TR&C

# Pennsylvania Unemployment Compensation Newsletter

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## *UC Audits*

*By Margaret M. Hock, Esquire*

The mere word—"audit"—can strike fear in the hearts of the courageous and can cause one to want to run away and hide. But, each year, thousands of Pennsylvania employers are selected for audit to ensure compliance with the reporting and taxation provisions of the Pennsylvania Unemployment Compensation (UC) Law. Survival is not limited to the fittest, but preparation is key. The best way to prepare is to have all of the necessary records readily available *before* the audit appointment letter arrives.

Under Section 206 of the UC Law, employers are required to keep accurate employment records. Section 63.64 of the UC Regulations sets forth the information that must be contained in those records:

(1) Social security account number.
(2) Full name.
(3) Wage rate (hourly, daily or piece rate, weekly, monthly or annual salary).
(4) Total remuneration paid for each pay period by type of payment (cash and fair market value of noncash remuneration).
(5) Traveling or other business expenses actually incurred and accounted for, and the dates such expenses were incurred and were paid by the employer.
(6) Place of employment.
(7) All scheduled hours and hours worked.
(8) Daily attendance record, showing the dates on which the worker actually worked, and time lost due to reasons other than lack of work.
(9) If separated, the date and the reasons for separation.
(10) Number of credit weeks.
(11) Documentation of payments made to worker, including bank statements, cancelled checks, check stubs, and electronic funds transfer records.
(12) If the worker is covered by an arrangement described in section 4(j)(2.1) of the law, the contract between the employer and the other party to the arrangement.
(13) Any contract between the employer and the worker.
(14) If the employer considers the worker to be an independent contractor or otherwise not an "employee" under the law, all records, documentation and evidence supporting that position.
(15) Federal and State tax returns for the periods when the worker was employed.

The employment and payroll records listed above are to be retained either at the place of employment or at an established central record-keeping office for at least 4 years after contributions relating to the records have been paid. Daily attendance records need not be retained for more than 2 years.

If an audit is scheduled, the period of time for

*(Continued on page 8)*

*Sherman W. Suber v. Unemployment Compensation Board of Review, No. 163 C. D. 2015, Filed November 2, 2015.*

The local service center issued a notice on September 5, 2014, finding Suber ineligible for UC benefits under section 402(b) of the Law due to his voluntary quit. The notice stated that he had until September 22, 2014 to file an appeal and that he could complete an enclosed petition for appeal or fax a letter of appeal to 814-871-4863.

On September 19, 2014, Suber wrote the reason for his appeal on the notice and asked an employee of his state senator to fax it. Although Suber maintained that he gave the employee the correct fax number, the employee faxed the document to 814-871-4750. On October 6, 2014, Suber called the local service center and was informed that his appeal had not been received. He was told that he could resend it with proof of the original fax date. Thus, on October 7, 2014, the employee of the senator's office faxed the appeal again to 814-871-4570. Thereafter, Suber again called the local service center and was again told that the appeal had not been received and that he should fax it to 814-217-6125. He then faxed his appeal to that number and the local service center acknowledged receipt of it on October 9, 2014.

After a hearing, the referee dismissed Suber's appeal as untimely pursuant to §501(e) of the Law, which provides that an appeal must be filed within fifteen days of the determination. Suber failed to establish fraud or a breakdown in the administrative process warranting a *nunc pro tunc* appeal. The UCBR affirmed. Suber appealed to the Commonwealth Court, contending that the untimely filing was not caused by his negligence. The Court disagreed.

The fifteen-day time limit for filing an appeal from a Department determination is mandatory, and a party filing an appeal by fax accepts the risk that the appeal may not be filed properly or timely. An appeal *nunc pro tunc* may be permitted when a delay is caused by extraordinary circumstances involving fraud, administrative breakdown, or non-negligent conduct, either by a third party or appellant. The burden to justify an untimely appeal is heavy and can be satisfied by showing either 1) that the administrative authority engaged in fraudulent behavior or manifestly wrongful or negligent conduct, or 2) there was non-negligent conduct beyond the appellant's control.

Here, the transmission verification reports showed that Suber's appeal had been faxed to an incorrect number. Thus, Suber failed to verify that the fax had been sent to the correct number. The Court stated that the act of faxing an appeal to an incorrect number and failing to check the transmission verification report, whether performed by claimant, counsel, or a third party, does not constitute non-negligent conduct warranting a *nunc pro tunc* appeal.

*Kevin E. Jacobs v. Unemployment Compensation Board of Review, No. 484 C.D. 2015, Filed December 21, 2015.*

Jacobs, who worked for a staffing agency, accepted an assignment to work 40 hours per week as a help desk analyst for Independence Blue Cross for 12 months beginning August 4, 2014 at the rate of $18 per hour. It was his understanding that he would be paid on the 15th and the last day of each month.

Jacobs was not paid on August 15, 2014 and, in response to his complaints, the employer issued a check outside the payroll system. The same situation occurred when Jacobs was not paid on August 30, 2014. Employer informed Jacobs that he would have to wait 30 days for the next pay check. On September 18, 2014, Jacobs notified employer that unless he received his overdue pay by September 21, 2014, he would not report for work and would consider the employment agreement breached by employer. By letter dated September 29, 2014, employer notified Jacobs that the employment agreement was terminated effective September 26, 2014.

Jacobs then filed for unemployment compensation benefits. After a hearing, the referee found claimant ineligible for benefits under §402(b) of the Law, relating to ineligibility for UC benefits due to voluntarily leaving work without cause of a necessitous and compelling reason. The UCBR affirmed.

Jacobs appealed to the Commonwealth Court. The Court noted:

> Where an employee terminates an employment relationship because of the employer's repeated failure to pay wages in a timely manner and on an established pay day, Pennsylvania's Wage Payment and Collection Law is implicated. Section 4 of the Wage Payment and Collection Law generally provides:
>
> > It shall be the duty of every employer to notify his employes at the time of hiring of the time and place of payment and the rate of pay and the amount of any fringe benefits or wage supplements to be paid to the employe...or...for the benefit of the employe…

> 43 P.S. §260.4. Moreover, Section 3 of the Wage Payment and Collection Law is absolutely explicit in its statement that: 'Every employer shall pay wages...due to his employes on regular paydays designated in advance by the employer.' 43 P.S. §260.3. Thus, employees are well within their rights to demand timely payment for work performed. Indeed, payment as agreed for services rendered is the very essence of an employment relationship such that no employee can be compelled to work without payment.

Clearly, failure to make timely payment for services rendered creates a real and substantial pressure upon an employee to terminate employment. Without question, repeat occurrences would cause a reasonable person to terminate employment. As such, the order of the UCBR was reversed.

*Jason Clark v. Unemployment Compensation Board of Review, No. 2425 C.D. 2014, Filed December 23, 2015.*

Section 401(a) of the Law authorizes unemployment compensation benefits to be paid to employees who are or who become unemployment and, *inter alia*, have been paid "wages for employment" under §404(c). After a claimant has been eligible for and received UC benefits in a preceding year, §4(w)(2) of the Law imposes an additional eligibility requirement. Specifically, an application for benefits is invalid: "*unless such individual has...earned wages in 'employment' in an amount equal to or in excess of six (6) times his weekly benefit rate."*

In March 2013, Clark applied for and was granted weekly benefits at a rate of $396. His initial benefits year was about to expire on March 30, 2014, so he again applied for benefits. The application was denied under §§401 and 4(w)(2) of the Law. Clark appealed, arguing that he supplied proof the he earned wages totaling $2,432.91 during the relevant period, which exceeded $2,376, the minimum income required of him under §4(w)(2) of the Law. He did not, however, provide proof in the form of W-2 Forms. As such, the UCBR determined that Clark "earned no wages in employment" and was thus self-employed and ineligible for benefits.

The Commonwealth Court disagreed. The existence of an employer/employee relationship is dependent upon the facts of each case. There is a strong presumption in the Law that an individual receiving wages in an employee. The Department offered no evidence to overcome that presumption. The evidence showed that Clark was paid for his services. The lack of a W-2 Form alone is insufficient to establish an independent contractor relationship. Thus, the order of the UCBR denying Clark benefits was reversed.

*Darrell J. Miller v. Unemployment Compensation Board of Review, No. 2282 C.D. 2014, Filed October 9, 2015, Reported December 23, 2015.*

Miller was incarcerated from June 20, 2014 through July 14, 2014, not as a result of a conviction, but because he was on Facebook in violation of his probation. On July 8, 2014, employer sent Miller a letter terminating his employment for being absent without leave. Miller's subsequent application for UC benefits was denied on the basis that he had violated his probation and thus engaged in willful misconduct.

Miller appealed, arguing that he had just cause for his absence inasmuch as the criminal trial court found that he had not violated his probation. Miller argued that the UCBR erred in contravening the criminal trial court's disposition and making an independent determination that he violated his probation. The Commonwealth Court noted that absence from work due to pre-trial incarceration is not, itself, willful misconduct. On the other hand, evidence of a conviction and attendant absences does constitute willful misconduct.

Here, the UCBR made no credibility determinations with respect to Miller's testimony that the criminal trial court found that he did not violate the terms of his probation. The outcome of the criminal trial court case is vital to determining whether claimant violated his probation and, thus, engaged in willful misconduct. As such, the case was remanded to the UCBR for further credibility determinations and findings of fact.

*Katera's Kove, Inc. v. Unemployment Compensation Board of Review, No. 464 C.D. 2015, Filed December 30, 2015.*

> Katera's Kove had a policy which provided:
> "The use...or being under the influence of intoxicating liquor, illegal drugs, or other intoxicants by employees at any time on [Employer's] premises or while on [Employer's] business is prohibited...Employees must not report for duty or be on [Employer's] property while under the influence….Violation of this policy will result in termination.
> All employees are subject to random drug testing."

Georgia Howard was employed by Katera's Kove as a personal care aide. On July 1, 2014, Katera's Kove required Howard to submit to a drug test because she was acting erratically. She tested positive for marijuana and was discharged.

Howard's application for UC benefits was granted. Katera's Kove appealed. The UCBR affirmed Howard's eligibility because the employer's policy only allows for *random* testing. Howard was not subjected to a random test; but rather, she was tested based upon suspicion of drug use.

Katera's Kove sought review by the Commonwealth Court, which reversed the UCBR's determination. The Court agreed that, under §402(e.1) of the Law, the drug test must be in accordance with employer's substance abuse policy in order for a claimant to be found ineligible. Here, the express purpose of the policy is to prohibit employees from the use of any liquor, illegal drug, narcotic or substance or be under the influence of any such substance while on the employer's property. To read the inclusion of random drug testing as invalidating any other drug testing is simply illogical and contrary to the company's policy.

*Department of Labor and Industry, Office of Unemployment Compensation Benefits Policy v. Unemployment Compensation Board of Review, No. 1641 C.D. 2014, Filed January 7, 2016.*

Section 401(b)(1)(i) of the Pennsylvania Unemployment Compensation Law requires claimants to register on-line for employment search services within 30 days of applying for benefits. On February 5, 2014, Marshall filed an application for unemployment compensation. A handbook was sent to the claimant that explained the new legal requirement that he register for employment search services offered by the CareerLink system or its successor agency within 30 days. On February 26, 2014, a letter reminding him of the registration requirement was sent to Marshall. On March 17, 2014, the Department notified claimant that he was ineligible for benefits because he had not registered by March 8, 2014. Marshall appealed, stating: "I filed with the jobgateway link provided and have been receiving e-mails from Beyond.com. I believe I filed in the 30 day period."

In affirming the Referee's grant of benefits to Marshall, the Commonwealth Court stated: "A failure of a claimant to register timely in accordance with Section 401(b)(1)(i) of the Law is not a *per se* violation that automatically disqualifies a claimant from unemployment compensation. Section 401(b)(6) of the Law provides that the Department may waive or alter the requirements of this subsection in cases or situations in which such requirements would be oppressive or inconsistent with the purposes of the Law. In short, where a claimant shows "good cause" of not registering on time, the Department may waive the time requirement of Section 401(b)(1)(i).

Here, Marshall believed he had properly registered. Moreover, because he was receiving job referrals, it is clear that he was complying with the real purpose of Section 401(b), which is to ensure that a claimant "is making an active search for suitable employment." 43 P.S. §801(b).

*Michele Havrilchak v. Unemployment Compensation Board of Review, No. 1054 C.D. 2015, Filed December 14, 2015, Reported February 18, 2016.*

Havrilchak worked as a medical technician from 2011 until September 2014 when she took leave for her pregnancy. Originally, her leave was to end in November 2014. She requested extended leave, which her employer granted through early January. When her physician released her to return to work, Havrilchak requested to return in a part-time capacity. The employer had no part-time positions available, and offered her only a full-time position, which she refused. As a result, the employer issued a letter advising Havrilchak that her refusal to return to work on a full-time basis ended the employment relationship.

The UC Referee affirmed the denial of benefits, reasoning that Havrilchak did not have a necessitous and compelling reason to quit under §402(b) of the Law. The UCBR affirmed, noting that Havrilchak chose to quit rather than return to her full-time position.

The Commonwealth Court agreed. A claimant may not unilaterally change the terms of his or her employment from full-time to part-time. Mere discontent with wages, hours and working conditions is not adequate to establish a necessitous and compelling reason for an employee to quit. To prove a necessitous and compelling reason for leaving employment, a claimant must demonstrate the following: (1) circumstances existed that produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and, (4) the claimant made a reasonable effort to preserve his or her employment.

*Chartiers Community Mental Health and Retardation Center v. Unemployment Compensation Board of Review, No. 1677 C.D. 2015, Filed March 10, 2016.*

On May 20, 2015, Flynn was found by the UC Referee to be ineligible for benefits due to willful misconduct. On May 26, 2015, Flynn submitted an appeal to the UCBR via email. The UCBR responded that same day via email stating that it was unable to open the secure message box in Flynn's email and requesting that she resend the information. Flynn resubmitted by facsimile her request to appeal the Refe-

ree's order, to file a brief with the UCBR, and to receive a copy of the hearing transcript and exhibits. The fax was marked as received by the UCBR on June 12, 2015. Flynn and the employer both submitted briefs for the UCBR's review, with the employer arguing, inter alia, that Flynn's appeal was untimely and should be rejected without a review of the merits. The UCBR did not agree and issued a decision and order finding Flynn's appeal timely and that she was not ineligible to receive benefits due to willful misconduct.

On appeal to the Commonwealth Court, the employer argued that subsection 4 of 334 Pa. Code §101.82(b) is controlling. That section provides that, in the case of electronic transmissions other than fax transmissions, "[t]he date of filing is the receipt date recorded by the Department appeal office or the Board's electronic transmission system, if the electronic record is in a form capable of being processed by that system." Employer, however, misconstrued that section. While Flynn accepted the "risk that the appeal may not be properly or timely filed," the UCBR responded on May 26, 2015, alerting Flynn to resend the unreadable section of the email. The UCBR did not fail to receive the appeal or reject it, nor did it inform Flynn that the additional information must be resent within a specific time frame.

As long as the electronic transmission is received prior to the expiration of the appeal period, the regulation affords the UCBR discretion to instruct the employer or claimant on how to proceed if there is an issue with readability. Here, the UCBR acted fully within its discretion in directing Flynn to resend the unreadable segments of her email once it had received her appeal. The order of the UCBR was affirmed.

*Greenray Industries v. Unemployment Compensation Board of Review, Nos. 1895 C.D. 2014, 1896 C.D. 2014, and 2234 C.D. 2014, Filed March 17, 2016.*

Greenway Industries asked all of its employees to sign a non-disclosure agreement in September of 2012. All of its employees, except three, signed the agreement. Thereafter, Greenway and the three employees negotiated the agreement's wording over an 18-month period. Greenway finally notified the three employees on April 25, 2014 that it would not negotiate further and, if they refused to sign the agreement by April 30, 2014, they would be discharged. The employees refused to sign the agreement because they were designing testing equipment as a private business venture and they were concerned about the potential for Greenway to have ownership of their personal intellectual property. Greenway discharged the employees on April 30, 2014.

Greenway appealed the UCBR's determinations finding the employees eligible for UC benefits. The Commonwealth Court noted that the record established that (1) the employees were working at the time they refused to sign the agreement; (2) the employees knew that they would lose their jobs if they refused to sign the agreement; and (3) they refused to sign the agreement. Because they refused to accept an offer of continued employment while employed, they are deemed to have quit their positions.

The Court next determined whether the employees had a necessitous and compelling reason to quit. The Court concluded that they did not. The employees did not meet their burden of proving that signing the agreement, which included terms they did not fully comprehend, was a real and substantial pressure that would cause a reasonable person to refuse to sign the agreement. A person with ordinary common sense would not believe the language of the agreement would cause him to turn over any personal intellectual property that was not created in connection with employer. The agreement did not represent a substantial unilateral change in the conditions of their employment. The agreement did not change their rate of pay, nor did it change their job responsibilities. Overall, the employees did not have necessitous and compelling reasons to terminate their employment.

*Barry M. Stock v. Unemployment Compensation Board of Review, No. 415 C.D. 2015, Filed April 8, 2016.*

On September 23, 2014, the UC Service Center issued several notices of determination to claimant relating to a fraud overpayment of benefits. Claimant's weekly benefit rate was $539, his partial benefit credit was $216, and he "worked but knowingly failed to report all earnings and therefore failed to file a valid claim for compensation." He reported no earnings over a period of 17 weeks, although he actually received gross earnings for each of those weeks in the amount of $360. As a result, the UC Service Center determined that claimant had received a total of $9,163 in Emergency Unemployment Compensation (EUC) benefits and $300 in Federal Additional Compensation (FAC) benefits to which he was not entitled. Because the Service Center determined that the overpayment constituted a "fraud overpayment," claimant was subject to a 15% penalty, as well as the repayment and recovery provisions of the Law.

Claimant appealed. After a hearing, the Referee concluded that claimant did not knowingly or intentionally give false information in order to obtain the benefits. The claimant was disqualified from receiving EUC and FAC benefits with respect to the 17

weeks at issue and that claimant had received a *non-fraud overpayment* of the EUC and FAC benefits. The Referee concluded that no penalty weeks or amounts should be assessed against claimant.

Claimant appealed to the UCBR, arguing that the Referee erred in disqualifying him from receiving all of the EUC and FAC benefits he had received. Instead, he should be permitted to settle the overpayment by reimbursing the difference between the amount that he had received and the amount that he should have received had his part-time earnings been properly reported, or a difference of $2,607. The UCBR did not agree.

The claimant then took his argument to the Commonwealth Court. The Court agreed. The concept of "total ineligibility" in the context of non-fraud overpayments does not serve the same purposes as it does in fraud overpayment situations. In a non-fraud overpayment situation, there is no deterrent purpose to be served, because the underlying conduct was done without any fraud or fault. In these situations, it is more reasonable to require a claimant to be subject to recoupment for the amount he would not have received if he had properly reported his earnings. Here, the UCBR should have calculated the non-fraud overpayment by first determining the amount of EUC and FAC benefits that the claimant would have received had he properly reported his part-time earnings and then subtracting that amount from the amount the claimant actually received. The difference between these sums would equal the amount of the non-fraud overpayment.

*Reading Area Water Authority v. Unemployment Compensation Board of Review, No. 1177 C.D. 2015, Filed April 21, 2016.*

Claimant, a maintenance worker at employer's filtration plant, removed parts from a discarded compressor in the scrap pile. Claimant informed his supervisor that he had removed the parts in order to fix a compressor at the filtration plant that was leaking oil. Employer contacted the local police and they conducted an investigator into the removed compressor parts. Claimant was then suspended from his employment based on allegations that he stole property from employer. He was subsequently charged with theft by unlawful taking and receiving stolen property.

Claimant filed for UC benefit, but was denied under §402(e) of the Law. On appeal, the Referee reversed the UC Service Center's determination and concluded that claimant's actions did not constitute willful misconduct. Employer appealed to the UCBR, which remanded the case to the Referee for a determination as to the outcome of the criminal charges pending against claimant.

At the remand hearing, claimant noted that he agreed to enter the Accelerated Rehabilitation Disposition (ARD) program for 30 days. He was required to pay $190 in costs, but no restitution. In the ARD colloquy, it was noted that the claimant was not pleading guilty to any charge by agreeing to enter the ARD program and that, upon completion of the program, the charges and arrest would be expunged from his record.

The UCBR then concluded that claimant was eligible for benefits. Employer sought review by the Commonwealth Court, arguing that the UCBR erred "as a matter of law because claimant's entry into the ARD program was proof he committed willful misconduct.

The Court noted that §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." The question here is whether employer proved claimant committed theft. Mere entry into the ARD program, without more evidence, is insufficient proof of willful misconduct. "Where a claimant is discharged for a criminal act, such as theft, the subsequent acceptance into an ARD program is *insufficient* proof of willful misconduct." Bruce v. Unemployment Comp. Bd. Of Review, 2 A.3d 667, 677 (Pa.Cmwlth.) (emphasis added) (citing Unemployment Compensation Board of Review v. Vereen, 370 A.2d 1228 (Pa.Cmwlth. 1977), appeal denied, 12 A.3d 753 (Pa. 2010).

*Great Valley Publishing v. Unemployment Compensation Board of Review, No. 49 C.D. 2015, Filed March 8, 2016, Reported May 12, 2016.*

Claimant, a full-time account executive, was discharged for violating her employer's policy governing employees' personal use of computers and internet service. The local service center determined that claimant was ineligible for benefits under §402(e). Claimant appealed and a referee's hearing was held.

At the hearing, employer's vice-president testified that employer has a policy prohibiting employees' personal use of computers and internet service without advance permission. Claimant signed the policy and procedures manual, but never asked for permission to use the computers for personal reasons. Employer's vice-president testified that employer has a zero tolerance policy for using the computer or internet for personal reasons, but can exercise discretion to terminate an employee if the policy is abused. When misuse is

observed, employer will hold a meeting to remind employees of the policy.

Employer's associate sales manager testified that employer does not have a norm or accepted level of personal use of computers and that disciplinary actions were taken on a case by case basis. He stated that he saw claimant shopping on Amazon and told her to get back to work. When he reviewed the reports later that day, he saw that claimant again had used the internet for personal reasons. The decision was then made to terminate claimant.

Claimant testified that employees commonly used employer's computers and internet for personal purposes, and that employer was aware of this but did not consistently enforce its policy.

The referee found that, although employer inconsistently enforced its policy, claimant was aware of the policy and violated it without good cause. Accordingly, the service center's determination of ineligibility was affirmed. On appeal, the Unemployment Compensation Board of Review reversed, noting the inconsistent enforcement of the policy and the fact that claimant never received a written warning. As such, the Board reversed the referee's decision and held that claimant was not ineligible due to willful misconduct.

The Commonwealth Court agreed with the Board that where employer admittedly tolerated violations of its policy governing employees' internet use, employer failed to establish that claimant use of the computer and internet amounted to willful misconduct under §402(e). Employer admittedly tolerated violations of the computer/internet policy so long as the employee's use was not "excessive," the policy does not define "excessive," and claimant credibly testified that she believed her minimal usage was permissible under the policy as enforced by employer.

*Chester Community Charter School v. Unemployment Compensation Board of Review, No. 1180 C.D. 2015, Filed February 17, 2016, Reported April 28, 2016.*

Employer has a policy contained within its code of conduct which prohibits the falsification of records or documents and provides that violation of its policy is grounds for disciplinary action up to and including termination. Employer classifies its paraprofessional staff members as hourly employees and authorized them to work a maximum of 29 hours per week.

Claimant worked as a Principal Secretary, whose duties included time keeping. The Principal Secretary reviews employee's time cards, confirms that they are working no more than 29 hours per week, and sends the time cards to the payroll department. If an employee works more than 29 hours per week, the Principal Secretary should notify the Principal and the Principal would modify the schedule to ensure that the employee works only 29 hours per week.

On January 23, 2015, claimant sent an email to employer's HR Director, Wadkins, advising her that certain paraprofessional staff members had worked more than 29 hours per week during the relevant pay period. Claimant further informed Wadkins that she had altered the time cards to reflect that those employees only worked 29 hours and initialed the time cards to indicate that she made the changes. Claimant was advised that she could not modify the hours that employees worked because it violated state wage laws. Claimant apologized and insisted that she would not alter time cards in the future. Nevertheless, claimant was suspended pending an investigation to determine if claimant had violated employer's policy prohibiting falsification of records or documents. Because it was ultimately determined that claimant had violated the policy, her employment was terminated.

The local service center determined claimant was ineligible for benefits because she was terminated for willful misconduct. Claimant appealed. Before the referee, claimant testified that she misunderstood the time-keeping instructions. She stated that, although aware of the policy prohibiting falsification of records, she had previously modified and initialed time cards to indicate changes. She maintained that she committed an honest error and, if she knew what she was doing was illegal, she would not have initialed the time cards or emailed Wadkins to advise her that she made the alterations. The referee concluded that claimant exhibited poor judgment and the employer had a right to discharge her; however, her conduct did not amount to willful misconduct. Accordingly, she was entitled to benefits. The Unemployment Compensation Board of Review affirmed the referee's decision.

On appeal to the Commonwealth Court, employer argued that the UCBR erred because it failed to shift the burden to claimant and require her to show good cause for violating employer policy after employer established that claimant was aware of and violated employer's policy prohibiting the falsification of records. The Court did not agree.

An employer alleging willful misconduct bears the burden of proving the existence of a reasonable work rule and its intentional or deliberate violation by the employee. An inadvertent or negligent violation of the rule may not constitute willful misconduct. Where the employer fails to carry its initial burden of proving a deliberate violation, the burden never shifts to the claimant to demonstrate good cause for violating the rule. Here, claimant's credited testimony was that she was confused about employer's policy be-

cause she had previously altered time cards and initialed them to indicate that she had made the change. She did not believe employer's rule applied to her because she was working in payroll and not altering her own time card.

Thus, in this case, the claimant attempted to comply or believed she was complying with employer's rule, which is in stark contrast to cases in which the claimant engages in disobedience of a direct instruction. Claimant's confusion regarding employer's policy does not amount to willful misconduct and, thus, employer's argument was found unpersuasive. The order of the UCBR was affirmed.

### *UC Audits*

*(Continued from page 1)*

which records will be reviewed will be set forth in the appointment letter. Usually, audits cover one calendar year; however, if the auditor discovers a problem with the records, the audit may cover a longer period of time.

The employer or an authorized individual familiar with the employer's records, such as a bookkeeper or accountant, should be present during the audit. The time needed to complete an audit varies from employer to employer and depends upon the size of the employer, the condition of the employer's records, the cooperation of the employer[1], and the number of issues discovered by the auditor, if any, that must be addressed. The auditor may discuss his or her findings with the employer before leaving the employer's place of business. In any case, once the auditor and his or her supervisor have completed their review of the audit, a letter will be mailed to the employer with the approved audit findings. If the employer disagrees with the auditor's findings, the employer has the right to appeal.

More information regarding audits and an employer's right to appeal may be found at the Department's website: www.uc.pa.gov. Questions may also be addressed to Thomson, Rhodes & Cowie at: uc@trc-law.com.

[1]If an employer refuses to allow access to its records, the Department may subpoena the records and enforce the subpoena in civil court. A penalty of $1,500 may be assessed for each day an employer withholds its records. An employer may be subject to criminal fines or imprisonment for up to 30 days for failure to produce the records.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Unemployment Compensation Newsletter invite you to submit questions you may have dealing with unemployment compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified unemployment compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.