



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-109103-A (Mar. 26, 2010) -- Although not convicted of a crime, it was undisputed that the claimant broke into a dwelling and a vehicle. Such conduct was a wilful disregard of the employer's expectation that correctional officers not detract from the dignity of their law enforcement position.

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 reverse.

The claimant was separated from employment on September 29, 2008. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued by the agency on January 9, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which only the claimant attended, the review examiner reversed, allowing benefits in a decision rendered on February 13, 2009.

Benefits were granted 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. The review examiner determined that the claimant 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 review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to take additional evidence and make additional findings. Only the employer attended the remand hearing. After a further remand for subsidiary findings from the record, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the review examiner's final set of consolidated findings.

The issue on appeal is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he broke into an apartment and a vehicle while off duty.

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 as a correctional officer for the employer from 5/21/89 until he was fired on 9/29/08.
2. The claimant was fired for conduct unbecoming an officer of a correctional facility and for violating the Standards of Correction Service.
3. The Standard of Correction Services policy is in the Blue Book which contains the rules and regulations for all employees of the Massachusetts Department of Correction.
4. The Standard of Correction Services policy stated the following; "You must remember that you are employed in a disciplined service, which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and the places they frequent."
5. The General Policy also states in part that improper conduct affecting or reflecting upon any correctional institution of the Department of Correction in any way will not exculpated [sic] whether or not it is specifically mentioned in the described rules and regulation.
6. The claimant understood that he could not engage in conduct that could be construed as unbecoming an officer of a correctional facility. The claimant also received, read and understood the Standard of Correction Service policy and the General Policy.
7. The claimant was arrested on 10/9/06 and charged with a felony breaking and entering into a dwelling and felony breaking and entering into a motor vehicle. The claimant went into a dwelling uninvited and when he was told to leave, he went into the resident's car and began rummaging though it and took items from the vehicle. The resident's son approached the claimant and managed to get some of the things back. The clamant left with some of the items he took from the vehicle.

8. The 10/9/06 incident occurred while the claimant was off duty.
9. The claimant called the employer to report he had been arrested and the employer placed the claimant on Administrative Leave with pay. The claimant remained on administrative leave until he was terminated. The claimant remained on paid leave until the court finding and because there was a scheduling conflict for the termination hearing which was held in August 2008.
10. On 4/10/08, the charges were reduced to a misdemeanor offense for breaking and entering into a dwelling and breaking and entering into a vehicle.
11. On 4/9/08, the claimant went to court and the court issued a general continuance with special conditions until 4/10/09. There was 'no finding' from the court that the claimant was guilty of a felony for breaking and entering in a dwelling and a car. The claimant was ordered to do 20 hours of community service. If the claimant does not break the law or have any other problems with the law through 4/10/09, there will be no criminal charges on his records.
12. The claimant had a history of bad behavior and was issued a number of warnings. On 10/28/91 the claimant was reprimanded for being disrespectful to a superior officer. On 1/20/98 he was issued a one day suspension for verbally assaulting a LHS physician. On 6/24/99 he was issued a two day suspension for disobeying a direct order/abandoned post. On 2/17/00 he was issued a five day suspension for inappropriate outbursts and threatening behavior toward a fellow officer. On 7/17/00 he was issued a reprimand for shouting vulgarities while representing himself at a meeting of DOC while at a Fleet Bank. On 6/5/01 he was placed on a five day suspension for insubordination, hung up the telephone on superior, refused three direct orders and used profanity. On 5/17/04 he was issued a reprimand for failing to provide medical evidence. On 4/27/05 he was issued a final warning that included a 20 day suspension, which was later reduced to 12 days, for being disrespectful to a supervisor, he failed to perform duties/reused direct orders from two supervisors. On 5/2/06, he was reprimand for failing to provide medical evidence. On 3/29/07 he was issued a five day suspension for submitting a false incident report concerning an altercation between two other staff members and on 9/29/08 terminated for arrest for breaking and entering.
13. A hearing was held on 8/8/08 to determine if the claimant violated the Department's rules or policies. The claimant was present with union representation. During the hearing the claimant admitted to sufficient fact including breaking and entering.

14. On 9/29/08, the claimant received a notice of discharge. The claimant filed a union grievance.
15. Given the facts, the claimant testified that he understood the policy and that engaging in conduct that could be construed as unbecoming an officer of a correctional facility [sic] could result in the loss of his employment. The claimant knowingly violated this policy when he made the decision to break the law. In addition, he admitted that he illegally broke into and entered a dwelling and motor vehicle during the Department of Corrections hearing.

Ruling of the Board

The Board adopts the 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. Only the claimant attended the initial hearing. We remanded the case to allow the employer to testify. Only the employer attended the remand hearing. We then remanded the case again for the review examiner to make subsidiary findings from the record.

In light of the consolidated findings of fact, we conclude that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest. The review examiner made consolidated findings that the employer had an expectation that "...[e]mployees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and the places they frequent." While the claimant was not convicted of criminal charges, there is no factual dispute that the claimant broke into a dwelling and then into a vehicle. The claimant's actions in breaking into a dwelling and then breaking into a car detracted in the dignity of his position as a correctional officer. Consequently, these actions represented wilful disregard of the employing unit's interest. These acts, which were directly antithetical to the

claimant's law enforcement function, constituted misconduct of the most self-evident kind. As the Massachusetts Appeals Court has stated in a very similar case, also involving public safety personnel, such

[O]fficers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. . . In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

Police Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986) (emphasis in original).

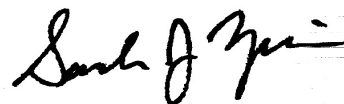
We, therefore, conclude as a matter of law that the employer sustained its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 11, 2008 and for subsequent weeks thereafter, until he has had eight weeks of work and in each of those weeks has earned an amount equal to or in excess of his weekly benefit amount.

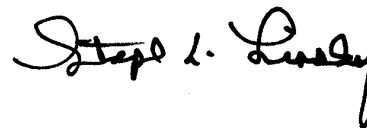


John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 26, 2010



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

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 – April 26, 2010