

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael T. Assise, :
Petitioner :
 :
v. : No. 2507 C.D. 2011
 : Submitted: August 24, 2012
Unemployment Compensation :
Board of Review, :
Respondent :

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: January 4, 2013

Petitioner Michael T. Assise (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Unemployment Compensation Referee's (Referee) decision denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law),¹ based on willful misconduct. For the reasons set forth below, we reverse.

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

Claimant filed for unemployment compensation benefits after being discharged from employment with the Borough of Wilson (Employer),² where he worked as a part-time police officer. The Allentown UC Service Center (Service Center) issued a determination, finding Claimant eligible for unemployment compensation benefits. (Certified Record (C.R.), Item No. 5.) Employer appealed the Service Center's determination, and a Referee conducted an evidentiary hearing.

At the hearing before the Referee, Employer presented the testimony of Steven Parkansky, Jr., Chief of Police. Chief Parkansky testified that since March 2010, Employer has a code of conduct (Code) in effect. The Code provides, in relevant part:

Neglect of duty is defined as the abandonment, either through omission or commission, intentional or otherwise, of any duty which has been designated to an employee of the department, whether through the duties prescribed by law, General Orders, special orders, orally, or through written directive from the superior. The assignment of the duty may be either explicit or implicit.

(C.R., Item No. 27, Employer Exhibit No. 1.) Chief Parkansky testified that he personally shared a copy of the Code—at the time of its implementation—with every officer, including Claimant. (C.R., Item No. 27 at 5, 28.) Chief Parkansky also testified that in addition to a hard copy, Employer also made available to all officers an electronic copy of the Code via the Employer's network computer drive—*i.e.*, the intranet. (*Id.* at 5-6.) Employer provided computer access to all officers, including Claimant. (*Id.* at 6.) Chief Parkansky further testified that

² The Borough of Wilson filed an amicus brief in this matter.

Employer trains its officers, among other things, in defensive tactics and the use of force and that such training is subject to the Code. (*Id.* at 6, 30.) Claimant received the training. (*Id.* at 6, 30.)

Chief Parkansky testified that Officer Calvin Siegfried notified him of a riot that occurred on November 20, 2010. (*Id.* at 8.) A few days later, when Chief Parkansky reviewed the riotous incident with Officer Siegfried, Chief Parkansky discovered “some possible inappropriate conduct” involving Claimant. (*Id.*)

Chief Parkansky also testified that he discussed the incident with Claimant. (*Id.*) Claimant described the incident to Chief Parkansky. (*Id.*) Specifically, Chief Parkansky testified that Claimant asserted that he meted out a couple knee strikes to an individual (FY) who had resisted, forced FY to the ground, handcuffed FY in the back, and then assisted another officer. (*Id.* at 9.) Chief Parkansky further testified that, based on Claimant’s version of the incident, he ordered the filing of charges against FY. (*Id.* at 23, 36.)

Further investigation revealed that cameras mounted in two squad cars³ at the scene had captured the incident. (*Id.* at 10.) The videos extracted from the cameras did not have sound. (*Id.* at 13.) Chief Parkansky testified regarding the contents of the videos, which he initially had reviewed after his discussion with Claimant.

Chief Parkansky testified that the first video depicts Claimant approaching FY, who was on top of another individual in the street at the time. (*Id.*) Chief Parkansky noted that Claimant used force—*i.e.*, knee strikes—in

³ We note that the squad cars, respectively, belonged to Claimant and Officer Siegfried.

handcuffing FY, even though FY had not resisted. (*Id.* at 13-16.) Chief Parkansky further testified that after forcibly handcuffing a compliant FY, Claimant left, leaving FY alone on the ground. (*Id.* at 14.) According to Chief Parkansky's testimony, FY got up with the help of a friend and walked over to Claimant's squad car, in front of which FY stood unattended and with the friend for a period of approximately seventeen minutes. (*Id.* at 10, 15-16.) Chief Parkansky noted that Claimant walked by his squad car once after FY was standing there in handcuffs. (*Id.* at 15.)

Chief Parkansky's testimony on the contents of the second video indicated that an unknown female attempted to approach FY in an "aggressive manner or irritated manner," while FY was standing next to Claimant's squad car. (*Id.* at 19.) Chief Parkansky testified that the footage at the end of the second video depicts Claimant removing FY's handcuffs, conversing with FY, and allowing FY to leave. (*Id.* at 20.)

Chief Parkansky further testified that, based on the contents of the videos, he revoked his order to charge FY with disorderly conduct. (*Id.* at 23, 36.) Chief Parkansky also testified that Claimant's actions involving the use of force were in violation of the Code and did not comport with Employer's training. (*Id.* at 9.) Specifically, Employer trains its officers to use force that is commensurate with the level of resistance only, but he did not elaborate further on when certain use of force would be appropriate. (*Id.* at 10.)

Chief Parkansky also testified that, "when a police officer takes somebody into custody, such as handcuffing them, it's the responsibility of the officer to maintain their security and their safety." (*Id.* at 10.) In explaining why it is important for officers to secure individuals who are in their custody, Chief

Parkansky testified that, *inter alia*, there is concern that someone could assault the individuals, or that the individuals could escape or fall. (*Id.* at 10, 15.) Chief Parkansky, however, did not elaborate as to any specific guidelines that an officer should follow when securing individuals in the various environments that an officer may encounter, including riotous situations.

Subsequent to reviewing the videos, Chief Parkansky met with Claimant again. Chief Parkansky testified that during the second meeting, Claimant acknowledged that he should have placed FY in the back of the squad car before assisting a fellow officer, because Claimant had an obligation to ensure FY's safety. (*Id.* at 22.) Chief Parkansky also testified about a third meeting he had with Claimant. (*Id.* at 23-24.) During the third meeting, Claimant stated that FY only resisted to the extent that he was attempting to talk to Claimant. (*Id.* at 24.) In fact, Chief Parkansky testified that Claimant stated that FY had been compliant. (*Id.*) Finally, Chief Parkansky testified that, given Claimant's actions, Claimant agreed that he should be disciplined for failing to ensure the safety of FY. (*Id.*)

Chief Parkansky suspended Claimant from employment without pay and recommended that Claimant be terminated on two counts of neglect of duty. (*Id.* at 25-26, 36.) Ultimately, Employer terminated Claimant's employment for (1) using excessive force—*i.e.*, knee strikes—against FY when FY had not resisted, and (2) leaving FY unsecured and unattended in handcuffs. (*Id.*)

Employer also presented the testimony of Officer Siegfried, a certified defensive tactics training instructor and patrolman, who testified for Employer concerning the training that Claimant received. Officer Siegfried testified that Claimant received, *inter alia*, training regarding control standards for defensive

tactics, handcuffing, and use of force training, although he, too, did not provide any specific testimony regarding standards. (*Id.* at 38.) Officer Siegfried also testified that handcuffing training included guidance on how to secure an individual, but he again provided no information regarding the specific instructions regarding securing individuals. (*Id.*) Officer Siegfried, however, testified that Claimant received the training on two occasions.⁴ (*Id.*) Officer Siegfried further testified that Claimant's actions of meting out knee strikes to FY and failing to ensure the safety of FY, who was handcuffed and left unattended for seventeen minutes, were in violation of the training that Claimant received. (*Id.* at 42.) Officer Siegfried testified that in the event Claimant had ordered FY to stand by the squad car in handcuffs, such order would have been against Claimant's training as well. (*Id.* at 44.) Officer Siegfried noted that it would have taken Claimant only a few seconds to place FY in the back of his squad car. (*Id.* at 48.) Finally, Officer Siegfried opined that it was inappropriate and against Claimant's training to have given knee strikes to FY. (*Id.* at 42-43.)

In response, Claimant testified that upon arriving at the scene, he saw FY holding down another man. (*Id.* at 55.) Claimant testified that he grabbed FY by the collar and left wrist and directed him to go on the sidewalk. (*Id.* at 55.) Claimant further testified that FY was trying to go in the opposite direction. (*Id.*) In particular, Claimant testified that "[FY] was trying to turn around and speak to me while I was trying to deescalate the situation."⁵ (*Id.* at 51.) As a result,

⁴ Claimant passed a three-day training program in April 2009, as well as a two-day recertification program in March 2010. (C.R., Item No. 27 at 38-39.)

⁵ It is Claimant's testimony that FY did not push, shove, or hit him. (C.R., Item No. 27, at 51-52.)

Claimant noted that he meted out two knee strikes to FY's left thigh area, causing FY to go to the ground. (*Id.*) Claimant also testified that, while he was in the midst of dealing with FY, Claimant witnessed a number of women physically confronting another officer. (*Id.*) Claimant rushed to assist the officer. (*Id.*) Claimant testified that sometime after assisting the officer, on the orders of another officer at the scene, he wrote down FY's information and released him. (*Id.* at 58.)

Claimant acknowledged that he received the training in April 2009, as well as March 2010. (*Id.* at 48-49.) Specifically, Claimant acknowledged having received training on "control standards and handcuffing instruments," as well as securing individuals who are in custody. (*Id.* at 49-50.)

Claimant agreed that: (1) he received a hard copy of the Code; (2) the Code was accessible on the intranet; (3) FY should not have been standing by himself for seventeen minutes; (4) harm could have befallen FY when FY was left unattended in handcuffs; and (5) FY should have been placed inside the squad car. (*Id.* at 53-54.) Claimant also agreed that he misrepresented to Employer that FY was not left unattended. (*Id.* at 54.)

Claimant admitted telling Employer that he should not have given any knee strikes to FY or taken him to the ground. (*Id.* at 52.) Claimant also admitted that he did not escort FY to the squad car and that FY walked to the squad car on his own. (*Id.* at 53.)

Following the hearing, the Referee issued a decision, reversing the Service Center's determination. The Referee determined Claimant ineligible for unemployment compensation benefits pursuant to Section 402(e) of the Law. The Referee made the following relevant findings:

1. Claimant started working for Borough of Wilson in September 2007 and was last employed as a part-time police officer on February 15, 2011.
2. Employer's Code of Conduct defines Neglect of Duty as the abandonment, either through omission or commission, intentional *or otherwise*, of any duty which has been designated to an employee of the [police] department, whether through the duties prescribed by law, General Orders, special orders, orally, or through written directive from a superior. The assignment of duty may be either explicit or implicit.
3. Claimant was aware of the Code of Conduct.
4. Claimant received defensive tactics training for three days in April 2009 and recertification training for two days in March 2010.
5. The training includes control standards, use of handcuffs and other instruments, and the appropriate use of force.
6. Claimant was aware he was responsible for the safety and security of individuals in his custody.
7. On November 20, 2010, Claimant responded to a call for assistance for a fight in progress involving around 100 people at a local club.
8. When Claimant arrived on the scene he observed a man (FY) in the street holding down a second man.
9. Claimant assumed FY had been fighting with the other man and grabbed FY and directed him to the side of the street.
10. FY did not physically resist Claimant and attempted to explain Claimant had made the wrong assumption regarding what had occurred before Claimant arrived on the [scene].
11. Claimant gave FY several knee strikes, forcing FY to the ground and [handcuffing] FY with his hands behind his back.
12. Securing FY in the patrol car would have taken less than a minute.

13. Claimant left FY lying on the ground, walking away to assist another officer.
14. FY fell while trying to get up and required assistance to stand up.
15. Claimant took no steps to provide for the safety and security of FY during the next [fifteen] to [seventeen] minutes while FY dutifully waited by the patrol car for Claimant to return.
16. Claimant removed the handcuffs from FY after learning FY was an innocent bystander.
17. Claimant reported to the Chief of Police he had to use force to handcuff FY because FY had resisted his commands.
18. Based on Claimant's report, the Chief of Police ordered FY be charged with disorderly conduct.
19. On December 28, 2010, the Chief of Police reviewed surveillance videos obtained from cameras located in the patrol vehicles driven to the scene by Claimant and a fellow officer.
20. After reviewing the footage which revealed FY had not been resistant, the Chief of Police ordered charges withdrawn against FY.
21. During a subsequent interview, Claimant admitted using excessive force and failing in his responsibility to provide for the safety and security of FY.
22. Employer discharged Claimant for two counts of Neglect of Duty.

(C.R., Item No. 28 (emphasis added).)

The Referee concluded that because Claimant admitted to using excessive force on the compliant FY and leaving FY unattended, in handcuffs, in a riotous situation, Claimant deliberately violated Employer's policies, of which Claimant was aware, and showed a "disregard of the standards of behavior which Employer had a right to expect of [Claimant]." (*Id.*) As a result, the Referee

determined that Claimant's actions constituted willful misconduct and denied him benefits. (*Id.*)

Claimant appealed to the Board, and the Board affirmed the Referee's decision. (C.R., Item No. 30.) In affirming the Referee's decision, the Board adopted and incorporated the Referee's findings of fact and conclusions of law. (*Id.*)

On appeal,⁶ Claimant appears to argue that the Board's finding that Claimant engaged in excessive force is not supported by substantial evidence of record. Claimant also argues that the Board committed an error of law by concluding that Claimant's actions constituted willful misconduct.

First, we will address Claimant's argument that, to the extent that the Board found that Claimant engaged in excessive force, the Board's finding was not supported by substantial evidence. Substantial evidence is defined as relevant evidence upon which a reasonable mind could base a conclusion. *Johnson v. Unemployment Comp. Bd. of Review*, 502 A.2d 738, 740 (Pa. Cmwlth. 1986). In determining whether there is substantial evidence to support the Board's findings, this Court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences that can logically and reasonably be drawn from the evidence. *Id.* A determination as to whether substantial evidence exists to support a finding of fact can only be made upon examination of the record as a whole. *Taylor v. Unemployment Comp. Bd. of*

⁶ This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). The Board’s findings of fact are conclusive on appeal only so long as the record taken as a whole contains substantial evidence to support them. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 286, 485 A.2d 359, 365 (1984).

Here, Chief Paransky testified that, based on the contents of the video, Claimant’s use of force in meting out knee strikes to FY was in violation of the Code and did not comply with Employer’s training that instructs officers to use force that is commensurate with the level of resistance only. (C.R., Item No. 27, at 9, 10, 23, and 26.) Officer Siegfried provided similar testimony regarding Claimant’s use of force. (*Id.* at 42-43.) Claimant, himself, even testified that he admitted to Employer that he should not have given the knee strikes to FY and taken him to the ground. (*Id.* at 53.) Given the testimony of Employer’s witnesses and Claimant’s tacit admission, viewed in a light most favorable to Employer, we conclude that substantial evidence exists to support a finding that Claimant used excessive force—where force was not at all required—in meting out knee strikes to FY.

Section 402(e) of the Law provides, in part, that an employee shall be ineligible for compensation for any week in which “his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.”⁷ The employer bears the burden of proving that the claimant’s unemployment is due to the claimant’s willful misconduct. *Walsh v.*

⁷ Whether or not an employee’s actions amount to willful misconduct is a question of law subject to review by this Court. *Nolan v. Unemployment Comp. Bd. of Review*, 425 A.2d 1203, 1205 (Pa. Cmwlth. 1981).

Unemployment Comp. Bd. of Review, 943 A.2d 363, 369 (Pa. Cmwlth. 2008). The term “willful misconduct” is not defined by statute. The courts, however, have defined “willful misconduct” as:

- (a) wanton or willful disregard for an employer’s interests;
- (b) *deliberate violation of an employer’s rules*;
- (c) *disregard for standards of behavior which an employer can rightfully expect of an employee*; or
- (d) negligence indicating an intentional disregard of the employer’s interest or an employee’s duties or obligations.

Grieb v. Unemployment Comp. Bd. of Review, 573 Pa. 594, 600, 827 A.2d 422, 425 (2003) (emphasis added). An employer, seeking to prove willful misconduct by showing that the claimant violated the employer’s rules or policies, must prove the existence of the rule or policy and that the claimant violated it. *Walsh*, 943 A.2d at 369. Moreover, the employer must establish that the employee’s actions were intentional or deliberate. *Tongel v. Unemployment Comp. Bd. of Review*, 501 A.2d 716, 717 (Pa. Cmwlth. 1985). “[A]n inadvertent violation of an employer’s rule may not constitute willful misconduct.” *Eshbach v. Unemployment Comp. Bd. of Review*, 855 A.2d 943, 947 (Pa. Cmwlth. 2004). Once an employer, however, has met its burden to establish willful misconduct, the burden then shifts to the claimant to show good cause as justification for the conduct considered willful. *McKeesport Hosp. v. Unemployment Comp. Bd. of Review*, 625 A.2d 112, 114 (Pa. Cmwlth. 1993).

In support of his argument that the Board erred in concluding that Claimant’s actions constituted willful misconduct, Claimant urges the Court to consider the context of his actions. In this case, Claimant was responding to a report of a riotous situation. With respect to his use of excessive force, Claimant argues that while in hindsight he agrees that he violated Employer’s policy, there is

no finding by the Board that he did so intentionally and no evidence of record to support such a finding. Rather, the facts suggest only that Claimant responded as he did under exigent and uncertain circumstances. Even if that response is later determined to be improper, he should not be denied benefits without a finding of willfulness or deliberateness.

With respect to whether Claimant violated any policy when he left an individual handcuffed and unattended for fifteen (15) minutes without placing the individual in Claimant's police cruiser, Claimant points to the absence in the record of any specific policy that he violated and any finding by the Board that his failure to place the individual in Claimant's patrol car threatened the individual's safety and security. Though Claimant acknowledges, in hindsight, that it would have been better for him to secure the individual in his police cruiser, he argues that there is no specific policy that require him to do so and his failure to think of doing so at the time was in reaction to the exigency of the circumstances.

We acknowledge that police departments rightfully adopt rules and procedures to protect the public and police officers. We also acknowledge that police officers are trained to follow those rules and procedures and to make good decisions even in the harshest and most uncertain circumstances. The record in this case supports a finding that Claimant, by Claimant's own admission, failed to make good decisions on the evening of November 20, 2010. The failure of a police officer to make good decisions under those circumstances may certainly support disciplinary action, including termination. But, here, the question is whether Claimant's failure to make good decisions on the evening of November 20, 2010, rises to willful misconduct as a matter of law, such that he should be deemed ineligible for unemployment compensation benefits.

On this question, we agree with Claimant that Employer failed to prove any deliberate violation of Employer’s policies regarding the use of force or the need to provide for the safety and security of individuals once they are handcuffed. Indeed, the Board made no finding of willful or deliberate conduct by Claimant. Even if it had, we see nothing in the record, including the video tape of the incident, upon which a finding can be made that the Claimant chose to act in disregard of Employer’s interests or his duties or obligations. To the contrary, the evidence of record suggests only that Claimant attempted to do his duty under difficult and uncertain circumstances, but made bad decisions.

We further agree with Claimant that although Employer testified generally about policies and training relating to the use of force, handcuffing, defensive tactics, and control standards, Employer’s witnesses could not point to a specific standard, protocol, or training directive upon which the Board could find that, in this particular situation, Claimant did “X” but was either prohibited from doing “X” or required to do “Y”.⁸ Because Employer did not provide specific evidence regarding instructions or training provided to Claimant that were applicable to the situation at hand, Employer failed to prove that Claimant, at the time he engaged in such conduct, knew that his actions in this instance met the definition of “neglect of duty” under the Code. In other words, Employer failed to prove that Claimant’s conduct was deliberate or intentional.

⁸ In *Navickas v. Unemployment Compensation Review Board*, 567 Pa. 298, 787 A.2d 284 (2001), our Supreme Court observed that when a claimant fails to comply with a known work rule, his actions are not inadvertent. In other words, the question of negligence often arises when a claimant complies with a work rule, but his compliance itself is negligent. *Navickas*, 567 Pa. at 300-01, 787 A.2d at 286.

Accordingly, we reverse the Board's order.⁹

P. KEVIN BROBSON, Judge

Judge Simpson did not participate in the decision of this case.

⁹ Because we reverse the Board's order for failure to establish willful misconduct, we need not address Claimant's argument that the Board erred in concluding that his actions were not justified.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Petitioner	:	
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v.	:	No. 2507 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 4th day of January, 2013, the order of the Unemployment Compensation Board of Review is hereby REVERSED.

P. KEVIN BROBSON, Judge