



repairs, at no cost. On March 4, 1996, Claimant went to work for Employer as a mechanic and as a home inspector, earning an annual salary of \$40,811.27. On November 26, 2008, Employer discharged Claimant for accepting private employment from Employer's beneficiaries, also known as "consumers."

Claimant applied for unemployment compensation benefits, and the Unemployment Compensation Service Center denied his application. Claimant appealed, and a hearing was held before a Referee.

At the hearing, Employer's representative introduced Employer's conflict of interest policy into evidence. The policy provides that all work done for the beneficiaries is to be completed free of charge and only as approved by Employer. Accordingly, employees may not do work for beneficiaries on the side by private arrangement. Claimant acknowledged and agreed in writing as to this policy on September 19, 2003. Reproduced Record at 44a (R.R. \_\_\_\_). He signed an identical agreement on October 13, 2006. R.R. 45a.

Employer also offered its "Disciplinary Actions Guide" into evidence. R.R. 41a. The disciplinary guide provides that "[e]ngaging in outside employment, business, or professional activity" involving conflict of interest will result in discipline such as a written warning or a termination of employment. R.R. 43a. Claimant's March 4, 1996, signed acknowledgement of his receipt of the disciplinary guide was entered into evidence.

Ellena Jonas, Assistant Director of Employer's Housing Department, testified on behalf of Employer. Jonas explained the facts underlying Claimant's dismissal. One of Claimant's co-workers notified Jonas, by e-mail, that she had been contacted by one of Employer's beneficiaries who complained that she had paid for work to be done by a contractor who did not finish the job. The caller had not been

able to contact the contractor and asked the co-worker for assistance. In response, Jonas called the complainant, who identified Claimant as the contractor in question. The complainant explained to Jonas that in February 2007, Claimant did repairs to her home in his capacity as a mechanic for Employer. When Claimant returned to her home to complete these repairs, the complainant informed Claimant that her sink and sewage pipe also needed to be repaired. He told her that he could do these repairs for her privately. Jonas checked Employer's records and confirmed that Claimant had been to the complainant's house on February 27, 2007, to do repairs for Employer.

Jonas spoke to Claimant regarding the complaint. Jonas did not identify the complainant out of concern for her privacy. Accordingly, she simply asked Claimant if he had ever worked privately in any beneficiary's home. He replied, "I could have worked in, in other consumers' homes." R.R. 30a.

Susan Klein, Director of the Housing Department, also testified. She testified that when she asked Claimant if he had ever worked for one of Employer's consumers, he replied, "if it's the lady on Maydress (phonetic) Street then, yes, I did work for her and, but no one else." R.R. 32a. He then claimed that he had felt sorry for her and that she was the only consumer he had worked for privately.

Claimant testified. He claimed that Employer never provided him with the name of the consumer who complained. However, he admitted that he did identify a consumer by a street address when he spoke to Klein. Claimant testified that there had been instances where he recommended to some of the consumers that they contact Employer for help with other repairs. The Referee questioned Claimant about Employer's prohibition against doing private work for Employer's consumers, and Claimant responded that he was aware of that policy. When asked if Claimant

did private work for a person while that person was a consumer of Employer, Claimant replied, “Yes.” R.R. 33a.

The Referee denied Claimant’s claim for benefits. He determined that Employer had a policy prohibiting employees from doing private work for Employer’s consumers; that Claimant was aware of the policy; and that Claimant had violated the policy. Further, Claimant offered no justification for violating the policy. Thus, the Referee concluded that Claimant had committed willful misconduct, rendering him ineligible for unemployment benefits.

Claimant appealed to the Board. The reason stated for his appeal was that “[n]o name given for work ... done and I am seeking legal representation.” R.R. 49a. The Board rejected Claimant’s appeal. The Board found that Claimant admitted to violating a work policy and failed to offer good cause for his conduct. Accordingly, it affirmed the Referee.

Claimant filed a request for reconsideration for the stated reason that he had recently acquired legal representation. Claimant also contended that Employer did not prove that he violated company policy and that his conduct was not willful. The Board rejected Claimant’s motion for reconsideration because it was untimely filed.

Claimant, through counsel, filed a petition for review with this Court.<sup>2</sup> The petition for review stated that the Board’s determinations were not based on substantial evidence of record and that the Board incorrectly determined that

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<sup>2</sup> Our scope of review is limited to determining whether the Claimant’s constitutional rights were violated, whether an error of law was committed, or whether substantial evidence supports the findings of fact. *Steinberg Vision Associates v. Unemployment Compensation Board of Review*, 624 A.2d 237, 239 n.4 (Pa. Cmwlth. 1993). Whether a claimant’s conduct constitutes willful misconduct is a question of law subject to our review. *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436, 438 (Pa. Cmwlth. 2000).

Claimant had admitted to violating Employer's work rule. In his brief, Claimant raises three issues in his statement of questions presented. However, in the argument portion of the brief, four questions are outlined. Claimant argues that (1) there is insufficient evidence to support a finding of willful misconduct; (2) the Referee and the Board should have drawn an adverse inference from Employer's failure to present relevant evidence and witnesses; (3) the violation committed by Claimant did not rise to the level of willful misconduct; and, (4) the conduct of the Referee violated Claimant's right to a fair hearing. Claimant's issues are either without merit or have been waived.

To begin, "willful misconduct" has been judicially defined as

- (1) an act of wanton or willful disregard of the employer's interest;
- (2) a deliberate violation of the employer's rules;
- (3) a disregard of standards of behavior which the employer has a right to expect of an employee; and
- (4) negligence indicating an intentional disregard of the employer's interest or the employee's duties and obligations to the employer.

*Altemus v. Unemployment Compensation Board of Review*, 681 A.2d 866, 869 (Pa. Cmwlth. 1996). The employer has the burden of establishing that willful misconduct has occurred. Once this burden is met, the burden shifts to the claimant to prove that the conduct was not willful misconduct, given the circumstances, or that there was good cause for the behavior. *Kelly*, 747 A.2d at 438-439. Where the willful misconduct is based upon a violation of a work rule, the employer must establish that the rule existed; that the employee was aware of the rule; and that the rule was violated. *Arbster v. Unemployment Compensation Board of Review*, 690 A.2d 805,

808-809 (Pa. Cmwlth. 1997). It then becomes the claimant's burden to prove that the rule was unreasonable or that there was good cause for violating it. *Id.* at 809.

Claimant argues, first, that there was insufficient evidence to support a finding of willful misconduct. Claimant acknowledges that Employer presented evidence of its work rule and that he admitted that he was aware of the work rule. Claimant asserts that there was insufficient evidence to prove he violated the rule because the e-mail communication from his co-worker to Jonas regarding the beneficiary's complaint was hearsay.<sup>3</sup> The Board counters that Claimant admitted that he provided services for one of Employer's clients and did not challenge any of the Board's findings of fact.

We need not consider Claimant's hearsay argument because the Board did not base its decision upon the communication from his co-worker to Jonas. Jonas testified that when she asked Claimant whether he had worked privately for one of Employer's consumers, he responded by saying that if she was referring to a consumer that lived on "Maydress" Street, that he had done so. Claimant also admitted to the Referee that he had done work for a person while that person was a consumer of Employer. Claimant's admissions were exceptions to the hearsay rule that constitute substantial evidence to support the Board's factual finding that he violated a work rule.

We turn, next, to Claimant's second allegation of error, *i.e.*, the Board should have drawn an adverse inference from Employer's failure to present certain relevant evidence and witnesses. This alleged missing evidence includes a copy of

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<sup>3</sup> Hearsay is an out-of-court statement offered for the truth of the matter stated. Pa. R.E. 801(c). It is not clear that the statement in question, *i.e.*, the fact that a complaint was made by a consumer, was offered for the truth of what the complainant said. Rather, the statement was offered only to prove that a complaint was made.

the e-mail by which Jonas was informed of the complaint and the name of the complaining consumer.

We reject this claim. As noted by the Board in its brief to this Court, this evidentiary issue was not raised before the Referee or before the Board. As such, this issue has been waived. *See Merida v. Unemployment Compensation Board of Review*, 543 A.2d 593, 595 (Pa. Cmwlth. 1988) (where questions raised on appeal are insufficiently articulated, Board's duty is not to scour the record for error, but to review only the issues considered by the Referee).

Claimant's third claim of error is that the violation committed by Claimant did not rise to the level of willful misconduct because Employer's disciplinary policy states that an infraction may result in a suspension of pay and discipline. Essentially, Claimant argues that Employer should have selected a lesser sanction. Again, as noted by the Board in its brief to this Court, this issue was not raised before the Referee or the Board. Thus, this issue has been waived.<sup>4</sup>

Finally, Claimant contends that he was not provided a fair hearing. Claimant argues that the Referee did not ask him if he waived his right to counsel at the hearing and did not provide him with assistance in cross-examining witnesses. Again, this issue was not raised before the Referee or Board. However, the fairness of a hearing is a matter of a constitutional dimension that can be raised for the first time in an appeal to this Court. *See Felici v. Unemployment Compensation Board of Review*, 444 A.2d 843 (Pa. Cmwlth. 1982) (holding that claimant's challenge to the fairness of his hearing may be raised by the claimant for the first time in his brief to this Court).

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<sup>4</sup> In any event, we note that the disciplinary policy provides that engaging in outside employment involving a conflict of interest may result in termination for cause, even for a first infraction.

When a party is not represented by counsel, a referee is permitted to “advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of [the referee’s] official duties.” 34 Pa. Code § 101.21. The Board notes that while the referee may provide aid, the referee is not to advise a claimant as to the strength of his case, or explain what evidence is required to sustain a burden of proof. *Vann v. Unemployment Compensation Board of Review*, 508 Pa. 139, 494 A.2d 1081 (1985). Providing a claimant with “every assistance” has been construed to mean providing assistance “so that the claimant may adequately develop the facts necessary for a decision.” *Lewis v. Unemployment Compensation Board of Review*, 814 A.2d 829, 832 n.7 (Pa. Cmwlth. 2003).

Here, the Referee informed Claimant that he had the right to be represented by counsel; the right to have witnesses testify on his behalf; and the right to cross-examine the witnesses. The Referee specifically explained that after each witness testified, Claimant would be given a chance to question them.

At the hearing, the Referee initially questioned Employer’s witnesses as to the reason Claimant was terminated and what evidence was being presented in support of a work rule violation. When Employer offered exhibits into evidence, the Referee asked Claimant if he had any objections. Following direct examination, the Referee aided Claimant by questioning Employer’s witnesses and then giving Claimant an opportunity to do so. The Referee challenged Klein as to the purpose for Employer’s prohibition against private employment. He also asked Jonas to clarify the specifics of her conversation with Claimant. At the conclusion of the hearing, Claimant was asked if he had anything else to say. Claimant declined. As such, it appears that Claimant was properly aided and assisted by the Referee at the hearing.



Finally, Claimant argues that while the Referee informed him as to his right to counsel, the Referee failed to specifically ask him if he was waiving that right. In *Oliver v. Unemployment Compensation Board of Review*, 450 A.2d 287 (Pa. Cmwlth. 1982), the claimant argued that she was denied due process of law because the Referee failed to ask if she understood the implication of her right to counsel and to question witnesses. This Court held that the Referee's obligation was only to advise the claimant of her rights, not to explain their significance.

Here, as in *Oliver*, the Referee advised Claimant of his right to counsel. In doing so, the Referee met his obligation under 34 Pa. Code § 101.21. No more was required.

For all of the foregoing reasons, the order of the Board is affirmed.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|---------------------------|---|--------------------|
| Fitzroy A. Atwell, Sr.,   | : |                    |
| Petitioner                | : |                    |
|                           | : |                    |
| v.                        | : | No. 1030 C.D. 2009 |
|                           | : |                    |
| Unemployment Compensation | : |                    |
| Board of Review,          | : |                    |
| Respondent                | : |                    |

**ORDER**

AND NOW, this 17<sup>th</sup> day of February, 2010, the order of the Unemployment Compensation Board of Review dated April 8, 2009, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge