

GREATER BOSTON LEGAL SERVICES

197 Friend Street • Boston, Massachusetts 02114 • Telephone (617) 371-1234 • TDD 371-1228 • Fax 371-1222

June 18, 1996

Department of Employment and Training
Board of Review
19 Staniford Street
Boston, MA 02114

DEPARTMENT OF
EMPLOYMENT AND TRAINING
JUN 19 11 59 AM '96

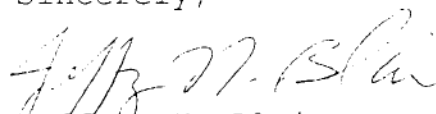
Dear Board Members:

Attached to this letter please find a memorandum of law in support of [REDACTED] appeal to the Board for review. The docket number of [REDACTED] hearing was # [REDACTED].

In my previous correspondence with you, I communicated that I would be mailing this memo within a week. Instead, I am hand delivering it directly to the Board of Review office today. The memo would have been received yesterday, June 17, but as it was Bunker Hill Day, no documents were being accepted by the office. I apologize for any inconvenience this may cause.

Thank you for giving this important matter your attention and consideration.

Sincerely,


Jeffrey N. Blair
Legal Intern



Commonwealth of Massachusetts
Department of Employment and Training
Board of Review

Re: [REDACTED], Docket # [REDACTED] / SSN: [REDACTED]

Date: June 18, 1996

The claimant, [REDACTED], respectfully requests that the Board of Review reconsider her case and find that there were errors of law and fact made by the Review Examiner in her May 10, 1996 decision overturning claimant's initial award of unemployment benefits. For the reasons stipulated below, the Board of Review should accept this petition for review, overrule the Review Examiner's decision and either remand the case for further findings of fact, conduct its own hearing to decide the issues, or grant claimant unemployment benefits upon review of the record.

STATEMENT OF FACTS

1. [REDACTED] ("Claimant") was employed as Assistant Manager at the [REDACTED] ("Employer") from May 30, 1995 until her discharge on February 5, 1996.
2. [REDACTED] was fired because she purchased \$4.06 worth of items on January 31, 1996. When she could not produce a receipt for the purchase, the employer accused her of theft.
3. It was not the store's practice to run a receipt tape daily, and therefore receipts were not provided to anyone.
4. After purchasing the items, [REDACTED] placed them on top of her bag in plain view. When the District Manager made his routine visit that day, he questioned her about the items. [REDACTED] responded that she had purchased them.

5. The cash register was \$9.00 short on January 31, 1996. [REDACTED] [REDACTED], the Store Manager, replaced the \$9.00 out of his pocket to balance out the drawer.
6. The District Manager concluded on February 1, 1996, that [REDACTED] [REDACTED] had not paid for the items he had seen the day before because there was no purchase price of \$4.06 on the detail tape which purportedly shows all purchases made on January 31, 1996.
7. [REDACTED] explained then and later under oath at the hearing on May 5, 1996 that she customarily rang in sales separately and often rounded prices up which would alter their appearance on the detail tape.
8. The employer admitted at the hearing that these were possibilities.
11. [REDACTED] filed a claim for unemployment benefits on February 9, 1996. On April 5, 1996 she was awarded benefits on grounds that there was no proof that [REDACTED] had misappropriated company property.
12. On April 10, 1996, the employer appealed the local office determination and a hearing was held on May 5, 1996. The Review Examiner rendered her decision overruling the initial determination on May 10, 1996.

LEGAL ANALYSIS

Chapter 151A §25(e)(2) provides criteria by which a person may be denied unemployment benefits applicable to this case. Since there was no deliberate misconduct or wilful disregard of the employing unit's interest found, it is only the second half

of subsection (2) that is applicable to this discussion. In order for claimant to be rightfully denied unemployment benefits, the employer must prove by "substantial and credible evidence" that (1) there was a *knowing violation* of a (2) *reasonable* and (3) *uniformly enforced* rule or policy which is (4) not the result of the employee's incompetence. It is clear that the employer has the burden of proof for the first three elements. MASS. GEN. L. ch. 151A, §25(e)(2) (1994). Since there is no issue of the claimant's competence, there is no need to discuss the burden of proof of the fourth element.

The employer has not shown by substantial and credible evidence that ██████████ ever had improper possession of company property. Therefore, the review examiner's conclusion that ██████████ knowingly violated a uniformly enforced store policy is an error of law as there is insufficient evidence in the record to support this finding.

The employer failed to prove by substantial and credible evidence that ██████████ ever violated the company's policy against improper possession of Company property.

The employer accused ██████████ of misappropriating \$4.06 worth of merchandise which was grounds for automatic termination. The employer has failed to prove that ██████████, in fact ever stole any merchandise. The finding by the Review Examiner was based on information contained in the detail tape which was never entered into the record and erroneous conclusions drawn from the \$9.00 cash drawer deficit on January 31.

According to the law, conclusions of the Review Examiner drawn from "any records, investigative reports, documents, and stipulations" must be made a part of the record. MASS. REGS. CODE

tit. 801, §1.01(10)(h). The detail tape was never entered into evidence and is therefore not part of the record. The Review Examiner's decision relies upon information contained in the detail tape. This is an error of law which should negate the conclusions drawn by the Review Examiner.

The Review Examiner also erroneously concludes that [REDACTED] stole the \$4.06 worth of merchandise by assuming that had she not stolen the products, the cash drawer would not have been under that day. This is a very questionable conclusion. Even had claimant paid for the product without ringing it into the register, the drawer would still be approximately \$5.00 short, not over as suggested by the Review Examiner's Finding of Fact #8. Alternately and just as believable, she did paid the \$4.06 without ringing the products in, and the cash drawer would have been approximately \$13.00 short without it. There is no rational basis for the Review Examiner's conclusion that [REDACTED] stole the products based on these facts.

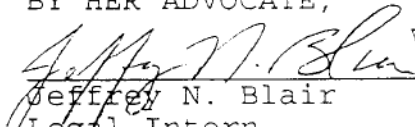
The employer can proffer no other evidence to support its allegation the [REDACTED] misappropriated company property. [REDACTED] provides uncontradicted testimony that she never stole company property and explains logical reasons for the purported discrepancies in the daily detail tape. The employer, having the burden of proof, must demonstrate with substantial and credible evidence that disputes [REDACTED] testimony. The employer failed to meet that burden which has resulted in a reversible error committed by the review examiner in her May 10, 1996 decision.

CONCLUSION

For the reasons stated above, claimant respectfully requests that the Board of Review accept this petition for appeal by claimant, [REDACTED], and reverse the decision made by the Review Examiner at the claimant's hearing. The Board of Review should find that on the record a finding of theft by claimant is unfounded, that there were no knowing violations of a reasonable, uniformly enforced company policy or rule, and that claimant's disqualification from receiving unemployment benefits was a determination based on errors of fact and law. The Board should further find that on the record, claimant is eligible for unemployment benefits and should be awarded them accordingly.

RESPECTFULLY SUBMITTED,
[REDACTED]

BY HER ADVOCATE,



Jeffrey N. Blair
Legal Intern
Greater Boston Legal Services
197 Friend Street
Boston, MA 02114



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EMPLOYMENT AND TRAINING
BOARD OF REVIEW

Great Job !!
G.H.

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

WILLIAM F. WELD
GOVERNOR
A. PAUL CELLUCCI
LT. GOVERNOR
MARK T. HALDANE
CHAIRMAN
THOMAS E. GORMAN
MEMBER
KEVIN P. FOLEY
MEMBER

BR-69642

EMPLOYEE APPELLANT:

[REDACTED]

Office #31

EMPLOYING UNIT:
Richdale Dairy Stores
c/o Jon-Jay Associates Inc.
P.O. Box 779
Lynnfield, MA 01940

The application of the **claimant** for review by the Board of the decision of the Commissioner dated **May 10, 1996** is hereby allowed and the case remanded for one of the following reasons:

- To the Commissioner for taking additional evidence. Parties will be notified by the agency of the date, time and place of the hearing.
- To the Commissioner for a new hearing and a new decision, with new appeal rights. Parties will be notified by that agency of the date, time and place of hearing.
- To the Commissioner solely for the issuance of a corrected decision with new appeal rights.
- To the Local Office for compliance with certain procedures.

DATE: July 1, 1996

Mark T. Haldane

Mark T. Haldane
Chairman

Attachment
dg
RV. 2-95

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EMPLOYMENT AND TRAINING
BOARD OF REVIEW

TO: Hearings Department

DATE: July 1, 1996

FROM: Board of Review

SUBJECT: Remand for De Novo Hearing

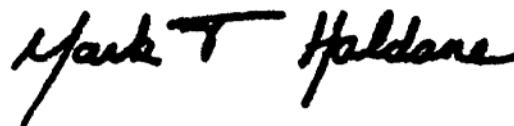
Board of Review Docket Number BR-69642

Please conduct a de novo hearing, before a new hearing officer, with a resulting new decision and new appeal rights to the Board of Review.

The Presiding Officer's findings of fact are deficient in critical areas. Further, the Presiding Officer failed to secure all relevant testimony and evidence necessary to reach a proper decision in violation of her responsibilities under 801 CMR 1.02 (10)(g)(10), The Standard Adjudicatory Rules of Practice and Procedure. The Presiding Officer's conclusions of law are fatally flawed as she has relied on critical evidence that was not taken into the record. Although the employer indicated they had the detail tape, no further reference was made to the actual tape. The Presiding Officer has also made a further conclusion relative to the claimant's husband balancing the drawer after the claimant was questioned by the District Manager upon which there was no testimony. Material finding of fact 4 is not supported by the record. No testimony was offered that the claimant was requested to produce a receipt on this date and testimony needed to be developed regarding the manager not verifying the claimant's purchases on this date. Although two employer witnesses testified the items in question totaled the amount cited in the findings of fact, testimony needed clarification as to the actual total of the amounts testified to. Employer testimony was unclear as to whether any items the claimant purchased were on the detail tape, such as the purchase of a newspaper. Further, disputed testimony on store policies for employee purchases and the requirements of receipt was unresolved. Testimony needed clarification with respect to the employer policy submitted into the record relating to employee purchases in lieu of this disputed testimony.

The Presiding Officer's decision is not supported by substantial evidence. In order to ensure a full, fair, and impartial hearing, the Board orders a de novo hearing be held before a new hearing officer.

So ordered.

A handwritten signature in black ink that reads "Mark T. Haldane". The signature is written in a cursive style with a large, sweeping initial "M".

Mark T. Haldane
Chairman

dg