IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Coatesville, Petitioner	:	
	:	No. 78 C.D. 2011
v.	:	
	:	Submitted: June 3, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: December 27, 2011

City of Coatesville (Employer) petitions for review of the December 30, 2010, order of the Unemployment Compensation Board of Review (Board) affirming a referee's decision that Harry G. Walker (Claimant) is not ineligible for benefits under section 402(e) of the Unemployment Compensation Law (Law).[1] We now affirm.

Claimant began working as Employer's City Manager on May 1, 2006. On January 4, 2010, the current City Council, which took office in January of 2010, placed Claimant on administrative leave. By action of City Council on February 26,

[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 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 to his work.

2010, Employer discharged Claimant for breaching his duties as City Manager, specifically alleging that Claimant: failed to keep City Council fully informed and regularly acted without City Council's knowledge; improperly transferred funds from a trust account; failed to follow proper procedures by hiring consultants; and failed to respond to requests for assistance from City departments. (Findings of Fact Nos. 1-3.)

The alleged actions underlying Claimant's discharge took place beginning in 2007. Between 2007 and 2009, Claimant was not formally warned by City Council that it was dissatisfied with the manner in which he was performing his duties or that it believed that he was exceeding his authority as City Manager. (Findings of Fact Nos. 4-6, 20.)

In April and October of 2009, Mass Mutual Insurance Company (Mass Mutual) provided Claimant with two letters that it had prepared for his signature to authorize the reallocation of the pension fund held by that company. Claimant informed Mass Mutual that it needed to appear at a meeting with the City's Pension Board to receive approval before the reallocation of the pension funds could occur. Claimant denied signing either of the letters authorizing reallocation of the funds, and Employer did not provide copies of those documents purportedly signed by Claimant. (Findings of Fact Nos. 7-9.)

Claimant was authorized to hire consultants for the City from his consulting budget that totaled approximately $75,000.00 in 2009. Claimant did not need City Council's approval to encumber the funds in the consulting budget. (Finding of Fact No. 10.)

City Council directed that Claimant was to decrease the amount of legal fees as part of his mandate to establish fiscal control and restraint over the City's budget. In carrying out that mandate, Claimant re-executed a lease with a local farmer

for 30 acres after directing the Assistant City Manager to research the prior agreement and to obtain the best price for the City. Claimant also settled various code enforcement actions against an individual for approximately $10,000.00 after consulting with the City Solicitor. Claimant also withdrew several other code enforcement actions against a developer who had purchased property after a fire to carry out City Council's directive that code enforcement should not be selectively applied against minority property owners. (Findings of Fact Nos. 11-14.)

In December of 2008, Claimant transferred approximately $469,000.00 from a trust account to prevent a City bond from going into default. Claimant believed that he was authorized to transfer the funds under a 2005 City Ordinance that permitted the City to transfer approximately $15,000.00 from the fund. The City incurred a $10,000.00 fee for the early withdrawal of the funds, but Claimant believed that the fee was less than the cost of the bond default. Claimant informed City Council of the transfer of funds in December of 2008 or January of 2009. City Council permitted Claimant to continue working following the transfer and took no action concerning his employment until January of 2010. (Findings of Fact Nos. 15-19.)

On February 28, 2010, Claimant filed a claim for benefits. (Reproduced Record (R.R.) at 1a-5a.) On July 1, 2010, the Erie Unemployment Compensation Service Center (Service Center) determined that Claimant was eligible for benefits, finding that Claimant was discharged for various breaches of his duties but that he was not involved in the incident that led to his separation from employment. (R.R. at 59a.)

Employer appealed the Service Center's determination to a referee. (R.R. at 62a-76a.) The referee held hearings on August 27, 2010, and September 21, 2010. (R.R. at 77a-403a.) Employer presented the testimony of Interim City Manager Wayne G. Reed; City Council members Martin L. Eggleston and Edward W. Simpson;

and Director of Urban Planning and Codes Enforcement Damalier Molina in opposition to the claim for benefits. (R.R. at 77a-140a.) Claimant testified, and Patsy Ray, a former member of City Council for four years and its president in 2007, also testified in support of his claim. (R.R. at 345a-93a.)

On September 24, 2010, the referee issued a decision in which she made the foregoing findings of fact. (R.R. at 404a-05a.) The referee's decision also stated the following in pertinent part:

> In the present case, the employer discharged the claimant for failing to properly carry out his duties as City Manager and for allegedly acting without authorization. The testimony of the claimant, as well as a member of City Council from 2006 through 2009, who was in fact President of City Council during 2007, described a body with multiple varied interests. The Councilwoman also described City Council members who would appear at meetings unprepared and at times hostile and uncooperative toward the claimant. The testimony at hearing of the claimant and the Councilwoman indicated the claimant requested that City Council specify the manner in which he communicate with them, such as by email or written report. The City Council did not provide the claimant with a response to his query. The claimant testified that the decisions which he made over the years were to carry out the directives given to him by City Council, namely to make the city more fiscally sound and responsible. The claimant also testified he made the decisions to best of his ability at the time especially in light of financial crises that existed and to alleviate the impact of those crises.
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> The employer presented hearsay testimony regarding the alleged execution of the letters by the claimant to reallocate the pension funds. The claimant testified credibly he enacted a procedure in which the Solicitor and Human Resources were to advise City Council and the insurance carrier of lawsuits and claims against the city as they arose.
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> * * *

> Based on the testimony of the parties presented at hearing, the claimant's actions in the present case do not rise to the level of willful misconduct. Therefore, the claimant cannot be denied benefits under Section 402(e) of the Law. The Referee also notes that the *Remoteness Doctrine* precludes the denial of benefits to the claimant, since many of the incidents at issue occurred years prior to the date of discharge.

(R.R. at 406a.) Accordingly, the referee affirmed the Service Center's determination that Claimant is not ineligible for benefits under section 402(e) of the Law. Id.

On October 12, 2010, Employer appealed the referee's decision to the Board. (R.R. at 411a-22a.) On December 30, 2010, the Board issued an order affirming the referee's decision; the Board incorporated the referee's findings and conclusions and stated the following, in pertinent part:

> [T]he Board accepts as credible that the claimant did not intentionally violate any policy of the employer, but simply tried to address multiple issues and problems with the functions of government to the best of his ability. The fact that the employer does not like the results allows the employer to discharge the claimant but such actions do not rise to the level of willful misconduct so as to deny benefits….

(R.R. at 423a.) Employer then filed the instant petition to review the Board's order.[2]

In this appeal Employer claims: (1) the Board's determination is not supported by substantial evidence; (2) the Board's decision reflects a capricious disregard of competent record evidence; and (3) the Board erred because the evidence established willful misconduct under section 402(e) of the Law.

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[2] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704; Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796, 799 (Pa. Cmwlth.), appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

As noted above, pursuant to section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when he has been discharged from work for willful misconduct connected with his work. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (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.

Although willful misconduct is not defined by statute, it has been described as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior that 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. Guthrie, 738 A.2d at 521 citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-69 (Pa. Cmwlth. 1973).

However, a conclusion of willful misconduct is negated where a claimant has worked to the best of his ability. Norman Ashton Klinger & Associates, P.C. v. Unemployment Compensation Board of Review, 561 A.2d 841, 843 (Pa. Cmwlth. 1989). Thus, mere incompetence, incapacity or inexperience which causes poor work performance will not support a finding of willful misconduct. Id.

In addition, the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 270, 501 A.2d 1383, 1385 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207, 208 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board, which may either accept or reject a witness' testimony, in

whole or in part, whether or not it is corroborated by other evidence of record. Peak; Chamoun; Grief v. Unemployment Compensation Board of Review, 450 A.2d 229, 230 (Pa. Cmwlth. 1982). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support them. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 356, 378 A.2d 829, 831 (1977). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board and give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

A capricious disregard of evidence is a deliberate disregard of competent evidence that one of ordinary intelligence could not possibly avoid in reaching a conclusion. Diehl v. Unemployment Compensation Board of Review, 4 A.3d 816, 824 (Pa. Cmwlth. 2010), appeal granted, ___ Pa. ___, 20 A.3d 1192 (2011). This standard generally applies in considering negative findings and conclusions and it will not be applied to intrude upon the Board's role as fact-finder or discretionary decision-making authority. Id. "'[W]here there is substantial evidence to support an agency's factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard.'" Id. at 824 quoting Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 204 n.14, 812 A.2d 478, 488 n. 14 (2002).

In this case, the Board found that "[C]laimant did not intentionally violate any policy of the employer, but simply tried to address multiple issues and problems with the functions of government to the best of his ability." (R.R. at 423a.) More specifically, the Board determined that, during Claimant's tenure with Employer: the City Council was a body with multiple varied interests; City Council members appeared at meetings unprepared; City Council members were at times hostile and

uncooperative toward Claimant; Claimant had requested that City Council specify the manner in which he was communicate with them such as by email or written report but City Council did not provide a response to his query; Claimant's decisions over the years were made to carry out City's Council's directives to make the city more fiscally sound and responsible; and Claimant made the decisions to best of his ability in light of financial crises that existed at the time. (R.R. at 421a.)

All of the foregoing findings are amply supported by the testimony of Claimant and the former City Council member. (R.R. at 345a-93a.[3]) As a result, these findings are conclusive on review. Taylor.

Nevertheless, Employer cites evidence in the record purportedly demonstrating that Claimant violated statutes and City Code provisions in executing the duties of his office, acted beyond the authority of his office, and failed to inform City Council of his actions.[4] Employer asserts that the Board capriciously disregarded this evidence and that this evidence supports a finding of willful misconduct.

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[3] When viewed in a light most favorable to Claimant, the former City Council member's testimony fully supports the Board's findings and demonstrates: a dysfunctional City Council in which the body was divided into two factions; members were absent from meetings; members refused to prepare for meetings; members refused to communicate with one another; members referred to each other using expletives; and members were openly hostile to Claimant. (R.R. at 385a-93a.) When viewed in such a light, Claimant's testimony shows that he met City Council's mandate to address a number of important issues to the best of his abilities in spite of his lack of experience, and that he either informed or attempted to inform City Council of his actions while in office. (R.R. at 349a-85a.)

[4] The Pennsylvania Supreme Court has specifically rejected Employer's suggestion that greater scrutiny should be applied to Claimant's actions due to the unique nature of his employment in the public sector. See Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 601-03, 827 A.2d 422, 426-27 (2003) (holding that section 402(e) does not provide for a "public safety" exception which impermissibly imposed a higher standard of care upon school employees); Navickas v. Unemployment Compensation Board of Review, 567 Pa. 298, 306-08, 787 A.2d 284, 289-91

(Footnote continued on next page…)

However, as previously indicated, the Board was free to reject the foregoing evidence, in whole or in part, whether or not it was corroborated by other record evidence. Peak; Chamoun; Grief. Because the Board's findings are supported by substantial evidence, and because they support the conclusion that Claimant did not engage in willful misconduct, there was no capricious disregard of evidence in this case. See Diehl, 4 A.3d at 825 ("[B]ecause the Board's findings are supported and because those findings support the Board's determination that there were no necessitous or compelling reasons forcing Claimant to retire early, … no capricious disregard of evidence is apparent.") (footnote omitted). The fact that Employer produced witnesses who gave a different version of the events or that Employer views the evidence differently from the Board is simply not grounds for reversal on appeal. Tapco v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Moreover, as noted above, the Board found that Claimant did not intentionally violate any Employer policy but that he simply tried to address multiple issues and problems with governmental functions to the best of his ability. (R.R. at 423a.) Such a finding negates a conclusion of willful misconduct. Norman Ashton

(continued…)

(2001) (holding that section 402(e) does not provide for a higher standard of care for healthcare workers).

Klinger & Associates, P.C.[5] As a result, the Board did not err in concluding that Claimant is not precluded from receiving benefits under section 402(e) of the Law.[6]

Accordingly, the Board's order is affirmed.

PATRICIA A. McCULLOUGH, Judge

[5] See also Quality Bakery v. Unemployment Compensation Board of Review, 166 A.2d 303, 305 (Pa. Super. 1960) (holding that where an employer has vested an employee with discretion, the employer's subsequent dissatisfaction with the employee's exercise of that discretion, in the absence of showing abuse, does not constitute willful misconduct).

[6] Employer also claims that the Board erred in relying upon the referee's mistaken reference to the remoteness doctrine. The remoteness doctrine precludes a finding of willful misconduct where the incident giving rise to the termination of employment is too temporally remote from the dismissal. Tundel v. Unemployment Compensation Board of Review, 404 A.2d 434, 436 (Pa. Cmwlth. 1979). However, in this case the remoteness doctrine was not dispositive of Claimant's claim for benefits and was merely an ancillary basis upon which the referee relied to buttress the award of benefits. See R.R. at 406a. We need not reach this ancillary basis as we have determined that Claimant's conduct does not constitute willful misconduct as a matter of law.

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ORDER

AND NOW, this 27th day of December, 2011, the December 30, 2010 order of the Unemployment Compensation Board of Review is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge