

HAMPDEN, ss.

Trial Court of the Commonwealth  
District Court Department  
Springfield Division  
Civil Docket No. 1823CV0694

[REDACTED]

*Plaintiff(s)*

v.

**DIRECTOR OF THE DEPARTMENT OF UNEMPLOYMENT ASSISTANCE AND  
SPRINGFIELD AREA TRANSIT COMPANY, INC.**

*Defendant(s)*

Memorandum of Decision

This is a Complaint for Judicial Review brought pursuant to the provisions of G.L. c. 151, § 42 seeking a review of the decision of the Board of Review of the Department of Unemployment Assistance.

PROCEDURAL BACKGROUND: The Plaintiff, [REDACTED] worked as a driver for the Defendant, Springfield Area Transit Company, Inc. ("Springfield Transit"). [REDACTED] applied for and was denied unemployment insurance benefits ("UI"). The Plaintiff filed a timely appeal. After hearing, the Review Examiner ("RA") ruled [REDACTED] was disqualified from receiving benefits pursuant to G.L. c. 151A §25(E)(2) finding that [REDACTED] had knowingly violated the employer's drug testing policy. The plaintiff appealed the RA's findings to the Board of Review, which affirmed the RA's decision. The plaintiff has brought the present action for judicial review of the denial of benefits.

FACTUAL BACKGROUND: On November 14, 2017, Springfield Transit notified [REDACTED] that it was terminating his employment pursuant to the employer's drug testing policy. Following

his termination, ██████ filed a claim for unemployment benefits. The Department of Unemployment Assistance (“DUA”) issued a notice of disqualification dated January 9, 2018. The plaintiff filed a timely request for a de novo hearing under G.L. c. 151A §39(b).

██████ worked as a driver for Springfield Transit from April 29, 2013 until November 14, 2017. Springfield Transit has a written Drug and Alcohol Control Policy setting forth in relevant part, when, how, and why, employees in ██████ position are subject to drug and alcohol testing. The policy is in accordance with federal requirements, and sets forth the consequences for failing said tests. On May 22, 2017, ██████ was sent for a drug test and was positive for cocaine and marijuana. The plaintiff was suspended without pay and referred to a substance abuse professional in accordance with the aforesaid Drug and Alcohol Control Policy. On June 9, 2017, ██████ signed a post-rehabilitation Return to Work Agreement in which the employee acknowledged understanding that a second positive drug test would result in his termination and that the condition of his continued employment included attending an approved rehabilitation program and passing a return to work test. ██████ returned to work in June of 2017.

On October 27, 2017 ██████ submitted to a follow-up drug test. After the test was deemed invalid, a second test was given on November 7, 2017. On November 14, 2017 Springfield Transit notified ██████ that the test results were positive for cocaine and marijuana, and his employment was terminated. The plaintiff contends that Springfield Transit did not provide him with a copy of the test results at the time of his termination, nor were the results provided when the employer provided him with his personnel records.

As previously stated, ██████ claim for unemployment benefits was denied on the basis of disqualification for violating a uniformly enforced rule or policy. After filing a timely appeal an unemployment appeal hearing was held before a DUA Review Examiner on February 21, 2018. At the hearing, Springfield Transit presented testimony from one witness, the human resources employee who had discharged ██████. Springfield Transit completed the presentation of its case without introducing into evidence the federal Drug Testing Custody and Control form with the results of ██████ most recent drug test. Thereafter, the Plaintiff contends, the RA exited the hearing room and returned with the test results, indicating the other witness waiting but not called to testify by Springfield Transit had the form. The RA entered the Drug Testing Custody and Control Form into evidence over the Plaintiff's objection. The RA affirmed the DUA's decision denying ██████ benefits, and the Board of Review affirmed the RA's decision on April 19, 2018.

At the hearing, ██████ has acknowledged, and it is uncontested, that he suffers from depression, anxiety, mood disorder and bi-polar disorder. The plaintiff also contended at the hearing before the RA that he suffers from polysubstance dependence, while the defendants contend that ██████ denied being addicted to drugs or alcohol. The RA did consider Mr. ██████ health at the time of the incident, and concluded that his condition did not render him incapable of adhering to the Drug and Alcohol Control Policy.

**STANDARD OF REVIEW:** The District Court's review of a decision of the Board of Review is governed by G.L. c. 151A § 42, which incorporates the standard of review applicable to agency decisions as set forth in G.L. c. 30A § 14(7). A decision of the Board of Review may be reversed

if it is in “violation of constitutional provisions, based upon an error of law, made upon unlawful procedure, or unsupported by substantial evidence...” See *Buguszewski v. Commissioner of Dept. of Employment and Training*, 410 Mass. 337, 345, 572 N.E. 2<sup>nd</sup> 554 (1991). The review shall give “due weight to the experience, technical competence, and specialized knowledge of the agency as well as any discretionary authority conferred upon it”. *White v. Director Div. of Employment Sec.*, 382 Mass. 596, 599, 416 N.E. 2<sup>nd</sup> 962 (1981). The judicial review is confined to the administrative record, and the burden is on the plaintiff to demonstrate the decisions invalidity. *Lincoln Pharm of Milford v. Commissioner of the Div. of Unemployment Assistance*, 74 Mass. App. Ct., 428, 43, 907 N.E. 2<sup>nd</sup> 1128 (2009). If the agency findings are supported by substantial evidence, not arbitrary and capricious or an abuse of discretion, and there is no error of law, the court must affirm the agency. *Silva v. Director of Div. of Employment Sec.*, 398 Mass. 609, 611, 499 N.E. 2<sup>nd</sup> 1205 (1986). In order to be supported by substantial evidence an agency conclusion need “not be based upon the clear weight of the evidence... or even a preponderance of the evidence, but rather only upon reasonable evidence”. *Lisbon v. Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 257, 670 N.E. 2<sup>nd</sup> 392 (1996). Reasonable evidence is further defined as “such evidence a reasonable mind might accept as adequate to support a conclusion after taking into consideration opposing evidence in the record”. *New Boston Garden Corp. V. Assessors of Boston*, 383 Mass. 456, 466, 420 N.E. 2<sup>nd</sup> 298 (1981). The Plaintiff contends that the RA’s decision was based upon unlawful procedure; to wit by deciding the case based at least in part upon evidence that Springfield Transit had not presented at the hearing. Springfield Transit, as the employer carries the burden of proof on each element. See *Commissioner of the Dept. of Employment and Training v. Dugan*, 428 Mass. 138, 142, 697 N.E. 2<sup>nd</sup> 533 (1998). The Plaintiff further contends that two of the elements needed to establish disqualification based

upon a drug-testing discharge are 1) that the claimant failed a drug test, and 2) that the test was administered in accordance with federal drug testing requirements and procedural safeguards. In presenting its case in chief, Springfield Transit did not seek to admit into evidence the Drug Testing Custody and Control form nor did it provide a copy of the form in response to Plaintiff's discovery or request for ██████████ personnel file. The Defendant contends that it was able to meet its burden based upon ██████████ admission the drug test administered on November 7, 2017 came back positive for cocaine and marijuana and written submissions made by the Plaintiff to the DUA. Therefore, the RA's actions in admitting the Drug Testing Custody and Control form was, at most, harmless error.

The responsibility for determining the credibility and weight of testimony and evidence rests with the hearing officer. *Trustees of Deerfield Academy v. Director of the Div. of Employment Sec.*, 382 Mass. 26, 31, 413 N.E. 2<sup>nd</sup> 731 (1980). It is the RA's responsibility to weigh the evidence, find the facts, and decide the issues. *See Grave v. Director of the Div. Of Employment Sec.*, 384 Mass. 766, 769, 429 N.E. 2<sup>nd</sup> 705 (1981). The RA's powers and duties include receiving and considering all relevant and reliable evidence. *See 801 CMR §1.02(10)(f)*. Thereafter, based upon the evidence so presented at the hearing, the RA must reach a "fair, independent and impartial decision". *See 801 CMR §1.02(10)(f)*. The Court finds that the RA exceeded the authority granted to her under the Informal/Fair Hearing Rules promulgated at 801 CMR §§ 1.02 and 1.03 by considering evidence a party did not present at hearing from an individual who did not testify at said hearing and was not subject to direct or cross examination. *See 801 CMR §§ 1.02 and 1.03 et seq., Lagosh v. Commissioner of the Div. of Unemployment Assistance*, 69 Mass. App. Ct. 1118, 872 N.E. 2<sup>nd</sup> 840 (2007). While the Court recognizes that the formal rules of evidence do not apply in administrative hearings, that informality does not

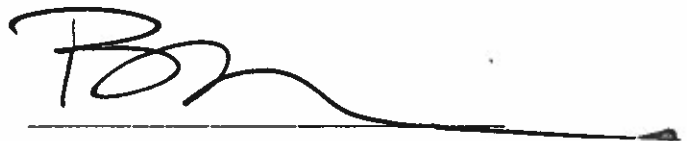
relieve a party or the hearing officer from the requirement of having potential documentary evidence properly admitted into evidence. The RA's decision was made upon unlawful procedure affecting [REDACTED] substantial rights. See *GL c. 30A §14(7)(d), Quintal v. Commissioner of the Dept. of Employment and Training, 418 Mass. 855, 858 n.4, 641 N.E. 2<sup>nd</sup> 1338 (1994)*. The failure to produce and admit into evidence the Drug Testing Custody and Control form by the Defendant through witness testimony prejudiced the Plaintiff. See *Doe v. Sex Offender Registry Bd., 79 Mass. App. Ct. 683, 692-693, 948 N.E. 2<sup>nd</sup> 1268 (2011)*.

CONCLUSION: Based upon the record and after consideration of the arguments of counsel, the decision of the Board of Review to disqualify the Plaintiff from unemployment benefits is set aside and the Court awards [REDACTED] unemployment compensation benefits pursuant to GL c. 30A §14(7)(C).

As a result of the aforesaid decision, the Court makes no finding or ruling on the Plaintiff's further arguments that the decision of the Board of Review must be reversed on the grounds the employer failed to produce evidence of [REDACTED] state of mind as required for disqualification and that the DUA erred as a matter of law by failing to consider [REDACTED] alleged addiction to drugs as a mitigating factor.

So Ordered.

Date: 9.21.18



Bruce S. Melikian

Associate Justice of the District Court