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Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: BR- 98096

CLAIMANT APPELLANT:

[REDACTED]
Pittsfield, MA 01201

S.S. #020-64-6897
Office #04

EMPLOYING UNIT:

[REDACTED]
Pittsfield, MA 01201

EMP. #43-407410

On October 19, 2005, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearing held by the Commissioner's representative on July 25, 2005.

On September 9, 2005, the Board allowed the claimant's application for review of the Commissioner's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Unemployment Insurance Law (the Law). The Board remanded the case to the Commissioner for further review and to make further findings of fact from the record. The Commissioner returned the case to the Board on October 14, 2005.

The Board has reviewed the entire case to determine whether the Commissioner's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The appeal of the claimant is from a decision of the Commissioner which concluded:

The claimant did not voluntarily quit his job. Therefore, Section 25(e)(1) is not applicable to this matter.

In a Section 25(e)(2) case, the burden of proof is on the employer to establish that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced policy or rule, or to deliberate misconduct in wilful disregard of the employer's interests.

Given the facts as stated above, there is substantial and credible evidence to establish that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced policy or rule rather than for deliberate misconduct in wilful disregard of the employer's interest.

The employer discharged the claimant when he failed a random drug test. The claimant was aware of the employer's drug testing policy because he received the handbook. The policy is reasonable because it protects a legitimate interest of the employer. The policy is uniformly enforced, since the employer would terminate any employee who failed the drug test. The claimant violated the policy when he tested positive for marijuana in a random test. There was no evidence that the violation was the result of any incompetence on the part of the claimant.

While the claimant denied using marijuana, the test results did not support that denial. Although the claimant may well have been taking prescription medications, timing of intake as well as dosage levels could be factors that might account for their failure to show up on the drug test.

In view of the facts, the claimant is subject to disqualification and denied benefits.

Benefits are denied beginning with the week ending 3-19-05 and until the claimant works eight weeks and in each of said weeks earns an amount that is equal to or in excess of his weekly benefit amount.

Section 25 of Chapter 151A of the General Laws is pertinent and provides, in part, as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for—

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount after the individual has left work. . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence....

The Commissioner's representative held a hearing on July 25, 2005. Both parties appeared. The Board remanded the case to the Commissioner for further review and to make further findings of fact. The Commissioner's representative then issued the following consolidated findings of fact:

1. The claimant worked as a sales manager/used car manager for the employer, an automobile dealership, from 12-00 to 3-9-05, on a salary plus commission pay basis.
2. On 3-9-05, the employer discharged the claimant because he failed a random drug test.
3. The employer has a drugs and alcohol policy, written in the employee handbook. The claimant signed for and received the handbook on 11-5-04. The purpose of the policy is to provide a drug-free, healthful, and safe workplace.
4. The drugs and alcohol policy states in part as follows: "To help ensure a safe and healthful working environment, associates may be randomly asked to provide body substance samples (such as urine and/or blood) to determine the use of drugs and alcohol." It further states in part as follows: "Using or being under the influence of drugs or alcohol on the job may pose serious safety and health risks. Violations of this policy will lead to disciplinary action, up to and including immediate termination of employment. Such violations may also have legal consequences."
5. Prior to 2005, the employer had not enforced the random testing portion of the drugs and alcohol policy. In 2004, the employer got a new insurance company. The new insurance company informed the employer that random testing needed to be done.
6. The employer has had no other employees who have tested positive for drugs and/or alcohol. Because of potential liability, the employer would terminate all employees who tested positive on random testing.

7. The employer provided the claimant with a demo vehicle. In addition to driving the company owned vehicle, the claimant also drove customers' vehicles in the performance of his duties.
8. On 3-2-05, the employer sent the claimant and a service technician to a local facility, 510 Medical Walk In, for a random drug and alcohol test. The claimant was informed that his name was picked out of a hat. The employer personally knew nothing about the drug testing process and how it was done (and so stated at the hearing).
9. Upon arrival, the claimant and service technician were given instructions and each was given a cup to provide a urine sample. The claimant filled the cup, closed it, and returned it to the appropriate individual. He asked some questions about the use of prescription medications in relation to the results of the test, and was told it would not be a problem.
10. Prescription medications prescribed for the claimant were Methylphenidate which is an amphetamine, and Methadone, which is an opiate. The claimant was taking said prescription medications on a daily or regular basis for chronic pain due to abdominal surgeries about five or six years earlier.
11. The claimant then waited for the service technician, who had not followed the instructions and had to provide a second sample.
12. The sample was sent to a laboratory in St. Paul, MN, called Medtox Laboratories Inc. The employer presented on (sic) evidence/documentation to show the chain of custody of the specimen provided by the claimant for use in drug testing.
13. The claimant's test came back positive for marijuana. It was the only positive reading.
14. The employer called 510 Medical Walk In to check if it was correct, and was assured that it was. He then called his lawyer and insurance company. He was informed of the possible consequences and liability in the future, should he keep in his employ an individual who tested positive on a drug test and that individual had an accident.
15. The employer notified the claimant that he was being terminated for failing the drug test. The claimant denied using marijuana and requested a retest. The employer's policy does not have provision for retesting, and the employer did not agree to a retest.
16. The claimant presented medical documentation stating that the drug test result should have been "positive" for the prescription medications being taken by the claimant. The testing laboratory reported "negative" test results for those medications.
17. The business is small and the employer does not have an employee assistance program.

After reviewing the record, the Board adopts the findings of fact made by the Commissioner's representative as being supported by substantial evidence. The Board concludes as follows:

Under G. L.c. 151A, § 25(e)(2), the burden of proof is upon the employer to establish by substantial and credible evidence that the discharge of the claimant was attributable to a knowing violation of a reasonable and uniformly enforced company policy or rule of the employer, or due to deliberate misconduct in wilful disregard of the employer's interest. The employer has not met its burden.

The employer discharged the claimant because he failed a random drug test. The employer's reasonable policy prohibited associates from using or being under the influence of drugs or alcohol. The policy provided for the random testing of associates to determine use of drugs and alcohol. The claimant was aware of this policy. He received the handbook containing the policy on November 5, 2004, shortly before the employer began to enforce it.

On March 2, 2005, the employer sent the claimant and a service technician for a random drug test at a local facility. They provided urine samples at this facility, after which the specimens were sent to a laboratory in St. Paul, Minnesota for testing. The claimant's test result was reported as positive for marijuana use.

No direct or other reliable evidence, however, was presented to show that the claimant used marijuana or that the report of the positive test result was reliable. The employer failed to demonstrate that there was a proper chain of custody of the specimen which the claimant provided. The employer has no knowledge about the drug testing process. Although the claimant denied the use of marijuana and requested a retest, the employer denied the claimant's request for a retest. In addition, the testing laboratory reported a "negative" result on prescribed medications which the claimant was taking. The claimant presented medical documentation stating that the test results should have been "positive" for use of those medications. The employer has failed to establish that the test results were accurately developed.

Accordingly, the employer did not meet its burden of proving that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employing unit's interest or that the discharge was for a knowing violation of a reasonable and uniformly enforced rule or policy within the meaning of section 25(e)(2) of the Law cited above.

The Board modifies the Commissioner's decision. The claimant is entitled to benefits for the week ending March 19, 2005, and subsequent weeks, if otherwise eligible.

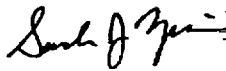


Kevin P. Foley
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - October 26, 2005



Donna A. Freni
Member



Sandor J. Zapolin
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

mh

LAST DAY- November 25, 2005



THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF UNEMPLOYMENT ASSISTANCE
BOARD OF REVIEW

MITT ROMNEY
GOVERNOR

KERRY HEALEY
LT. GOVERNOR

JANE C. EDMONDS
DIRECTOR, DEPARTMENT OF
WORKFORCE DEVELOPMENT

ALLOWANCE OF APPLICATION FOR FURTHER REVIEW
OF THE DECISION OF THE COMMISSIONER

KEVIN P. FOLEY
CHAIRMAN
THOMAS E. GORMAN
MEMBER
DONNA A. FRENI
MEMBER

September 9, 2005

BR-98096

CLAIMANT APPELLANT:

[REDACTED]

[REDACTED]

Pittsfield, MA 01201

S.S. # 020-64-6897

Office # 04

EMPLOYING UNIT:

[REDACTED]

[REDACTED]

Pittsfield, MA 01201

EMP. # 43-407410

The application of the claimant for review by the Board of the decision of the Commissioner dated July 29, 2005, is hereby allowed.

- The case is remanded by the Board to the Commissioner for making subsidiary findings of fact from the record.
- The case is remanded by the Board to the local office.
- The Board will review the record of the hearing.

Kevin P. Foley
Chairman

attachment:

**THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF UNEMPLOYMENT ASSISTANCE
BOARD OF REVIEW**

DATE: September 9, 2005

TO: Hearings Department
FROM: Kevin P. Foley, Board of Review
SUBJECT: Remand for Subsidiary Findings
Board of Review Docket Number: **BR-98096**

Please make subsidiary findings from the record regarding the following areas of concern. Thereafter, issue consolidated findings of fact and return this file to the Board.

1. Did the employer present as evidence documentation to show the chain of custody of the specimen provided by the claimant for use in drug testing?
2. Did the employer acknowledge at the hearing that he knew nothing about the drug testing and how it was done?
3. Reference finding of fact #10. At the time of the drug testing, was the claimant taking the prescription medications on a daily or regular basis for chronic pain due to abdominal surgeries about five or six years earlier? Did the claimant present medical documentation stating that the drug test result should have been "positive" for these prescription medications? Did the testing laboratory report "negative" test results for these medications? (Reference finding of fact #10.)

IMPORTANT NOTICE TO ALL PARTIES: The above-referenced issues are to be addressed only by the hearing officer from information already contained in the record. No new factual information will be accepted by the hearing officer or the Board of Review for consideration at this time. The parties should not respond to this remand order.

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BR-98096

PITTSFIELD MA012010000

APPEAL RESULTS

Docket: 418401

Mail Date: JULY 29, 2005

Appellant: CLAIMANT

Local Office: 4-0

Claimant :
XXXXXXXXXX
XXXXXXXXXX
PITTSFIELD MA012010000
SSN : 020 - 64 - 6897

Date Of Determination : 04/13/05
Hearing Request Filed : 06/29/05
Hearing Date : 07/25/05
Location Of Hearing : PITTSFIELD

Employer :
XXXXXXXXXX
XXXXXXXXXX
PITTSFIELD MA012010000
EMP # : 43407410

Original Determination :
AFFIRMED [X]
OVERTURNED []
OTHER []

Appearances :

Claimant	[X]	Employer	[X]
Claimant's Rep/Attorney	[]	Employer's Rep/Attorney	[]
		Interpreter	[]

 You may Appeal this Decision to the Board of Review.
 The last date to file an Appeal is AUGUST 29, 2005

Mitt Romney, Governor
Kerry Healey, Lt. Governor

Commonwealth of Massachusetts
Jane C. Edmonds, Director, Department of Workforce Development
John P. O'Leary, Director, Division of Unemployment Assistance