COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EMPLOYMENT AND TRAINING
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

Tel. 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: **BR-67220-OP**

EMPLOYEE APPELLANT:
[redacted]
Lynn, Massachusetts 01905
[redacted]
Office #17

EMPLOYING UNIT:
M.B.T.A.
c/o Jon Jay Associates
P.O. Box 779
Lynnfield, Massachusetts 01940

The Board of Review held a hearing in Boston, Massachusetts, on February 7, 1996, to take additional evidence in the above cited- case. The claimant was present and represented by counsel; the employing unit was present and represented by counsel. The Board reviewed a transcript of the testimony presented at hearings of the Commissioner's representative held on August 17, and September 21, 1995.

The Board allowed the claimant's application for review of the Commissioner's decision in accordance with the provisions of Section 41 of M.G.L. c. 151A, the Massachusetts Employment and Training Law.

The appeal of the claimant is from the Commissioner's decision which found that:

> The claimant did not leave work voluntarily. Therefore, Section 25(e)(1) does not apply to this matter.
>
> In accordance with Section 25(e)(2) of the Law, the burden of proof is upon the employer to establish by substantial and credible evidence that the claimant's discharge was 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 claimant knew of the rule or policy by it being in the collective bargaining agreement.
>
> The rule or policy was reasonable and fundamentally fair as it is a legitimate interest of the employer not to allow employees to steal from it.
>
> The rule or policy is uniformly enforced and fairly applied in the case at hand. The employer did conduct an investigation and found that the calls had been made from the claimant's home telephone and that his saying they were made without his knowledge lacked credibility. The employer enforced the rules uniformly.
>
> The explanation that several people, unknown to the claimant, were making third party calls from his telephone and charging them to the employer's telephone lacks credibility. In the case of his father, the father does not have the ability to make this type of call and in the case of his son, the call the claimant attributes to him was made while the son was in school.

The claimant's failure to comply with the employer's rule or policy was not as a result of any incompetence on the part of the claimant.

It is concluded that there is substantial and credible evidence to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy and that such was not the result of the claimant's incompetence.

Deliberate misconduct while always being an issue in a discharge case need not be addressed at this time, as it has (sic) found that the burden of proof has been met that there was a knowing violation of a reasonable and uniformly enforced rule or policy.

In view of this conclusion, the claimant is subject to disqualification.

The claimant is disqualified from receiving benefits under Section 25(e)(2) of the MESL (sic) for the week ending May 13, 1995, and until he has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of his weekly benefit amount and that he received benefits in the amount of $336.00 to which he was not entitled.

M.G.L. c. 151A, §§ 25(e)(2) and 71 are pertinent and provide 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. . .

Section 71. The commissioner may reconsider a determination whenever he finds that **(1)** an error has occurred in connection therewith; or **(2)** wages of the claimant pertinent to such determination but not considered in connection therewith have been newly discovered; or **(3)** benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentation of fact; provided, however, that with respect to **(1) and (2)** no such redetermination shall be made after one year from the date of the original determination; and provided, further, that with respect to **(3)** no such redetermination shall be made after four years from the date of the original determination; and provided, further, that the time limitations specified above shall not apply with respect to an award of back pay received by an individual for any week in which unemployment benefits were paid to such individual. If the commissioner reconsiders a determination under this section, parties entitled to notice of the original determination shall be afforded an opportunity for an interview before the commissioner or his authorized representative for the purpose of presenting evidence or refuting opposing positions before such a determination can be made.

The Board makes the following findings of fact:

The employer is a regional transportation authority.

The claimant was employed as a relief bus driver from December 2, 1985 until May 5, 1995, when he was discharged. He worked out of the employer's Lynn, Massachusetts garage. He was paid $740.00 per week and he was a member of a collective bargaining unit, Local Number 589 of the Carman's Union.

The employer, through the collective bargaining agreement, has imposed rules on its employees which provide in pertinent part as follows:

General Rules

5 (j) Abusing, destroying, damaging, stealing or defacing property, tools or equipment of the Authority. The first offense will lead to a Recommendation for Discharge.

Section 104 Grievance Procedure
B. Originating Disciplinary Action

4. The Authority will not suspend or remove an employee from service until its investigation has been completed and the disciplinary action specifically prescribed. However, an employee may be suspended pending completion of the Authority's investigation under the following circumstances:

b. Dishonesty, including proper fare collection procedures.

During December 1994, while reviewing the telephone bills for the Lynn garage, the employer found that during September, October and December 1994, 30 unauthorized telephone calls had been made to third parties and charged to a telephone line at the Lynn garage. The telephone company billed the employer approximately $55 for the calls. The employer's operations manager investigated and found that the calls originated from a telephone listed to an individual with the same surname as the claimant, but a different given name, Leo.

Shortly thereafter, while helping the claimant fill out a job related form, the operations manager learned that the claimant lived at the address where the third party calls were made from. The claimant had previously moved to that address but had failed to notify the employer.

Upon concluding that the unauthorized telephone calls had been placed from the claimant's residence, the operations manager reported his findings to the employer's Deputy Superintendent.

On December 20, 1994, the claimant accompanied by a representative of the union, was interrogated by the Deputy Superintendent and a member of the employer's Labor Relations department. The employer charged the claimant with making the unauthorized calls and gave him the opportunity to respond. The claimant denied that he had made the calls.

On December 26, 1994, the employer suspended the claimant without pay. On May 5, 1995, after further investigation, the employer discharged the claimant for violating the employer's previously stated rules and for theft of the employer's property. The claimant filed a grievance with the union.

Prior to December 1994, the claimant's stepson, Neil, lived with him. The telephone, from which the unauthorized calls were made, was ordered by the claimant and installed in his stepson's bedroom. Although his stepson's name was Neil, not Leo, the telephone company put the telephone in the name of Leo. The claimant neglected to inform the telephone company of the stepson's correct name, but it was the claimant who was responsible for paying the telephone bill.

The claimant had two telephones with separate numbers, one for himself and one for his son. In September 1994, the telephone company disconnected the claimant's telephone for not paying the bill. During the months of September through December 1994, only the sons's telephone was operating but with a long distance block on it so that no calls could be made outside the local area.

On October 11, 1994, one call, charged to the employer, was made from the stepson's telephone to the claimant's physical therapist in Danvers, Massachusetts at 9:30 a.m. Because he had conflicting medical appointments on that morning, the claimant asked his stepson to call and cancel his appointment for physical therapy. The claimant knew that he would be traveling on public transportation that morning and unable to make the call himself. He gave his stepson the money to make the call from an outside pay telephone.

In December 1994, the claimant's stepson moved in with his mother, the claimant's estranged wife. Since the wife had been granted a restraining order which was issued against the claimant, it was difficult for him to contact or meet with his stepson.

When the claimant was working out of the employer's Lynn garage, his estranged wife and stepson who lived with him occasionally called the garage and left messages.

The claimant denies that he made the telephone calls or that he knew who made the calls at the time of the employer's interrogatory.

The Board concludes as follows:

The employer has the burden of proving all of the facts required to establish a disqualification from receiving benefits under § 25(e)(2) of the Law cited above. Cantres v. Director of the Division of Employment Security, 396 Mass. 226,231 (1985). In this case, the employer has failed to meet that burden.

At the hearings, both parties agreed or accepted the fact that third party calls were placed from a telephone located in the claimant's residence and charged to the employer's telephone in the Lynn garage. In order to prove its case, the employer offers uncorroborated hearsay evidence gathered as a result of an investigation by the Superintendent into the whereabouts of the claimant and the claimant's stepson when the calls were made. Such evidence of an investigation submitted by the employer without any further verifiable documentation or first hand testimony is not substantial evidence in this case upon which this Board could base its decision, since it does not carry with it certain indicia of reliability and probative value. Mersime v. Board of Appeals, 27 Mass. App. Ct. 470 (1989).

The claimant denied making the calls and offered evidence tending to show that other individuals who had access to the telephone made or could have made the calls without his knowledge. The employer never asked the telephone company to investigate the matter nor did it attempt to contact the persons receiving the calls to determine their relationship to the claimant or his family, or to link the calls directly to the claimant.

In light of the evidence submitted by the employer, this Board is not convinced that the claimant committed the acts with which the employer charged him. The employer has failed to show that the claimant's discharge was 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 as required by § 25(e)(2) of the Law, cited above.

It follows, therefore, that a redetermination was not necessary within the provisions of Section 71 of the Law, also cited above.

The decision of the Commissioner is modified. The claimant is entitled to benefits for the week ending May 13, 1995, and subsequent weeks, if otherwise eligible. He has received benefits in the amount of $336 which he is entitled to retain.

Mark T. Haldane
Chairman

Kevin P. Foley
Member

DISSENT

I respectfully dissent from the decision of the majority in this case.

The facts are not in dispute, however an interpretation and application of M.G.L. c. 151A, § 25(e)(2) is. This case turns on the credibility of the claimant and his witness, the claimant's father. Sufficient evidence and testimony was provided by the employer upon which a reasonable person can conclude that the claimant made 30 unauthorized telephone calls from his home and charged them to the employing unit. The claimant failed to produce credible rebuttal evidence to show that he was not at his residence when the calls were made.

Although the claimant denied any knowledge of the calls, I do not find him credible. I do not believe that while the claimant was not at work, the 30 third party telephone calls made from his residence were made by his friends and relatives without his knowledge. The claimant's only supporting witness was his father who testified before this Board that even though he did not know his son's work number, he made some of the third party calls. He also testified before the Commissioner's representative that he did not know how to make a third party call. His testimony was also not credible.

A preponderence of evidence exists in this case that is undisputed and not hearsay in nature. I find the weight of this evidence conclusively establishes that the claimant made the calls and that he should be disqualified under both elements of the law cited above.

Thomas E. Gorman

BOSTON, MASSACHUSETTS
DATE OF MAILING - MAR 15 1986

Thomas E. Gorman
Member

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

LAST DAY - APR 14 1986

dc