey sites. Ms. Herrington testified that Garver would be at great liability if Mr. Cook were to have an accident in a company truck, and that the risk is too great. She further indicated that Mr. Cook's conduct was a violation of one of his employer's policies that are available for all employees to see. In particular, Garver Policy Memo 126 provides:

> Use of Vehicles on Company Business. The purpose of this policy is to provide guidelines for the safe and responsible use of vehicles for Garver Engineers' related business. This policy applies to the use of Garver owned vehicles, personal vehicles when used for company business and rental vehicles for business use.
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> . . . .
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> #4 Motor Vehicle Records and Violations. Garver will review motor vehicle records of employees on a periodic basis. Garver will also review motor vehicle records of prospective employees. If an employee or prospective employee has

> incurred violations, appropriate action will be taken. Such action may include dismissal, refusal of position for prospective employee or refusal of an employee's rights to drive a vehicle on company business. Drivers with the following violations will be subject to these actions: a. Any driver with a Type A violation in the past five years. . . . Type A violations are as follows: Driving under the influence of alcohol or drugs. . . .

Jim Petty testified on behalf of the appellant. Mr. Petty stated that he formerly worked for Garver in the same position as Mr. Cook from July 2002 through May 2005. According to Mr. Petty, he received a second DWI during his employment but was not terminated. He stated that Garver arranged to pick him up and drive him to work, and that it was not necessary for a party chief to have a driver's license to perform the job. Mr. Petty stated that when he left Garver it was a voluntary separation unrelated to his DWI.

Mr. Cook testified on his own behalf, and stated that he was cited for his second DWI while driving his personal vehicle in April 2008, and had received the first DWI a little more than four years earlier. Mr. Cook stated that he reported his second DWI to Garver and surrendered his company vehicle. Mr. Cook said that his license has been suspended, but that he has not yet been convicted and his DWI trial is pending.

Mr. Cook continued to work for Garver for about six weeks after being cited for DWI second offense, and testified that during that time Garver sent someone to drive him to work each day and charged him for the mileage. According to Mr. Cook, his employment does not require him to drive a vehicle because although they go to various work sites, the crew never consists of less than two people. Mr. Cook maintained that he had never worked while under the influence of alcohol. He testified that when his

employment was terminated the reasons given were the company's cost of insurance and its reputation.

In this appeal, Mr. Cook argues that substantial evidence does not support the Board's finding that he engaged in misconduct. "Misconduct" involves: (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior that the employer has a right to expect of its employees, and (4) disregard of the employee's duties and obligations to his employer. *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). In order to find that a claimant's off-duty activities constitute misconduct connected with the work, the employer must show that the employee's conduct (1) had some nexus to the work; (2) resulted in some harm to the employer's interest; and (3) was in fact conduct that was (a) violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. *Id*. Mr. Cook was terminated because he received a second citation for DWI, and we agree that there was no substantial evidence of any misconduct because Mr. Cook was not convicted of the DWI and there was no evidence presented at the hearing to support the charge.

Had Mr. Cook been convicted of his second DWI, we would have a different question, and in all probability we would have little hesitation in affirming the Board's decision to deny unemployment benefits. Contrary to Mr. Cook's position, we conclude that Garver Policy Memo 126 puts its employees on written notice that they are subject to dismissal for driving under the influence of alcohol, even when such activity occurs

while the employee is off duty. Moreover, while Mr. Cook testified to the contrary, there was testimony that driving was a requirement of his employment, and thus it would be contrary to his employer's interest were his driver's license to be suspended due to a DWI conviction. Moreover, we recognize that Garver has an interest in employing safe drivers and limiting its insurance costs and exposure to liability. But the only evidence of any willful violation by Mr. Cook giving rise to his termination was the DWI citation itself, which was not sufficient to prove any misconduct by Mr. Cook.

The appellee urges that this case is on point with *Feagin v. Everett, supra*, but we disagree. In that case, a school teacher was denied unemployment benefits after being charged with possession of a controlled substance, and we affirmed. The local news media had reported the teacher's arrest, and we affirmed a finding of misconduct detrimental to her employer's interest notwithstanding the fact that she was ultimately acquitted of the charge. However, there was ample evidence in that case that the claimant was in fact involved with illegal drugs given that a police search of her marital home uncovered drug paraphernalia, marijuana, and hash oil. We recognized in *Feagin* that some professions require higher standards of behavior than others, and that teachers serve as examples and role models for their students. We relied on *Lakeside School v. Harrington*, 8 Ark. App. 205, 649 S.W.2d 847 (1983), where we said that the disposition of criminal charges is a factor that the Board may consider in determining whether a worker's actions constituted misconduct in connection with the work, but it does not decide the issue. We also cited *Food Fair Stores, Inc. v. Commonwealth of Pennsylvania*, 314

A.2d 528 (Pa. Commw. Ct. 1974), where the court held that the employee was guilty of misconduct precluding unemployment benefits even though he was acquitted of criminal charges arising out of the activity that brought about his discharge.

The case at bar is distinguishable from *Feagin v. Everett*, *supra*, and the cases cited therein. Note that in *Lakeside School*, *supra*, the claimant/teacher was denied benefits even though the charges against her for possessing marijuana were dismissed, where the claimant admitted to smoking marijuana at a party. And in *Food Fair Stores, Inc.*, *supra*, the claimant assisted the driver of a delivery truck in unloading the employer's merchandise at the driver's garage. Contrary to all of these cases, there was no evidence presented at the hearing in this case that Mr. Cook had engaged in any misconduct.

We think this case is more like *A. Tenenbaum Co. v. Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990). There, the claimant was a truck driver and was charged with DWI while driving his own vehicle off duty. There was a written policy providing that a driving record containing a DWI would warrant dismissal, and the claimant was fired on that basis. However, we affirmed the Board's award of unemployment benefits, noting that although the claimant had told the employer that he had been charged with DWI while off duty and that he planned to plead not guilty, there was no indication that the employer asked whether he had, in fact, been driving while intoxicated, or made any other effort to determine whether the charges had any basis in fact prior to terminating him. Because there was evidence from which reasonable minds could conclude that the claimant was not discharged because of his conduct, but instead was discharged merely

because he had been ticketed for DWI, we held that the Board did not err in finding that the claimant was discharged for reasons other than misconduct connected with the work.

In this case the employer's stated reason for terminating Mr. Cook was being cited for his second DWI. At the time of the hearing, Mr. Cook had pleaded not guilty to the charge and was awaiting trial. There was no evidence presented to substantiate the allegation that Mr. Cook had in fact driven while intoxicated as alleged in the current charge. Therefore, there was no substantial evidence to support the Board's finding that Mr. Cook was discharged for misconduct in connection with the work, and we reverse and remand for an award of appropriate benefits.

Reversed and remanded.

HART and BAKER, JJ., agree.