IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Sadowski,	:	
Petitioner	:	
	:	
v.	:	No. 1169 C.D. 2012
	:	Submitted: November 2, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE COLINS **FILED: December 13, 2012**

Michael Sadowski (Claimant) petitions for review of the May 23, 2012 decision and order of the Unemployment Compensation Board of Review (Board), affirming the decision of the Referee denying Claimant unemployment compensation. The Board concluded that Claimant was ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1] We affirm.

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[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). That section provides, in relevant part, that "[a]n employe shall be ineligible for compensation for any week – (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is 'employment' as defined in this act." Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his

(Footnote continued on next page…)

Claimant was employed, full-time, by the Milton S. Hershey School (Employer or School) as a house parent, from November 1987 until January 12, 2012. (Record Item (R. Item) 11, Referee's Decision, Findings of Fact (F.F.) ¶1.) House parents care for 10-12 students who reside in homes at the School. (R. Item 10, Referee's Hearing: Transcript of Testimony w/Exhibits (H.T.) at 7, Reproduced Record (R.R.) at 8a.) Employer's policies require house parents to conduct themselves in a professional manner, demonstrating respect and courtesy towards students, sponsors, visitors, and to each other, and to refrain from activities that interfere with the efficiencies or progress of the School, and from those activities that would damage or misrepresent the School. (F.F. ¶¶3-4.) Employer's policies also provide for disciplinary action for inappropriate conduct or abuse of a sexual, physical, or psychological nature, and prohibit corporal punishment. (F.F. ¶6.) Employer's corporal punishment policy prohibits the use of physical restraint except to prevent injury, and violation of this policy may result in immediate termination. (F.F. ¶¶7-8.)

In December 2011, another house parent overheard two students who had previously resided in the home supervised by Claimant and his wife, discussing "birthday spankings," and reported this to Employer; Employer then instructed Claimant's Home Life Administrator (HLA), who is charged with supervising the house parents in 10-12 residences at the School, to investigate these allegations. (F.F. ¶10-11, H.T. at 7, R.R. at 8a.) During the investigation,

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(continued…)

employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations. *Sheetz, Inc. v. Unemployment Compensation Board of Review*, 578 A.2d 621, 623-24 (Pa. Cmwlth. 1990).

Claimant admitted that for a period of approximately fifteen years, he had been giving the boys in his home, who were elementary school-aged boys of seven to ten years, "birthday spankings" with his hand. (F.F. ¶12.) Claimant described these actions as voluntary, with one spank for each year plus one for good luck and one to grow on, administered while the boys laid over Claimant's knees, and conducted in the presence of all the boys residing in the home. (F.F. ¶¶ 13-14, 16.) Claimant admitted that he had seen some of the boys become 'glassy-eyed,' but could not tell whether this was due to excitement or discomfort from the spanking. (F.F. ¶15.) Sometime in 2011, Claimant discontinued the spanking tradition, because of what he felt the School might perceive about such conduct. (F.F. ¶¶17-18.) Claimant was discharged from his employment for multiple violations of Employer's policies, including the policy against corporal punishment. (F.F. ¶19.)

Claimant filed for unemployment benefits and the local service center determined that although Employer had demonstrated that Claimant violated the rule against corporal punishment, and Claimant was aware or should have been aware of the rule, Claimant had good cause to violate the rule and therefore his actions did not constitute willful misconduct, and benefits must be allowed. (R. Item 5, Notice of Determination, February 15, 2012.) Employer appealed, and a hearing was held before a Referee on March 27, 2012. Claimant and Claimant's wife appeared and testified at the hearing; Employer was represented by Claimant's HLA, who appeared with counsel. The Referee reversed the service center, found the HLA to be credible, and resolved all conflicts in testimony in favor of Employer. (R. Item 11, Referee's Decision at 2.) The Referee ruled that Claimant had "failed to justify the multiple violations of [Employer's] policies over a period of at least fifteen years." (*Id.*, at 3.) Claimant appealed to the Board,

and the Board adopted the Referee's findings and conclusions and affirmed its decision. (R. Item 19, Board's Order, May 23, 2012.) Claimant then appealed to this Court.[2]

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when he had been discharged from work for willful misconduct connected with his work. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. *Id*. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. *Id*. A violation of employer's work rules and policies may constitute willful misconduct. *Id*. An employer must establish the existence of the work rule and its violation by the employee. *Id*. If the employer proves the existence of the rule, the reasonableness of the rule, and the fact of its violation, the burden shifts to the employee to prove that he had good cause for his actions. *Id*. The employee establishes good cause where his actions are justified or reasonable under the circumstances. *Id*.

At the hearing, Claimant's HLA testified that his investigation consisted of interviews with: (a) the two students who had made the initial comments, overheard by their house parent, that "birthday spankings" had occurred while they were living with Claimant; (b) nine or ten other students, some of whom lived with Claimant previously and some of whom were living with Claimant at the time of the interviews; and (c) Claimant and his wife. (H.T. at 12,

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[2] Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or necessary findings of facts were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181, 1183 n.4 (Pa. Cmwlth. 2003) (*en banc*).

R.R. at 13a.) The HLA referred to Employer's Exhibit A, which he identified as, in part, a summary entitled "Summary of Concerns" that he prepared at the conclusion of his investigation. (*Id.*) The HLA indicated that he prepared this sort of document in the ordinary course of his job. (H.T. at 13, R.R. at 14a.) This summary contains the HLA's characterization of the kinds of comments the students he interviewed made about the "birthday spankings" and the degree to which those comments were corroborated by Claimant in his interview with the HLA. The summary points out that Claimant and his wife had different answers from those given by the students in regard to the force of the "birthday spankings." In addition to the summary, Exhibit A contains the first page of Employer's Corrective Action Warning Notice (Notice), a form indicating the School's decision to terminate the employment of both Claimant and his wife. The Notice states:

> Several students from [Claimant's] student home Novello reported that they received "birthday spankings" as part of the student's birthday celebration. Student indicated that the housefather would "use a belt and jokingly bang it at bed-time" on the beds and dressers and snap the belt together.

(Employer Exhibit A.) The Notice sets forth three specific School policy/procedure violations (Policy Nos. 5.01, 5.02, and 5.15); there is a check mark below Policy No. 5.02-Corporal Punishment noting a "Performance Transgression" and the general statement that "house parents [sic] actions were inconsistent with our mission and values of Milton Hershey School." (*Id.*) Also listed on the first page of the Notice is a section called "Prior Notifications," which lists two previous disciplinary actions unrelated to the "birthday spankings," with dates and subject matter. (*Id.*) The Notice in its entirety is attached to the hearing

transcript as Employer Exhibit D, and includes nine additional prior disciplinary notifications, none related to the "birthday spankings," plus a section entitled Incident Description and Supporting Details. (Employer Exhibit D.) The narrative set forth in this section of the Notice consists of a nearly verbatim reiteration of the HLA's summary prepared following his investigation and included as part of Exhibit A. (*Id.*) Employer Exhibit F consists of a series of transcribed questions posed by the HLA, together with Claimant's responses, from a fact finding meeting held as part of the investigation conducted at the School; HLA, Claimant, Claimant's wife, and a union representative attended this meeting. (Employer Exhibit F.)

At the hearing, Claimant objected to the admission of Employer Exhibit A, stating that it did not pertain to the rule violation for which he was fired, and included "a bunch of extra stuff that doesn't even pertain to the rule policy which I was terminated for." (H.T. at 13, R.R. at 14a.) The Referee admitted Exhibit A, finding "that the summary as well as the other documents relating to the discharge are relevant." (H.T. at 19, R.R. at 20a.) Claimant also objected, on the basis of hearsay, to the admission of the transcript of an interview with a student. (H.T. at 21, R.R. at 22a.) Claimant argued that the student interviewed had lived in the home he supervised during the period after the "birthday spankings" had ceased, and had never witnessed this activity, and the referee sustained his objection. (*Id.*)

On appeal, Claimant contends that the Board's decision should be reversed because, other than the alleged violation of the rule prohibiting corporal punishment, Employer failed to state with sufficient specificity any other policy violation that could have resulted in termination of his employment. Thus,

Claimant argues, since he did not engage in corporal punishment, Employer has failed to establish any basis whatsoever for termination of his employment, and has not met its burden of proving willful misconduct. (Claimant's Brief at 16-17.)

We note initially that the Notice provided to Claimant makes clear Employer's reasons for termination of his employment. Employer delineated three specific policy provisions, each dealing directly with the duties and responsibilities of its employees. Policy No. 5.15 deals with an employee's obligation to be familiar with the Policy and Procedural Manuals developed and published by the School, and Policy No. 5.01 deals with employee conduct responsibilities, including, *inter alia*, respecting students, fostering an open and trusting atmosphere, and delivering a high quality nurturing and educational environment. (Employer Exhibit B.) Claimant's HLA testified extensively at the hearing as to the mission and values of the School, the critical role played by its house parents in protecting and nurturing the students in their care, and the importance the School places upon constant regular meetings, training sessions, and overall support for house parents. (H.T. at 7-9, R.R. at 8a-10a.) Claimant testified that he was aware of, and had access to the rules, regulations, and policies concerning house parent performance, including the rule prohibiting corporal punishment. (H.T. at 32-33, 36, R.R. at 33a-34a, 7a.) Claimant's argument is, in essence, that his actions simply did not constitute corporal punishment. He states that the "birthday spankings" were administered in fun, and at no time did he intend to harm or punish the students, whom he loved, or to physically restrain them. (Claimant's Brief at 11-12.)

Claimant argues specifically that the two findings of fact (F.F. ¶¶10-11) made with regard to the manner in which the School became aware of the

"birthday spankings" were based solely upon statements contained in the HLA's summary included as part of Exhibit A, and these statements should have been inadmissible as hearsay.[3] We disagree. The statements made by the students that were overheard by their house parent were offered not to establish their truth, but rather to establish the events which led to Employer's investigation of Claimant's activities, and did not constitute hearsay. Pa. R.E. 801 (c). Claimant further states that the sole evidence that he engaged in corporal punishment was provided by Claimant's HLA, by his testimony that several boys told him the "birthday spankings" hurt, as well as his summary report of the boys' comments.[4] (Claimant's Brief at 12, 23.) Claimant argues that both constitute hearsay, and should have been inadmissible, thus, a finding that he punished or physically restrained any child is uncorroborated by any competent evidence.[5] (Claimant's Brief at 12, 23.) We disagree. Claimant's own testimony at the hearing, as well as

[3] F.F. ¶10 states: "A house parent had overheard two boys that had previously resided in the home supervised by the claimant discussing birthday spankings and spankings they had received if they did not go to bed when told." F.F. ¶11 states: "The house parent reported the incident to the employer who contacted the claimant's home life administrator who was instructed to investigate the allegations."

[4] The HLA's summary states, "Several of the students in the home reported that the birthday spankings were sometimes hurtful and, "sometimes kids will cry from it" or "sometimes it hurt". Other students in the home corroborate that the birthday spankings were done in front of all the other students in the home and as one student reported "it was embarrassing"." (Exhibit A, Summary of Concerns.)

[5] In his Brief, Claimant refers to *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976), wherein this Court established that hearsay evidence, properly objected to, is not competent to support a finding of fact, but, where admitted without objection, it will be given its natural probative effect and may support a finding of fact if corroborated by any competent evidence in the record.

the answers he provided at the fact finding meeting conducted by his HLA and attended by his union representative, constitute ample, competent corroborating evidence that for a fifteen-year period, he violated, without good cause, Employer's stated policy prohibiting corporal punishment. He administered "birthday spankings" to all of the boys, aged seven to ten years, in his home, with his hand, across his lap, and in front of the other students. (Employer Exhibit F, Q&A ¶¶2, 4, H.T. at 30, R.R. at 31a.) In terms of force, on a scale of one to ten, with one being not hard and ten being very hard, he rated his "birthday spanks" a "3." (Employer Exhibit F, Q&A ¶9.) He never asked a student whether or not they were in pain because he said "it was all done in love and fun and games." (H.T. at 34, R.R. at 35a.) Although he stated at the fact finding meeting that he always asked the boys permission in front of everyone, and no child ever said "no" or asked him to stop during the ritual, at the hearing he testified that he never forced a boy into the ritual if they did not want to receive a "birthday spanking." (Employer Exhibit F, Q&A ¶¶6-7, 11, H.T. at 30, R.R. at 31a.) Claimant stated that "if the boys did not want to do it, I would have three or four kids [say] I'll take their spankings for them." (H.T. at 30, R.R. at 31a.) He made the decision to stop performing the "birthday spankings" because he no longer felt comfortable doing it, and believed that "some people could misconstrue this as some form of abuse" and "if someone…who didn't know their relationship with the students who live in their home walked in during a birthday spanking, they would get the wrong impression as to what was going on." (Employer Exhibit F, Q&A ¶12.)

In his decision, the Referee reasoned that Employer offered competent evidence that its policies prohibited corporal punishment, and established that Claimant violated this policy over a period of fifteen years. (Referee's

Decision/Order at 3.) The Referee further reasoned that Claimant only stopped the "birthday spankings" in 2011 when he felt that the School would perceive his actions as abuse. (*Id.*) The Referee recognized several conflicts in testimony between Claimant and Employer regarding the circumstances that surrounded Claimant's termination from employment, and found Employer's witness to be credible. (*Id.*) The Board adopted the findings and conclusions of the Referee.[6]

The Referee also noted in his decision that Claimant's conduct demonstrated a disregard of the standards of behavior an employer has a right to expect from an employee. (*Id.*) We vehemently agree. Even if we were to characterize the "birthday spankings" as does Claimant, which we do not, his actions in inflicting what clearly qualifies as corporal punishment upon young children most certainly constitute a bizarre ritual that clearly demonstrates a disregard of the standards of behavior that Employer had a right to expect from Claimant. The rule against corporal punishment was clear, as previously noted, and regardless of his intentions, Claimant violated this rule without good cause.

The order of the Board is affirmed.

JAMES GARDNER COLINS, Senior Judge

[6] The Board is the ultimate fact-finding body in unemployment matters and is empowered to resolve conflicts in evidence, to determine what weight is to be accorded the evidence, and to determine the credibility of witnesses. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999).

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O R D E R

AND NOW, this 13th day of December, 2012, the order of the Unemployment Compensation Board of Review, dated May 23, 2012, at No. B-535754, is affirmed.

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JAMES GARDNER COLINS, Senior Judge