

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert Balik,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 2449 C.D. 2010
	:	
Respondent	:	Submitted: November 18, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: December 28, 2011

Robert Balik (Claimant) petitions for review of the October 25, 2010 order of the Unemployment Compensation Board of Review (Board) reversing the decision of the Referee and denying Claimant unemployment compensation (UC) benefits. The issues before this Court are: (1) whether the Board erred by granting a request for remand made by the Quakertown Community School District (Employer), and (2) whether there was substantial evidence to support the Board's determination that Claimant engaged in willful misconduct. For the reasons that follow, we affirm the order of the Board.

Claimant was employed as a day custodian by Employer for three years. It is undisputed that he was assigned to the senior high school, and that he was to report to work at 6:00 a.m. each day, unless otherwise directed. Employer's Coordinator of Custodial Services, Barry Hillegas, claimed that Claimant arrived for work after 6:14 a.m. on February 4, 2010, after 6:20 a.m. on February 5, 2010, and

after 6:08 a.m. on February 8, 2010, yet Claimant recorded on his time cards that he began work at 6:00 a.m. on those mornings.

On February 22, 2010, Mr. Hillegas and Employer's Director of Human Resources, Nancianne Edwards, met with Claimant and his union representatives to discuss Mr. Hillegas' findings. Claimant denied ever having been late for work. By letter dated April 5, 2010, Ms. Edwards suspended Claimant without pay for falsifying his time cards, and for lying about it to Employer during its investigation. By letter dated May 12, 2010, Ms. Edwards notified Claimant that the School Board approved his termination. Claimant filed for UC benefits. The UC Service Center denied benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).¹

Claimant appealed, and a hearing was scheduled before a Referee for July 7, 2010. By letter dated June 29, 2010, a continuance was requested on Employer's behalf, due to the fact that Ms. Edwards, the person who conducted the investigation that led to Claimant's discharge, was on vacation until July 12, 2010. Employer's continuance request was denied, and the hearing was held. Claimant appeared at the hearing, and testified merely that he never violated Employer's work rules. The Referee issued an order reversing the UC Service Center's determination and granting Claimant benefits, holding that Employer failed to meet its burden of proving willful misconduct. Employer appealed to the Board and requested a remand hearing to provide testimony concerning Claimant's termination. By order issued August 30, 2010, the Board remanded the case to the Referee to receive testimony as to why Employer failed to appear at the initial hearing, and additional evidence relating to the merits of Claimant's claim for benefits. The remand hearing was held

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

on September 23, 2010, at which Claimant, Ms. Edwards and Mr. Hillegas, testified. Following the hearing, the Board issued an order reversing the Referee's determination, and finding that Claimant had a non-fault overpayment of \$1,044.00 and a non-fraud overpayment of \$75.00, which were subject to recoupment. Claimant appealed to this Court.²

Claimant argues that the Board erred by granting Employer's request for remand. Specifically, Claimant argues that the Board granted Employer a second bite at the apple based upon its misrepresentation of why it needed a continuance of the initial hearing before the Referee. We disagree. Section 504 of the Law grants the Board discretion to order remand to afford a "reasonable opportunity for a fair hearing." 43 P.S. § 824. According to Section 101.104(c) of the Board's Regulations,

the Board may direct the taking of additional evidence, if in the opinion of the Board, the previously established record is not sufficiently complete and adequate to enable the Board to render an appropriate decision. The further appeal shall be allowed and additional evidence required in any of the following circumstances:

- (1) Whenever the further appeal involves a material point on which the record below is silent or incomplete or appears to be erroneous.
- (2) It appears that there may have been a denial of a fair hearing under the rules.

² In general, this Court's review in an unemployment compensation case is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006). "[W]here, as here, the Board makes its own findings of fact, it is the Board's rather than the referee's findings that are subject to this [C]ourt's review." *First Fed. Sav. Bank v. Unemployment Comp. Bd. of Review*, 957 A.2d 811, 815 (Pa. Cmwlth. 2008).

(3) Under § 101.24 (relating to reopening of hearing) a request for reopening received after the decision of the referee was issued which constitutes a request for further appeal to the Board.

34 Pa. Code § 101.104(c). Pursuant to Sections 101.104(d) and 101.108(b) of the Board's Regulations, 34 Pa. Code §§ 101.104(d), 101.108(b), the Board's remand order directed that the Referee return the record for the Board's consideration and further action as it may deem appropriate. In order to determine whether the Board abused its discretion in this case, we have to look at the Referee's denial of Employer's continuance request.

Section 101.23(a) of the Board's Regulations, 34 Pa. Code § 101.23(a), authorizes the Referee to grant hearing continuances for proper cause. According to the record, Employer's representative requested a continuance of the July 7, 2010 hearing because Ms. Edwards was on vacation. The letter specifically stated that Ms. Edwards would offer first-hand testimony that she issued Claimant's suspension, conducted the investigation that led to his discharge, and ultimately notified him of his termination. It also specifically stated that Employer would be unable to meet its burden without Ms. Edwards' testimony. Following a discussion with Employer's representative, however, the Referee denied the continuance request on the basis that Ms. Edwards was not a first-hand witness to the incidents causing Claimant's termination.

The Board's August 30, 2010 remand hearing order stated, in pertinent part: "The purpose of this hearing is to receive testimony and evidence on the employer's reason for its nonappearance at the previous hearing. The parties may also provide new or additional testimony and evidence on the merits." Reproduced Record (R.R.) at 75a. At the remand hearing, Ms. Edwards confirmed her role in Claimant's discharge, and that she was on vacation at the time of the initial hearing.

Employer also presented Mr. Hillegas' testimony that he specifically witnessed Claimant arriving late for work on February 4, 5 and 8, 2010, and that he was available for the July 7, 2010 hearing. The Board ultimately concluded, based upon evidence gleaned at the remand hearing, that Employer had good cause for its failure to appear at the hearing.

A referee's denial of a continuance request shall not be disturbed absent an abuse of discretion. *Skowronek v. Unemployment Comp. Bd. of Review*, 921 A.2d 555 (Pa. Cmwlth. 2007). "[A]n abuse of discretion occurs when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will." *Payne v. Workers' Comp. Appeal Bd. (Elwyn, Inc.)*, 928 A.2d 377, 379 (Pa. Cmwlth. 2007) (quotation marks omitted). Here, the Board deemed the testimony of both of Employer's witnesses necessary to make its case and, since one of them was unavailable, the Board held that the Referee incorrectly denied Employer's continuance request. We agree.

Section 101.23(b) provides that, although mere absence of a witness does not constitute proper cause to continue a hearing, the absence of a witness whose proposed testimony "would be competent and relevant to the issues involved" and "essential to a proper determination of the case," is a sufficient basis upon which to grant a continuance. 34 Pa. Code § 101.23(b). Employer's continuance request represented that Ms. Edwards was a key witness, and specifically stated how her role was relevant to Claimant's UC claim, and her account was essential to its case. There was no evidence that Employer misrepresented why it needed a continuance of the initial hearing before the Referee. Moreover, it is clear from the record that although Mr. Hillegas may have been available on July 7, 2010 to testify before the Referee, his testimony would have been, as here, limited to the facts that Claimant was

required to be at work at 6:00 a.m., and that he saw Claimant arrive late on February 4, 5 and 8, 2010. Without Ms. Edwards' testimony, Employer would not have been able to present any evidence as to Employer's investigation of the matter, or the administrative steps taken to properly discharge Claimant. There is no evidence in this record that another witness for Employer could have related those facts. Finally, had Employer relied upon Claimant's testimony, as Claimant suggests, to supply facts ultimately related by Ms. Edwards, it may have done so to its peril if Claimant had chosen not to testify, or in some respect misstated the facts.

Under these circumstances, the Board did not err in finding that the Referee abused her discretion by denying Employer's timely request for a continuance. This Court has held that "[a]n administrative agency has broad discretion in the performance of its administrative duties and functions and this court cannot overturn an agency's exercise of its discretion absent proof of fraud, bad faith, or blatant abuse of discretion." *Eureka Stone Quarry, Inc. v. Dep't of Env'tl. Prot.*, 957 A.2d 337, 344 (Pa. Cmwlth. 2008). Having found no evidence of fraud, bad faith or a blatant abuse of discretion in this case, we hold that the Board did not err by granting Employer's request for remand.

Claimant also argues on appeal that the Board erred by denying Claimant benefits. We disagree. Under Section 402(e) of the Law, an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work"

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 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.

Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009). “Whether a claimant’s conduct constituted willful misconduct is a question of law subject to this Court’s review. Further, the employer bears the burden of establishing that the claimant was discharged for willful misconduct on the job.” *Roberts v. Unemployment Comp. Bd. of Review*, 977 A.2d 12, 16 (Pa. Cmwlth. 2009) (citation omitted). “Once the employer meets its burden, a claimant may then prove he had good cause for his actions. Good cause is established where the action of the employee is justifiable or reasonable under the circumstances” *Dep’t of Corrs. v. Unemployment Comp. Bd. of Review*, 943 A.2d 1011, 1015 (Pa. Cmwlth. 2008) (citation and quotation marks omitted).

The Board’s determination that Claimant’s discharge was due to willful misconduct is supported by the evidence of record. According to this record, after Mr. Hillegas was notified that Claimant was coming to work late, he investigated Claimant’s start times. While he was sitting in his vehicle in a position to observe Claimant’s arrival for work on February 4, 5 and 8, 2010, Mr. Hillegas observed Claimant arrive in the parking lot after 6:00 a.m. Claimant admitted that he signed himself in at 6:00 a.m. on those dates. Claimant denies that he was ever late for work, and stated that Mr. Hillegas was lying.

Because the evidence presented consisted of the conflicting testimony of Claimant and Employer’s witnesses, it is clear that Claimant is asking this Court to reassess the credibility of the witnesses and to resolve those conflicts. “In unemployment compensation proceedings, the Board is the ultimate fact finder, and it is empowered to resolve all conflicts in the evidence and to determine the credibility of witnesses.” *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261, 262 n.1 (Pa. Cmwlth. 2008). Here, the Board deemed Employer’s witnesses credible and resolved conflicts in the testimony in Employer’s favor. Where substantial evidence

supports the Board's findings, credibility determinations made by the Board are not subject to review by this Court. *Duquesne Light Co. v. Unemployment Comp. Bd. of Review*, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Because there was substantial evidence to support the Board's finding that Employer met its burden, the Board did not err by finding that Claimant is not entitled to UC benefits, and that he received non-fault overpayments and non-fraud overpayments which are subject to recoupment. Accordingly, we affirm the Board's October 25, 2010 order.

JOHNNY J. BUTLER, Judge

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	:	Respondent

ORDER

AND NOW, this 28th day of December, 2011, the October 25, 2010 order of the Unemployment Compensation Board of Review is affirmed

JOHNNY J. BUTLER, Judge