THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

BOARD OF REVIEW
DECISION

BR-107722-A (Feb. 6, 2009) -- Affirmed payment of benefits to van driver found not to have mistreated disabled passengers. Weight to assign to hearsay evidence is a fact question, which may only be set aside on review when the fact-finder's reliance (or non-reliance) on the evidence was unreasonable. In this case, review examiner's rejection of hearsay statements as unreliable was reasonable. While consistent with each other, they were not corroborated by any non-hearsay evidence, had not been given under oath, and the declarants had not been cross-examined regarding the contents of the statements.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to award benefits following the claimant's separation from employment. We review pursuant to our authority under G.L. c. 151A, § 41 and affirm.

Benefits were awarded after the review examiner determined that the claimant did not violate a rule or policy of the employer and had not engaged in deliberate misconduct and, thus, was not subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the DUA hearing, the DUA review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to make additional findings. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The claimant was separated from employment on June 13, 2008. He filed a claim for unemployment benefits with the DUA which was denied in a determination issued by the agency on July 10, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner reversed the denial of benefits in a decision rendered on August 25, 2008. Both the claimant and the employer attended the remand hearing.

The issue on appeal is whether there is sufficient evidence to show that the claimant's alleged forcible pulling of a mentally disabled client out of the employer's van and calling him a derogatory name, for which he was terminated and which would serve as grounds for benefit disqualification if proven, actually occurred.

Findings of Fact

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

1. The claimant worked for the employer as a van monitor from 03/21/07 until his separation on 06/13/08.

2. The claimant was discharged for pulling a client out of his seat to get him out of the van.

3. The employer contracts with the Department of Mental Retardation to transport mentally retarded individuals to and from their residence.

4. The claimant had been verbally warned in the past for yelling at clients on the van.

5. At the [Program] where the claimant transported the clients in the morning, the staff complained that the claimant not only yelled at the clients but referred to them in very demeaning terms.

6. On 06/13/08, the employer received a call from [Program] complaining that the claimant pulled one of the clients out of his seat on the van.

7. The employer investigated the incident by first speaking to staff at [Program] and then spoke to the claimant.

8. The claimant told the employer that he did not pull the client out of his seat but held both of his hands to help the client off the van.

9. Based on the complaint from the contract client, the employer was faced with no choice but to terminate the claimant.

10. The employer did not present any direct witnesses from the [Program] to the incident that caused the claimant's separation but did submit statements from those witnesses.

11. Three witnesses provided written statements that were not sworn or notarized.

12. All three statements agree that the claimant forcefully pulled the claimant off the bus and yelled at him calling the client an asshole.

13. The claimant did not pull the client off the bus forcefully nor did he call him an asshole.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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 . . . .

The review examiner concluded at the initial hearing that the employer's discharge of the claimant was not attributable to a knowing violation of a reasonable and uniformly enforced policy or rule of the employer or deliberate misconduct in wilful disregard of the employing unit's interest. At the initial hearing, the claimant testified that he did not pull the disabled client out of the employer van nor call him a derogatory name. The employer provided hearsay testimony that the claimant pulled the mentally disabled client out of the van. The review examiner gave the direct testimony of the claimant greater weight and awarded benefits to the claimant.

We remanded the case back to the review examiner, in order to provide the employer with an opportunity to present direct witnesses. On remand, the employer proffered three unsigned, unsworn statements from witnesses.

The review examiner, who served as a finder of fact in this case, gave the claimant's direct testimony that he did not pull the mentally disabled client out of the van or call the client a derogatory name greater weight than the hearsay written statements that the employer submitted. The employer did not submit any direct testimony at the remand hearing. While hearsay evidence is admissible in G.L. c. 30A proceedings, and an administrative hearing officer's decision may rely heavily on hearsay, it must be weighted according to its reliability. Covell v. DES., 439 Mass. 766 (2003). The indicia of reliability of hearsay evidence include its consistency, the degree to which it is corroborated, the absence of a motive for the declarant to

fabricate, and whether the original statement was given under oath or was subject to cross-examination. The weight to assign to hearsay evidence is a fact question, and that determination may only be set aside on review when the fact-finder's reliance (or non-reliance) on the evidence presented was unreasonable. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

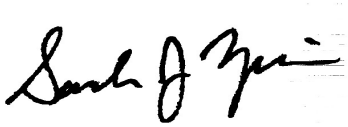
We cannot say that the review examiner's weighting of the evidence in this case and the conclusions he drew from it were unreasonable. The hearsay statements, while consistent with each other, were not corroborated by any non-hearsay evidence, had not been given under oath, and the declarants had not been cross-examined regarding the contents of the statements.

We, therefore, conclude as a matter of law that the employer did not sustain its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest, or that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The DUA review examiner's decision is affirmed. The claimant is entitled to benefits under G.L. 151A, 25(e)(2) for the week ending June 21, 2008 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 6, 2009

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

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

LAST DAY TO FILE AN APPEAL IN COURT – March 9, 2009

MS/ jv