IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mickey J. Davis,	:	
Petitioner	:	
v.	:	No. 276 C.D. 2010
	:	Submitted: July 16, 2010
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** October 29, 2010

Petitioner Mickey J. Davis (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Referee's decision and denied Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] For the reasons set forth below, we affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Section 402(e) of the Law provides, in pertinent 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."

Claimant was employed with PNC Bank (Employer) as an equipment operator until June 9, 2009, at which time Employer terminated his employment after a brief suspension. (Certified Record (C.R.), Item 8 at 4.) Claimant applied for unemployment compensation benefits, and the Duquesne UC Service Center (Service Center) found Claimant eligible for unemployment compensation benefits under Section 402(e) of the Law. (C.R., Item 3 at 1.)

Employer appealed, and an evidentiary hearing was held before the Referee. During the hearing, Claimant testified to the circumstances surrounding his separation from employment. Claimant testified that he worked full-time for Employer for six (6) months before his separation on June 9, 2009. (C.R., Item 8 at 4.) On June 5, 2009, he was suspended with pay as a result of an incident with his supervisor, William Druga (Druga). (*Id.*) Claimant testified that he performed a quality-assurance role for Employer, in which he would scan work units, run them through a special machine, and check to ensure that there were no errors. (*Id.* at 15.) Claimant received pay bonuses on his paycheck for each error that he found and reported. (*Id.* at 16.) Claimant testified that he was not receiving the proper number of bonuses on his paycheck, as he claimed he found more errors than his paycheck reflected. (*Id.* at 17.) He met with Julie Olanak, an employee relations investigator for Employer, a few days prior to June 5, 2009, to discuss the problems he was having in error reporting and paycheck bonuses. (*Id.* at 18.)

Olanak indicated that she would look into the matter. (*Id.* at 18-19.) Olanak came back to Claimant with a system whereby errors found by Claimant would be noted and signed by a supervisor, but Claimant testified that the system was quickly abandoned. (*Id.* at 19.)

Claimant testified that after the abandonment of the system, he went back to Olanak to complain that he still was not being properly compensated. (*Id.*) Olanak and Druga met with Claimant after Olanak investigated Claimant's complaints and told Claimant that there were no errors in the paycheck and that he needed to stop inquiring about them. (*Id.* at 19-20.) Claimant testified that he tried to present documentation that he claimed would prove that he was not receiving proper compensation, but Druga refused to look at the documents. (*Id.* at 20.) Claimant persisted, but Druga continued to refuse to look at the documents, eventually telling Claimant to hand over his ID badge and leave the premises. (*Id.*) Claimant refused to hand over his ID badge as Druga escorted Claimant to the front door. (*Id.* at 21.) Claimant gave his ID badge to the person working the security desk and left. (*Id.*) Claimant testified further that he was not disruptive or threatening in his actions or words, nor did he violate any company policies. (*Id.*)

Employer presented the testimony of Druga. Druga testified that Claimant was "very upset" after the meeting in which Druga and Olanak told him that the investigation was closed and that they did not want to hear anymore about

it. (*Id.* at 5.) Claimant left the meeting, but stayed on the premises after work hours. (*Id.* at 6.) Druga testified that when he later came out of his cubicle, Claimant approached him, waiving papers around and claiming he was unjustly compensated. (*Id.*) Druga told Claimant this issue was already closed and asked him to leave the premises. (*Id.*) Claimant refused to leave and became loud with Druga. (*Id.*) Druga then informed Claimant that he was suspended with pay until further investigation and directed him to hand over his ID. (*Id.*) Druga testified that Claimant finally began to exit, but on his way out Claimant said, "I dare you to push me." (*Id.*)

Following the hearing, the Referee issued a decision, in which he made the following relevant findings:

> 1. The claimant worked for PNC Bank as an Equipment Operator, full-time, for approximately six months at the rate of pay of $19,300.00 per year, with his last day of work being June 5, 2009.
>
> 2. The employer has a program where the employees can earn bonuses for discovering certain errors.
>
> 3. The claimant would keep a record of incidents which he felt were errors to compare to his compensation on his paycheck.
>
> 4. The claimant had informed the employer that he was not receiving the correct compensation based on the number of errors he was finding.
>
> 5. The employer launched an investigation on the claimant's allegations that he was not being paid properly

and determined that the claimant's paychecks were in order in accordance to the allowed errors.

6. The employer informed the claimant of their findings and told him that the issue was over.

7. The claimant continued to attempt to show the Site Manager that the information found in the investigation was incorrect.

8. The Site Manager informed the claimant that he did not want to see any of the documents as the investigation had been completed and that he would not review any additional documents.

9. The employer noticed that the claimant was visibly upset.

10. The claimant was observed after work hours sitting at a desk where he did not usually work.

11. The Site Manager asked the claimant why he was there, at which time, the claimant explained that he was off duty, but still wanted to show him some additional documents.

12. The Site Manager informed the claimant he had to leave.

13. The claimant continued to insist that he was unjustly compensated and became loud with his conversation.

14. The Site Manager instructed the claimant that he would be suspended with pay until a review of the situation had been conducted and that he needed the claimant's ID badge.

15. The claimant refused to give the Site Manager his ID badge and continued to argue about his compensation.

> 16. The claimant was led to the exit at which time he gave his ID badge to a Security Officer.
>
> 17. After the investigation, the claimant was terminated from his employment for insubordination as he refused to follow the orders of his Site Manager.

(C.R., Item 9 at 2.) Based on the findings of fact, the Referee reversed the Service Center's determination, finding that Claimant was terminated for willful misconduct connected with his work under Section 402(e) of the Law. (*Id.* at 2-3.)

Claimant appealed to the Board, which affirmed the Referee's determination and denied Claimant unemployment compensation benefits. (C.R., Item 13 at 1-2.) In its order, the Board adopted the Referee's findings of fact and conclusions of law. (*Id.*) Specifically, the Board found credible Employer's testimony that it retained the right under its progressive disciplinary policy to accelerate discipline to discharge based upon the severity of the incident involved. (*Id.* at 1.) Regarding Claimant's due process concerns, the Board concluded that Claimant was provided sufficient notice of the issue to be heard and was clearly aware before the hearing that Employer's allegation of willful misconduct pertained to his behavior during the final incident. (*Id.*) Claimant now petitions this Court for review of the Board's order.

On appeal,[2] Claimant argues that his due process rights were violated because he did not receive proper notice of the issues to be addressed at the Referee's hearing. Claimant contends that the Board's determination to the contrary, regarding notice, violated his due process rights, constituted an error of law, and was not supported by substantial evidence of record. We disagree.[3]

"The constitutional guarantee of due process of law is equally applicable to administrative proceedings as it is to judicial proceedings." *McClelland v. State Civil Serv. Comm'n*, 322 A.2d 133, 135 (Pa. Cmwlth. 1974). The essential elements of due process require that notice be given and that the notice "contain a sufficient listing and explanation of any charges so that the individual can know against what charges he must defend himself if he can." *Jacobs v. Dep't of Pub. Welfare*, 377 A.2d 1289, 1290-91 (Pa. Cmwlth. 1977). In regards to due process in the context of unemployment compensation appeals, our Court has opined: "[I]f the Bureau in notifying a claimant of his ineligibility for

[2] 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. 2 Pa. C.S. § 704.

[3] Specifically, Claimant argued: (1) the Board's decision is in violation of Claimant's constitutional right to due process because he did not receive proper notice of the issues to be addressed at the hearing; (2) the decision of the Board, finding Claimant ineligible for benefits under Section 402(e), is in error as a matter of law because it ignored legal precedent prohibiting a referee from hearing evidence which was not contained in any notice sent to Claimant; and (3) the Board's determination that Claimant received proper notice was an abuse of its discretion because the finding of proper notice was not supported by substantial evidence.

reasons of willful misconduct describes the offending misconduct, fairness and [34 Pa. Code § 101.87][4] require that the evidence adduced at the referee's hearing be limited to the kind of conduct described in the notice." *Bilsing v. Unemployment Comp. Bd. of Review*, 382 A.2d 1279, 1281 (Pa. Cmwlth. 1978). This Court also has held that when the Service Center provides the claimant with a "Notice of Hearing" which states that the specific issue to be considered at the referee's hearing is whether the claimant's unemployment was due to discharge from work for willful misconduct, the claimant has been appraised of the defense before him and, therefore, is not unfairly surprised. *Simmons v. Unemployment Comp. Bd. of Review*, 565 A.2d 829, 831-32 (Pa. Cmwlth. 1989), *aff'd*, 528 Pa. 590, 599 A.2d 646 (1991).

Claimant contends that the Department's notice of the Referee's hearing was insufficient because it did not adequately advise Claimant of the issues that would be raised at the hearing. The "Notice of Hearing" simply identified the issue to be addressed in this appeal as: "Whether claimant's unemployment was due to discharge . . . from work for willful misconduct connected with

[4] This regulation provides:

> When an appeal is taken from a decision of the Department, the Department shall be deemed to have ruled upon all matters and questions pertaining to the claim. In hearing the appeal the tribunal shall consider the issues expressly ruled upon in the decision from which the appeal was filed.

34 Pa. Code § 101.87.

employment." (C.R., Item 6.) Claimant disagrees with the Board's determination that his constitutional due process rights were not violated because "[C]laimant was provided sufficient notice of the issues and was clearly aware before the hearing that . . . [E]mployer's allegation of willful misconduct pertained to his behavior during the final incident." (C.R., Item 13 at 1.) Claimant asserts that the Board's reliance on *Simmons* is misplaced because, here, Employer raised additional allegations of willful misconduct at the Referee's hearing, whereas in *Simmons* there was only one charge of willful misconduct raised as the basis for denial of benefits.

We agree with the Board and reject Claimant's interpretation of our opinion in *Simmons*. In *Simmons*, an employee worked as a pumper for Nupra Industries Corporation, when the employer discharged him for a single act of negligently allowing an oil spill to occur. *Simmons*, 565 A.2d at 830. The Office of Employment Services (OES) granted the employee benefits on the basis that the employer failed to show any evidence before OES and failed to participate in the proceedings before OES. *Id.* The employer appealed, and the referee reversed. *Id.* The employee then appealed to the Board, which affirmed the referee's decision. *Id.* On appeal, the employee argued that because the employer refused to provide information to OES, he was deprived of notice of the employer's defense of willful

misconduct. *Id.* at 831. This Court held that the employee received proper notice of the defenses and issues to be raised against him. We explained:

> [T]he OES provided Claimant with a "Notice of Hearing on Original Appeal" indicating that the specific issue to be considered at the referee's hearing was "whether Claimant's unemployment was due to discharge . . . from work for willful misconduct connected with unemployment." Claimant was, therefore, apprised of Employer's willful misconduct defense before the hearing and was not unfairly surprised. Further . . . the only *charge* considered here as a basis for denial was the oil spill.

Simmons, 565 A.2d at 831-32 (citations omitted).

Further, this Court in *Simmons* acknowledged a line of cases in which we found fault with referees who had ruled on issues not set forth in the notices sent by the OES. Such a practice was unfair to the claimant who did not receive notice of *all the issues* before the referee's hearing. *Id.* (citing *Diaz v. Unemployment Comp. Bd. of Review*, 504 A.2d 973 (Pa. Cmwlth. 1986); *Lecker v. Unemployment Comp. Bd. of Review*, 455 A.2d 234 (Pa. Cmwlth. 1983); *Bilsing*, 382 A.2d at 1279). We noted, however, that these cases were distinguishable from the situation in *Simmons* because the claimant in *Simmons* received clear indication of the specific issue to be addressed at the referee's hearing on the "Notice of Hearing" and, therefore, had proper notice of the *single* charge considered as a basis for the denial of benefits. *Id.* (emphasis added).

The Board and Employer take the position that the fact pattern in *Simmons* is substantially similar to that in the present case. As in the present case, *Simmons* involved a claimant who was discharged from his employment after which the Department granted benefits based on Section 402(e) of the Law when the employer failed to participate at the first level of the administrative process. *Simmons*, 565 A.2d at 830. In both cases, the employer appealed the determination, and during the Referee's hearing, the employer presented witness testimony in support of the willful misconduct charge. *Id.* Relying on that testimony, the referee denied benefits under Section 402(e) of the Law, and the Board affirmed the denial in both cases. *Id.* On appeal to this Court, both claimants argued an inability to defend against the employer's allegation of willful misconduct raised at the referee's hearing. In both cases, the claimant received a notice of hearing, listing only willful misconduct as the main issue to be heard before the Referee.

Here, Claimant received a "Notice of Hearing," which indicated the specific issue to be addressed as identical to the one the Court found to be sufficient to give Claimant proper notice of the willful misconduct defense in *Simmons*: "[w]hether claimant's unemployment was due to discharge . . . from work for willful misconduct connected with employment." (C.R., Item 6.) Further, unlike the cases of *Lecker*, *Bilsing*, and *Diaz*, on which Claimant relies,

the only charge considered here as a basis for denial of benefits was the insubordination of Claimant for refusing to follow the orders of his Site Manager during the incident on his final day of work, of which Claimant was fully aware before the Referee's hearing. Therefore, Claimant's constitutional rights to due process were not violated because he received proper notice of the charge and defense to be addressed at the Referee's hearing in his "Notice of Hearing."

Claimant's argument that he was unaware of the issue to be addressed at the hearing is also implausible. Prior to the Referee's hearing, Claimant filled out a questionnaire with information clearly indicating that he was fully aware of the incident that was the cause of his unemployment. Specifically, Claimant wrote that he did not comply with an order or request from his employer and that the *reason he was unemployed* was because "he showed the print out form to his supervisor and he did not even look [at] them . . . told me I was suspended with pay . . . [and] told [me] that I have been terminated for 'behavioral reasons.'" (C.R., Item 2.) Therefore, Claimant was fully aware of the incident that formed the basis for willful misconduct.

Finally, if Claimant was unaware at the Referee's hearing that the incident was going to be the focus of the hearing and that the issue at the hearing was going to be willful misconduct, Claimant should have objected during the hearing on the basis of lack of notice. This would have given the Referee the

opportunity to address the matter at that stage of the proceedings. This Court has held that "[a]n objection which is not made before the referee when there has been an opportunity to do so is waived." *Phoebus v. Unemployment Comp. Bd. of Review*, 573 A.2d 649, 651 (Pa. Cmwlth. 1990) (citing *Williams v. Unemployment Comp. Bd. of Review*, 484 A.2d 831 (Pa. Cmwlth. 1984)). Here, Claimant did not raise an objection at the Referee's hearing regarding his alleged due process violations and, therefore, waived his ability to raise such objection before the Board.[5]

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

[5] Claimant asserted in his brief that he was unaware of the basis for his termination because a letter from Employer to the Service Center indicated that Claimant was discharged for a "violation of a well known policy." (C.R., Item 4 at 3.) Regardless of the language used by Employer in that letter, the Department's Notice of Hearing sent to Claimant satisfied the requirements of due process, as discussed above. Moreover, also as discussed above, circumstances surrounding this appeal make clear that Claimant was aware that the incident on his last day of work was the reason for his termination.

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	:	
Unemployment Compensation Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 29th day of October, 2010, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mickey J. Davis, Petitioner	:	
v.	:	No. 276 C.D. 2010
	:	Submitted: July 16, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 29, 2010

I agree with the majority that, because Mickey J. Davis (Claimant) failed to argue at the referee's hearing that he was not adequately informed of the issues that would be addressed at the hearing, Claimant waived that issue. As a result, I also would affirm the denial of benefits to Claimant. However, I believe that *Simmons v. Unemployment Compensation Board of Review*, 565 A.2d 829 (Pa. Cmwlth. 1989), *aff'd*, 528 Pa. 590, 599 A.2d 646 (1991), which the majority finds indistinguishable on the merits, is quite distinguishable.

Claimant, who worked for PNC Bank (Employer), complained that his paycheck was short bonus money he had earned for discovering the errors of other employees. Employer investigated and determined that Claimant's paychecks were correct. However, one day after work, Claimant attempted to show Employer proof to the contrary. Employer asked Claimant to leave, and,

when Claimant persisted, Employer suspended Claimant and asked for his ID badge. Claimant continued to argue with Employer until they reached the exit, where Claimant gave his badge to a security officer. A few days later, Employer discharged Claimant.

Claimant applied for unemployment compensation benefits, stating on the application that Employer had terminated him for "behavioral reasons" and that Claimant had asked, but was not told, what that meant. (C.R., Item 2.) Employer did not respond to requests for information from the Office of Employment Services (OES); thus, the OES granted Claimant's application. In its determination, the OES found that Employer discharged Claimant for "reasons unknown." (C.R., Item 3, OES Findings of Fact, No. 2.)

Employer appealed the grant of benefits. In the petition for appeal, Employer stated, "We wish to appeal the determination based on the following. The claimant was discharge[d] for violation of a well known policy." (C.R., Item 4, Petition for Appeal.) A hearing was scheduled before a referee. The hearing notice stated that the specific issue on appeal was "[w]hether claimant's unemployment was due to discharge . . . from work for willful misconduct connected with employment." (C.R., Item 6.) **Thus, prior to the hearing, Claimant was on notice that Employer would attempt to prove that Claimant engaged in willful misconduct by violating a "well known," but unstated, work policy.**

At the hearing, Employer bore the burden of proving willful misconduct, so Employer presented its case first.[1] None of Employer's witnesses identified a policy that served as the basis for Claimant's termination from employment. None of Employer's witnesses testified that Employer ever informed Claimant that the reason for his termination was the violation of a policy. Although Employer's witnesses gave an account of the incident that preceded Claimant's termination, none of the witnesses specifically stated that Employer fired Claimant for insubordination until Employer's closing statement. (N.T., 9/18/09, at 31.) At that point in the proceeding, Claimant had already made his closing statement and had no opportunity to address Employer's new charge of insubordination. Claimant could only assume that he had prevailed in the matter because Employer failed to prove that he violated any policy.

On appeal, Claimant argued that he was not provided sufficient notice of the issues to be addressed at the hearing. The Unemployment Compensation Board of Review (Board) found that Claimant "was clearly aware before the hearing that the employer's allegation of willful misconduct pertained to his behavior during the final incident." (Board's Op. at 1.) The Board concluded that Claimant had sufficient notice under *Simmons* and affirmed.

In *Simmons*, as here, the claimant received benefits when the employer failed to participate before the OES. The employer filed an appeal, and

[1] I note that, although Employer had the burden of proof and presented its case first, the majority presents Claimant's testimony first, as if to suggest that Claimant was aware of the issue being addressed **before** Employer presented its case.

the OES notified the claimant that there would be a hearing to decide whether the claimant engaged in willful misconduct. Only one incident could have served as the basis for willful misconduct. Thus, this court held that the claimant received sufficient notice of the issues that would be addressed at the hearing. *Simmons*, 565 A.2d at 832.

Here, however, Employer's initial appeal raised only one issue, i.e., whether Claimant had engaged in willful misconduct by violating a "well known" policy.[2] Employer waived any other issue, and Employer presented absolutely no evidence to establish the existence of, or Claimant's violation of, any work policy. Because Employer gave Claimant notice of a policy violation issue, I submit that there was **not** only one possible basis for Claimant's discharge, and, thus, *Simmons* is inapplicable here.[3]

Nevertheless, because Claimant waived the due process issue by failing to raise it at the hearing, I also would affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

[2] In reciting the procedural history in *Simmons*, this court did not indicate the issue that the employer raised in its initial appeal.

[3] Even if *Simmons* were applicable, I note that, in cases where the employer participated at the OES level, this court has held that a claimant is entitled to pre-hearing notice of the specific conduct that is alleged to be willful misconduct. *Sterling v. Unemployment Compensation Board of Review*, 474 A.2d 389 (Pa. Cmwlth. 1984). I fail to see any reason why claimants should have less notice in cases where employers do not participate at the OES level. To the extent that *Simmons* establishes an unwarranted dual standard for notice, I would overrule *Simmons*.