

Because the review examiner failed to weigh material and seemingly credible substantial evidence tending to show that the claimant police officer did not ingest cocaine against the employer's positive hair follicle test evidence, his decision to disqualify the claimant due to deliberate misconduct was incorrect as a matter of law.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from his position with the employer on June 30, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 27, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 23, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, he was disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concludes that the claimant deliberately ingested cocaine in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked as a full time police officer for the employer, a city police force, from March 22, 1995 until June 30, 2017.

2. The claimant was a union member.
3. The employer's policy prohibits employees from use of illegal drugs and from testing positive for illegal drugs. Violators of the policy are punished at the employer's discretion based on the circumstances of the violation.
4. The employer expects employees to not use illegal drugs or test positive for illegal drugs. The expectation ensures a drug free workplace and ensures the safety of the public.
5. The employer provided the claimant with the policy and expectation during his employment.
6. The employer and the union agreed to the policy and expectation.
7. The employer and the union agreed all employees would be drug tested via hair sample within thirty days of each employee's birthday.
8. During his employment, the claimant received notification he would be required to provide hair samples for drug testing in accordance with the union and the employer's agreement within thirty (30) days of his birthday each year.
9. Drug tests completed using a hair sample show drug usage in the approximate ninety days before the collection of a hair sample.
10. The employer and the union agreed a third party laboratory (the Lab) would complete the drug testing of employees.
11. The Lab considers any result showing more than 5 ng/10 mg to be a positive test result for cocaine.
12. The employer made the claimant aware of the testing within thirty days of his birthday each year.
13. During the claimant's employment, the claimant completed annual drug screenings by providing hair samples.
14. During the claimant's employment, the claimant completed reports if he was exposed to any illegal drug.
15. During the claimant's employment, the claimant handled illegal drugs.
16. In the approximate thirty days before July 27, 2016, the claimant did not complete any reports regarding exposure to illegal drugs.

17. In the approximate thirty days prior to July 27, 2016, the claimant did not handle any illegal drugs.
18. On an unknown date prior to July 27, 2016, the claimant ingested cocaine.
19. On July 27, 2016, the claimant provided three hair samples to the employer's occupational health facility. The claimant's three hair samples were placed in three separate sealed bags, labeled with the claimant's name, and signed by the claimant.
20. The claimant provided three hair samples for drug testing on July 27, 2016 in accordance with the union and the employer's agreed upon drug testing program.
21. On August 5, 2016, the Lab notified the claimant his first hair sample (Sample A) had tested positive for cocaine. Sample A registered 12.7 ng/10 mg.
22. On August 5, 2016, the claimant requested a second hair sample (Sample B) be tested by the Lab.
23. On August 5, 2016, the Lab concluded Sample B tested positive for cocaine. Sample B registered 14.5 ng/10 mg.
24. The Lab notified the claimant Sample B tested positive.
25. After August 5, 2016, the claimant requested his third hair sample (Sample C) be tested by a second third-party laboratory (the Third Party). The claimant paid for the Third Party to test Sample C.
26. On August 9, 2016, the Lab notified the employer Sample A and Sample B tested positive for cocaine.
27. On August 11, 2016, the claimant completed a urinalysis screening concluding the claimant did not test positive for cocaine.
28. On August 12, 2016, the claimant completed a second urinalysis screening concluding the claimant did not test positive for cocaine.
29. Urinalysis drug screenings show any drugs used in the approximate three days preceding the collection of a urine sample.
30. On September 6, 2016, the Third Party confirmed the claimant tested positive for cocaine after testing Sample C. The Third Party notified the employer Sample C tested positive for cocaine.
31. On September 7, 2016, the employer placed the claimant on administrative leave as a result of his positive drug tests.

32. On December 27, 2016, the employer's Internal Investigations Unit (the Unit) concluded the claimant had violated the policy and expectation prohibiting the use of illegal drugs and testing positive for illegal drugs. The claimant did not provide any statements to the Unit.
33. On March 16, 2017, the claimant held a hearing with the employer's Chief Administrative Hearing Officer, the claimant's attorney, the employer's attorney, and character witnesses for the claimant regarding his positive cocaine tests. The claimant denied any drug use and provided a statement he did not know how or why he tested positive for drugs. The claimant's character witnesses testified they had not seen the claimant use drugs or show signs of drug use.
34. On July 6, 2017, the claimant filed a discipline appeal form with the Massachusetts Civil Service Commission.
35. Before August 3, 2017, the employer offered the claimant a settlement agreement that would have allowed the claimant to remain employed despite his three positive drug tests.
36. On August 3, 2017, the employer notified the employer [sic] Commissioner had sustained the claimant's positive drug test results and discharged the claimant effective June 30, 2017.

[Credibility Assessment:]¹

The claimant testified he did not use cocaine at any time and did not know how or why he tested positive for cocaine. The claimant admitted he had filed reports regarding his exposure to illegal drugs during his employment but failed to file any report regarding exposure to cocaine. The claimant testified he had handled cocaine during his employment, but admitted he had not handled cocaine in the approximate one month prior to his providing a hair sample for testing on July 27, 2016. The claimant offered evidence of urinalysis analysis conducted on August 11, 2016 and August 12, 2016 showing he had not used cocaine. However, despite the claimant undergoing urinalysis to prove he did not use cocaine, the claimant admitted urinalysis is accurate in showing whether cocaine had been used in the approximate two to three days prior to the testing whereas hair analysis is accurate in showing whether cocaine had been used in the approximate ninety days before the testing had been conducted.

Based on all three of the claimant's hair samples testing positive for cocaine, all three of the claimant's hair samples lab reports documenting positive tests, two separate labs confirming the claimant's hair samples tested positive for cocaine,

¹ The review examiner's credibility assessment is embedded in the Conclusion & Reasoning section of his decision. We have copied and pasted that portion of his decision here.

Sample A testing positive for approximately two times more than the maximum allowable amount of cocaine, Sample B testing positive for approximately three times more than the maximum allowable amount of cocaine, the claimant's admission he had not handled cocaine prior to July 27, 2017, the claimant's admission he had not filed any report regarding exposure to cocaine prior to July 27, 2017, and the claimant's admission hair samples test ninety days prior to a sample being taken while urine samples test the approximate three days before a sample is taken, it cannot be concluded the claimant provided credible testimony when denying use of cocaine or no knowledge of how or why he tested positive for cocaine. Rather, it is concluded the claimant did ingest cocaine and did test positive for cocaine. As a result it is concluded the claimant deliberately ingested cocaine prior to July 27, 2017.

Based on the claimant's failure to provide any credible or reasonable testimony, it cannot be concluded the claimant established any mitigating circumstances excusing his ingesting and positive test for cocaine.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact as supported by substantial and credible evidence, except as follows. Because we believe that the review examiner's credibility assessment failed to reasonably consider all of the material evidence presented, we reject Finding of Fact # 18 as not supported by substantial evidence. For this reason, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits, as discussed more fully below.

The claimant was terminated from his employment. Therefore, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . 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

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The employer has both a policy and an expectation that its employees not use and not test positive for illegal drugs. Findings of Fact ## 3 and 4. The employer's substance abuse policy states that the consequence for violating this policy depends upon the circumstances of each case.² See Finding of Fact # 3. Since not all employees are subject to the same disciplinary consequence for a violation, the employer has not established that the policy is uniformly enforced. For this reason, we agree with the review examiner's conclusion that the employer has not shown that the claimant was discharged for a knowing violation of a *uniformly* enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the claimant will be denied benefits pursuant to G.L. c. 151A, § 25(e)(2), if the employer establishes that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The findings show that the claimant was aware that the employer expected its employees not to use illegal drugs or to test positive for illegal drugs. It is undisputed that the hair samples, which the claimant provided to the employer on July 27, 2016, tested positive for cocaine, an illegal drug, and that he was discharged as a result. See Findings of Fact ## 19–26, 30, 36, and Exhibit # 17. However, the issue before us is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979). A claimant may not be denied unemployment benefits unless the employer shows that the claimant acted deliberately in wilful disregard of the employer's interest. If the act which caused his discharge was unintentional, there is no basis for disqualification under G.L. c. 151A, § 25(e)(2). See Id. at 97.

Thus, while the positive drug test results may have been grounds for discipline or discharge under the claimant's terms of employment, they are not *per se* grounds for denying unemployment benefits. The positive tests are only grounds for denying benefits, if the claimant engaged in a deliberate act to cause those positive results.

Finding of Fact # 18 states that the claimant ingested cocaine at some point prior to taking his hair test on July 27, 2017, and the review examiner concludes that the ingestion was deliberate. The review examiner's basis for reaching this key finding and his conclusion is explained in his credibility assessment. Such assessments are within the scope of the fact finder's role and unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.)

² Exhibit # 3 includes the portion of the employer's rules and procedures pertaining to its drug testing policy. Pages 2 and 8 of this exhibit include statements that discipline or the severity of the action chosen by the employer is discretionary and will depend upon the circumstances. Although not explicitly incorporated into the review examiner's findings, these policy statements are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

Here, the review examiner explains that he rejects the claimant's denial of using cocaine in light of the three positive lab test results, the claimant's failure to file a report that he had been exposed to cocaine on the job, and the claimant's admission that he had not handled cocaine in the month before providing the hair sample. We must consider whether a reasonable mind would find this evidence, alone or in combination, adequate to support the finding of deliberate cocaine ingestion, taking into account other evidence in the record that detracts from its weight.

Other evidence in the record indicates that the positive hair test results were scientifically unreliable and that they are not conclusive evidence of voluntary drug use. Specifically, Exhibit 25 is a January 5, 2017, letter from a physician, who is also a professor emeritus of pharmacology and toxicology and a former Medical Review Officer. In this letter, the physician reviews the claimant's three drug tests and explains why he concludes that the test results do not prove that the claimant ingested cocaine.³ Exhibit # 18 is a 127-page, 2013 Civil Service Commission Decision, which concludes that hair testing is not sufficiently reliable to be the *sole* evidence of voluntary drug use, because the testing cannot rule out contamination by environmental exposure. *See* Exhibit 18, p. 107–108.⁴ Exhibit # 19 is a copy of Thompson v. Civil Service Commission, in which the Appeals Court agrees that the evidence of shifting testing cutoff levels over the years, the lack of general acceptance in the scientific and law enforcement communities, and lack of universally recognized industry standards supports the Civil Service Commission's conclusion that hair test results alone are insufficient evidence of voluntary ingestion. 90 Mass.App.Ct. 462, 467–468 (2016) (in view of the potential for false positive tests, the Civil Service Commission properly required and considered additional evidence related to whether the officers ingested illegal drugs, and not simply the positive hair test results). However, nothing in the review examiner's decision reveals that he considered Exhibits ## 18, 19, or 25, or the questions they raise about the reliability of the claimant's positive hair tests. The credibility assessment summarily concludes that the hair analysis is accurate in showing whether the claimant used cocaine in the 90 days before the test without commenting on the material evidence challenging its validity.⁵

Further, nothing in the decision indicates that the review examiner weighed additional evidence that was material to the core issue of whether the claimant deliberately ingested cocaine. Though brought to his attention in Exhibit # 18,⁶ he appears to ignore the 2008 unemployment case, in

³ Specifically, he writes, "The results of the two laboratories are not in agreement, are not consistent, and the variability is not scientifically acceptable for hair collected from an individual on the same day. *See* Exhibit # 25, p. 3.

⁴ The Commission's conclusion is based upon an exhaustive review of the conflicting scientific evidence presented by several expert witnesses, the evolving case law in Massachusetts, including unemployment decisions, case law in other jurisdictions, and the fact that the FBI and SAMHSA (the federal Substance Abuse and Mental Health Services Administration) have declined to approve hair testing to detect illicit drug use by federal employees. *See* Exhibit # 18, p. 50–74, 99–102, and 105–106.

⁵ We note that the review examiner's credibility assessment is not strengthened by the claimant's failure to file an illegal drug exposure report in the month before his hair test. Presumably, the review examiner believed that this report would support the inference that the positive results were attributable to environmental exposure. Lacking any indication that the claimant was aware at the time that environmental exposure could lead to a positive hair test, he cannot be penalized for failing to file such a report.

Additionally, we note that the claimant's statement that he had not handled cocaine in the month before the test also does nothing to support the credibility assessment, as it reinforces the notion that the test results were unreliable.

⁶ *See* Exhibit # 18, pp. 101–102.

which the Appeals Court affirms awarding benefits to another police officer who had been fired by this employer because of a positive hair follicle drug test. City of Boston v. Downing, 73 Mass.App.Ct. 78 (2008). The review examiner in Downing considered the initial positive hair test as evidence tending to show that the officer had used cocaine in violation of the employer's substance abuse policy, but, unlike here, she properly weighed this against other evidence indicating that he had not. Id. at 82. She concluded that the claimant's denial of drug use was more credible than the test results, because he had promptly submitted to two independent drug tests with negative results, he refused to enter into a drug rehabilitation agreement knowing that his refusal would result in his discharge, and there was no history of prior drug use. Id. at 83.⁷

The facts in this case are not precisely on point with those in Downing. As in Downing, the review examiner had before him the fact that, against the claimant's own interest, he declined a settlement offer to keep his job in return for an admission of drug use. Also, this record lacks any evidence of the claimant's prior drug use or a prior positive test, and there was testimony from individuals who worked with the claimant stating that they had never seen him using illegal drugs. In contrast, the initial and independent lab test results in this case are higher.⁸ However, unlike in Downing, the review examiner in the present case had before him an exhaustive summary of scientific studies conducted over the last 20 years⁹ suggesting disagreement in the scientific community about the reliability of hair testing and a real risk of a false positive test due to involuntary environmental exposure. Nor do we see any evidence that the review examiner in Downing had before her an expert opinion specifically challenging the claimant's lab test results.¹⁰ By not mentioning and addressing all of this exculpatory evidence, the review examiner committed an error of law.

The review examiner was required to weigh all of the competing evidence. He needed to explain why he gave more weight to the test results than to the evidence indicating that the test results were unreliable and that the claimant was not a drug user. Because he did not take into account the evidence in the record that detracts from the weight of the positive lab tests, we conclude that Finding of Fact # 18 is not supported by substantial evidence.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest by ingesting cocaine is not supported by substantial evidence or free from error of law.

⁷ Compare Jones v. City of Boston, No. 04-P-833, 2005 WL 1398327 (Mass. App. Ct. June 14, 2005), *summary decision pursuant to rule 1:28*. The Court affirmed denying unemployment benefits based on a positive test at 5.1 ng/10mg, and a subsequent positive safety net test at lower levels, even though the police officer denied using drugs and refused the employer's settlement offer. However, in reaching its decision that the drug test results provided substantial evidence of the claimant's drug use, the court declined to consider the inaccuracy of hair follicle tests, because it was not raised below.

⁸ In Downing, the initial test was 5.8 ng/10 mg, and the two independent lab tests were lower. See Downing, 73 Mass.App.Ct. at 81.

⁹ See Exhibit # 18, pp. 50-74.

¹⁰ See Exhibit # 25, p. 3.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 25, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 30, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. declines to sign the majority opinion.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh