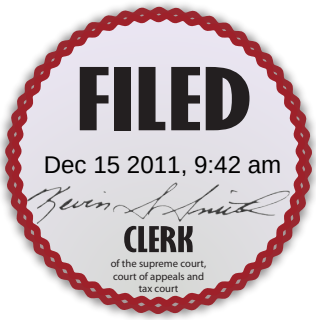

ATTORNEY FOR APPELLANT:

R. D.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

PAMELA S. MORAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

R.D.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 93A02-1103-EX-210
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT,et al,	)	
	)	
Appellee.	)	

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT
Cause No. 10-R-7380

December 15, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

R.D.[1] appeals the decision of the Review Board of the Indiana Department of Workforce Development ("Review Board") denying him unemployment benefits. We reverse.

Issue[2]

R.D. raises two issues, which we consolidate and restate as whether he was discharged for just cause.

Facts

R.D. was employed as a mapping specialist by Employer. At 5:10 p.m. on September 22, 2010, Director, who oversaw the data analysis of three departments, including the mapping department, walked to R.D.'s department, took a piece of candy, and noticed no one was there. At 4:40 p.m. on September 24, 2010, Director did the same thing and, again, no one was there. Director examined R.D.'s timekeeping records, which indicated R.D. worked until 6:00 p.m. on September 22, 2010 and until 5:00 p.m. on September 24, 2010. Director also compared R.D.'s timekeeping records to the time that he logged on and logged off of his computer and noticed discrepancies.

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[1] Two members of this panel believe that the use of initials is appropriate in cases involving the Department of Workforce Development and, thus, we use initials here. See S.S. LLC v. Review Bd. of Indiana Dep't. of Workforce Dev., 953 N.E.2d 597, 604-07 (Ind. Ct. App. 2011) (Crone, J., concurring). The third member of the panel believes that the use of initials is not required. See Moore v. Review Bd. of Indiana Dep't. of Workforce Dev., 951 N.E.2d 301, 304-306 (Ind. Ct. App. 2011).

[2] Because of our holding today, we need not address R.D.'s argument that the rule was not uniformly enforced by Employer, who discharged two employees and only suspended a third employee for similar violations.

On October 5, 2010, Employer terminated R.D.'s employment. The notice of termination referenced several dates in August and September 2010 in which R.D.'s timekeeping records did not match his computer log-in and log-out records. The notice also included Director's observations on September 22, 2010, and September 24, 2010. The notice concluded, "Because Employee submitted attendance reports documenting as time worked time that he did not actually work, termination is warranted." Employer's Ex. 1. The decision to terminate R.D.'s employment was based on a provision of Employer's Personnel Policies and Procedures Manual that categorized "[m]aking false or unfounded claims for injury, compensation, illness or disability" as offenses for which an employee may be terminated. Employer's Ex. 2. The decision was not based on another provision of Employer's Personnel Policies and Procedures Manual that prohibited "[m]aking false statements or supplying false information concerning an employee (including oneself)[.]" Id.

R.D. sought review of his termination by a grievance panel. The grievance panel found in part that R.D.'s Supervisor:

> instructed his staff that he was not concerned about their starting or quitting times, he was only concerned that his staff worked their full 75 hours in a 2 week time period. [Supervisor] further instructed his staff that they should record their time as their "scheduled" hours and not necessarily the hours they actually worked. He further instructed them that they must put down an hour for lunch, even if they did not take an hour for lunch. Therefore, if staff came in at 7:30 a.m., but was scheduled to begin work at 8:00 a.m., some staff members, including [R.D.] would still list 8:00 a.m. as the starting time because that was their regular scheduled starting time. If a staff member took a ½ hour for lunch or no lunch, staff believed they were still required to

> list an hour for lunch; this practice seems to still be utilized in the GIS area. The testimony revealed that [R.D.] utilized the timekeeping method prescribed by [Supervisor]. [R.D.'s] hours worked were substantiated by at least four witnesses who testified before the Panel.
>
> * * * * *
>
> After review of all the evidence, testimony, and applicable polices, the Panel finds that [R.D.] did not violate the Conduct Item 43 . . . because his actions did not constitute making false or unfounded claims for compensation. The Panel finds that [R.D.] did work the total 75 hours he claimed on each of his OTIS timesheets; however, [R.D.] did not accurately reflect his start, end, and lunch hours on his OTIS timesheets. Although this recording method was at the very least condoned by his supervisor . . . , it is still a violation of Conduct Item 24 . . . ; Making false statements or supplying false information concerning any employee, including oneself. As such the applicable discipline should apply.
>
> Recommendation:
>
> Therefore, it is the recommendation of this Panel, by unanimous vote, that the termination of [R.D.] should be overturned and substituted with a written reprimand for the violation of Conduct Item 24 . . . .

R.D.'s Ex. 1.

Contrary to the grievance panel's recommendation, Employer upheld R.D.'s termination. R.D. sought unemployment benefits, which were initially denied. R.D. appealed and, following a hearing, an administrative law judge ("ALJ") determined that R.D. was entitled to unemployment benefits. The ALJ found in part, "There is no evidence that [R.D.] claimed time that he did not work. The testimony of [R.D.] is found to be credible. [R.D.] did not violate the employer's policy regarding compensation." Appellee's App. p. 2.

Employer appealed and, on January 18, 2011, the Review Board initially affirmed the ALJ's decision. On January 19, 2011, the Review Board issued an order setting aside its decision and reinstating Employer's appeal. On February 18, 2011, the Review Board issued an order concluding that R.D. was not entitled to benefits. In its order, the Review Board adopted and incorporated the ALJ's findings of fact "except to the extent inconsistent with this decision and as modified herein." Appellant's App. p. 4. The Review Board found in part:

> [R.D.'s] workstation is located in the GIS department. On September 22, 2010, the Director visited the GIS department at approximately 5:10 p.m. Emp. Ex. 9. No one was present in the GIS department. The Director sent an e-mail message to herself noting that all of the employees in the GIS department were gone as of 5:10 p.m. Emp. Ex. 9.
>
> On September 24, 2010, the Director visited the GIS department at approximately 4:40 p.m. Emp. Ex. 9. No one was present in the GIS department. The Director sent an e-mail message to herself noting that all GIS employees were gone at 4:40 p.m. Emp. Ex. 9.
>
> Some time later, the Director reviewed the time sheets submitted by GIS employees, including [R.D.]. On September 22, 2010, [R.D.] reported that he clocked in for the day at 7:00 a.m., clocked out at 12:00 p.m., clocked back in at 1:00 p.m., and clocked out for the day at 6:00 p.m. Emp. Ex. 12, p. 44. On September 24, 2010, [R.D.] reported that he clocked in for the day at 7:00 a.m., clocked out at 12:00 p.m., clocked back in at 12:45 p.m., and clocked out for the day at 5:00 p.m. Emp. Ex. 12, p. 44. The Director noted that for September 22 and 24, 2010, [R.D.] indicated that he had clocked out after she visited the GIS department and noted that no one was there. This discovery prompted the Director to request computer usage records for the entire GIS department.

> After obtaining computer usage records, which indicate when employees log-in and log-out of their computers for the day, the Director reviewed the records. The Director discovered discrepancies between actual computer usage and time reported as worked by [R.D.] and three other employees. The Director's discovery prompted the Employer to conduct further investigation, which included meeting with each of the employee's supervisors in order to determine if there was an explanation for the discrepancies.
>
> Following the investigation, it was determined that [R.D.] and two other employees falsely reported time as worked that had not been worked. The Employer decided to terminate [R.D.] and these two employees. [R.D.'s] employment was terminated on October 5, 2010. Emp. Ex. 1.
>
> * * * * *
>
> During the hearing, [R.D.] contended that his computer usage logs could not be used to determine when he was actually working because there were some tasks that he did not need a computer to complete. [R.D.], however, also stated that he was not at work when the Director visited the GIS department on September 22 and September 24, 2010. On September 22, 2010, [R.D.] was not at his workstation at 5:10 p.m. because he was at his daughter's track meet. On September 24, 2010, [R.D.] stated that he was not working at 4:40 p.m. The Review Board finds that [R.D.] falsely reported time as worked that he did not work.

Appellant's App. pp. 4-5.

The Review Board concluded in part:

> The Employer's policy is a rule, because it sufficiently defines prohibited conduct to allow an employee to know when the policy has been violated. Furthermore, the policy is capable of uniform enforcement. The Employer's rule is reasonable. [R.D.] was aware of the Employer's policy. The Employer's rule is uniformly enforced, because all employees who were discovered to have falsely reported time as worked that was not worked were discharged. [R.D.] violated the rule

> because on September 22 and September 24, 2010, [R.D.] reported that he was at work when he was not.
>
> The only question is whether [R.D.] knowingly violated the rule. [R.D.] was aware of the rule, and his actions violated the rule, but is not enough that [R.D.] violated a known rule. It must be shown that [R.D.] knew – or should have known – that his conduct would violate the rule. In the present case, a reasonable person would realize that he should not report time as worked that he did not work. [R.D.] knowingly violated the rule when he deliberately reported that he was working when he was not. The Employer discharged [R.D.] for just cause.

Id. at 5-6. R.D. now appeals.

Analysis

"The Indiana Unemployment Compensation Act provides that any decision of the review board shall be conclusive and binding as to all questions of fact." Quakenbush v. Review Bd. of Ind. Dep't. of Workforce Dev., 891 N.E.2d 1051, 1053 (Ind. Ct. App. 2008) (citing Ind. Code § 22-4-17-12(a)). "Review Board decisions may, however, be challenged as contrary to law, in which case the reviewing court examines the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of facts." Id. (citing I.C. § 22-4-17-12(f)). "Under this standard, we review determinations of specific or basic underlying facts, conclusions or inferences drawn from those facts, and legal conclusions." Id.

Review of factual findings of basic facts are subject to a "substantial evidence" standard of review. McClain v. Review Bd. of Indiana Dep't. of Workforce Dev., 693 N.E.2d 1314, 1317 (Ind. 1998). In undertaking this analysis, we neither reweigh the

evidence nor assesses the credibility of witnesses and consider only the evidence most favorable to the Review Board's findings. Id.

The Review Board's conclusions as to ultimate facts involve an inference or deduction based on the findings of basic fact. Id. These questions of ultimate fact are appropriately characterized as mixed questions of law and fact. Id. at 1317-18. As such, they are reviewed to ensure that the Review Board's inference is "reasonable." Id. at 1318. If a question of ultimate fact is within the special competence of the Review Board, it is appropriate for a court to exercise greater deference to the "reasonableness" of the Review Board's conclusion. Id. However, as to ultimate facts not within the Review Board's area of expertise, the reviewing court is more likely to exercise its own judgment. Id. "In either case the court examines the logic of the inference drawn and imposes any rules of law that may drive the result." Id. "That inference still requires reversal if the underlying facts are not supported by substantial evidence or the logic of the inference is faulty, even where the agency acts within its expertise, or if the agency proceeds under an incorrect view of the law." Id.

Under these circumstances, "[t]o establish a prima facie showing of just cause for termination the employer must show that the claimant: (1) knowingly violated; (2) a reasonable; and (3) uniformly enforced rule." Butler v. Review Bd. of Indiana Dep't. of Emp't and Training Servs., 633 N.E.2d 310, 312 (Ind. Ct. App. 1994); see Ind. Code 22-4-15-1(d)(2). To have "knowingly" violated an employer's rule, the employee must know of the rule and know his or her conduct violated the rule. Stanrail Corp. v. Review Bd. of Dep't. of Workforce Dev., 735 N.E.2d 1197, 1203 (Ind. Ct. App. 2000), trans.

denied. "[M]isconduct which will justify discharge of an employee so as to make the employee ineligible for unemployment compensation is the 'wanton or willful disregard of the employer's interests, a deliberate violation of the employer's rule, or wrongful intent.'" Id. (citation omitted). "After the employer has met his burden, the claimant must present evidence to rebut the employer's prima facie showing." Butler, 633 N.E.2d at 312.

Employer discharged R.D. for making false or unfounded claims for injury, compensation, illnesses, or disability. Employer did not discharge R.D. for violating another provision of the Personnel Policies and Procedures Manual that prohibited making a false statement or supplying false information concerning any employee.[3] The Review Board acknowledges that it cannot change an employer's stated reason for discharge. See Appellee's Br. p. 11. n.2. As we have observed, "the issue is whether the stated grounds for discharge have a basis in fact and constitute just cause." Voss v. Review Bd. Dep't. of Emp't and Training Servs., 533 N.E.2d 1020, 1021 (Ind. Ct. App. 1989). Thus, we must limit our analysis to whether R.D. made a false or unfounded claim for compensation and cannot consider other grounds for R.D.'s discharge. See Coleman v. Review Bd. of Indiana Dep't. of Workforce Dev., 905 N.E.2d 1015, 1019 (Ind. Ct. App. 2009).

R.D. argues, "[e]ven though the times were reported inaccurately as they were instructed to be, he did not receive compensation for hours that [he] didn't work."

[3] The disciplinary schedule provided different sanctions for this violation, including written reprimand, one work week suspension, and eventually termination.

Appellant's Br. p. 9. We find merit to this argument. The Review Board found that R.D. "falsely reported time as worked that he did not work." Appellant's App. p. 5. This finding and the Review Board's conclusions mirroring this language show that R.D.'s time sheets were not accurate and it is undisputed that R.D. was not at work at times when he indicated he was on his timesheets. R.D., however, was not discharged for making false statements; instead, he was discharged for making false or unfounded claims for compensation. The Review Board's findings do not establish R.D. made a false or unfounded claim for compensation by working less than the seventy-five hours per pay period for which he sought compensation. The Review Board's failure to find that R.D. knowingly made a false or unfounded claim for compensation renders the findings insufficient to support the conclusion that he was discharged for just cause.

Further, we are not convinced the evidence would have supported such a finding when we consider the ALJ's findings, which the Review Board adopted and incorporated "except to the extent inconsistent with this decision and as modified herein." Appellant's App. p. 4. The ALJ found, "[t]here is no evidence that [R.D.] claimed time that he did not work. The testimony of [R.D.] is found to be credible. [R.D.] did not violate the employer's policy regarding compensation." Appellee's App. p. 2.

At the ALJ hearing, in addition to stating he did not claim time that he did not work, R.D. explained that Supervisor:

> allowed us to come in early before our start time if we wanted. He allowed us to stay late. He also worked with us if we wanted to take a half an hour lunch, we could take a half an hour lunch. If we wanted to take no lunch and leave an hour earlier, we could do that.

Tr. p. 34. When asked by Employer why his timesheets always added up to seventy-five hours per pay period, R.D. explained, "we were told we were not allowed to go over that. There were times I know that I stuck around and did things that I did not denote them on my time sheet because I can't go over seventy five hours." Id. at 43.

This testimony was consistent with the findings in the grievance panel's written recommendation, which was admitted into evidence at the ALJ hearing over Employer's objection.[4] The grievance panel found:

> During the testimony, [Supervisor] acknowledged that he was "blindsided" by the information and was "too upset" to think clearly. In fact, according to [Supervisor] he did not come into work the following day because he was too distraught. Weeks after the termination, [Supervisor] appeared visibly shaken in front of the Panel when he was discussing the events surrounding the termination of [R.D.]. As such, [Supervisor] was not able to explain his early morning meetings with staff, the timekeeping system utilized in the GIS area, the multiple projects in the GIS area that sometimes do not require the use of a computer, and his Outlook calendar recording of staff's early and late departure and days off.

R.D.'s Ex. 1. The grievance panel concluded that, although R.D. did not accurately reflect his start, end, and lunch hour on his timesheets, he "did work the total 75 hours he claimed on each of his OTIS timesheets[.]" Id. The grievance panel also found that

[4] Referencing R.D.'s citations to the grievance panel's recommendation, the Review Board notes that it "relied solely upon the evidence provided at the ALJ's hearing and did not look beyond it to reach its decision." Appellee's Br. p. 2 n.1. At the hearing, however, the ALJ overruled Employer's hearsay objection to the grievance panel's recommendation and stated, "This exhibit can be discussed and admitted to as evidence by [R.D.]." Tr. p. 31. The ALJ also observed that Employer had included as an exhibit its own response to the grievance panel recommendation.

R.D.'s hours worked were substantiated by at least four witnesses who testified before the panel.

Based on the evidence and the ALJ's assessment of credibility, we do not agree with the Review Board's assertion that, because R.D. was gone on the evenings of September 22, 2010, and September 24, 2010, he "knowingly sought to be paid for time he did not work, in violation of [Employer's] policy against making false claims for compensation." Appellee's Br. p. 10. R.D. rebutted Employer's prima facie showing that he was discharged for just cause.

Although R.D.'s timesheets did not accurately reflect when R.D. actually worked, the evidence does not establish that R.D. made a false or unfounded claim for compensation. The Review Board's findings do not support its conclusion that R.D. was discharged for just cause and the evidence does not show that R.D. knowingly violated a rule prohibiting the making of a false or unfounded claim of compensation. See Miller v. Indiana Dep't. of Workforce Dev., 878 N.E.2d 346, 357 (Ind. Ct. App. 2007) (concluding that Review Board's findings failed to support the judgment and the evidence failed to support a finding of gross negligence as required by the agreement between labor union and employer).

Conclusion

The Review Board's findings do not support its conclusion that R.D. was discharged for just cause and the evidence does not show that R.D. knowing violated a rule prohibiting the making of false or unfound claims for compensation. We reverse.

Reversed.

ROBB, C.J., and BRADFORD, J., concur.