



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## BOARD OF REVIEW DECISION

BR-123957 (Apr. 4, 2013) – Clarifying its interpretation of the Supreme Judicial Court's Shepherd decision and the Board's earlier rulings under Shepherd, the Board held that alcoholism did not mitigate a police officer's unprovoked, off-duty instigation of a bar-room fight, where the claimant's misconduct was so egregious and directly antithetical to the core function of a police officer.

### Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award 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 May 9, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 31, 2012. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on July 13, 2012. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not knowingly violated the employer's policy or engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to take additional evidence on the employer's investigation of the incident that led to the claimant's termination. Both parties attended the remand hearings. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based upon our review of the entire record including the recorded testimony and evidence from the remand hearing and the consolidated findings of fact.

The issue on appeal is whether the claimant, a police officer who was fired for his conduct in instigating a barroom brawl while he was off-duty, is entitled to receive unemployment benefits because of his alcoholism and state of intoxication at the time of the incident.

### Findings of Fact

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

1. From April 2010 through May 9, 2012, the claimant was employed by the employer, a town, as a full-time police officer.
2. On October 10, 2011, the claimant began a medical leave for injuries sustained on the job. The claimant had knee surgery on January 6, 2012. The claimant remained on paid medical leave until March 27, 2012.
3. The claimant returned to light duty work briefly, for a day or two, at the end of March. The claimant was then placed on paid administrative leave while the employer continued its investigation of an incident involving the claimant that had occurred on January 7, 2012.
4. On January 7, 2012, the claimant was recuperating from the prior day's surgery. The claimant found that the Percocet prescribed by the doctor was not controlling his pain.
5. The claimant is an alcoholic.
6. The claimant had lunch with his parents on January 7<sup>th</sup> at a restaurant/bar in Brighton. The claimant consumed alcohol during lunch.
7. After his parents left, the claimant remained at the same bar/restaurant and consumed additional alcohol.
8. In the late afternoon of January 7<sup>th</sup>, a friend joined the claimant at the bar. The claimant consumed additional alcohol with his friend.
9. At approximately 8 pm, the claimant and his friend each drove their own cars back to the claimant's apartment. They consumed additional alcohol at the apartment.
10. At approximately 10 pm, the claimant and his friend walked to a restaurant/bar across the street from the claimant's apartment (the [ ] bar) in order get something to eat.

11. The claimant became upset when the bartender told the claimant that the kitchen was closed. The claimant demanded to see the manager.
12. A patron told the claimant to leave the bartender alone. This led to an exchange of words between the patron and the claimant. The claimant then rose from his seat and walked approximately 30 feet towards the patron (who was seated halfway across the bar).
13. The patron stood when the claimant neared. The claimant pushed the patron and grabbed a second patron. A fight ensued between the claimant and two patrons. Other customers and staff pulled the claimant off the patrons.
14. The police were called.
15. As a staff member was physically evicting the claimant from the building, the claimant punched the staff member in the shoulder.
16. The claimant began the fight. Throughout the incident, the claimant was the aggressor.
17. The claimant was intoxicated during the fight on January 7<sup>th</sup>.
18. When local police arrived, the claimant identified himself as an off-duty police officer.
19. None of the fight participants or the restaurant's management wanted charges to be brought. The police told the claimant he was no longer welcome in the restaurant.
20. The claimant and his friend went in the friend's car, with the friend driving, to another restaurant where they were able to order food.
21. On January 8<sup>th</sup>, the [City] police department notified the claimant's superiors of the claimant's involvement in the fight.
22. The claimant's police captain thoroughly investigated the incident. He spoke to the responding officers, interviewed staff and customers present during the fight, and reviewed video footage from the restaurant's security cameras that showed the fight.
23. In a January 11<sup>th</sup> letter, the employer ordered the claimant to write a report detailing the incident and answering specific questions about the incident. The letter reminded the claimant that he was "required to answer questions

directly, truthfully and to the best of your knowledge and recollection...Your failure to comply with this order or the intentional making of untruthful statements and/or false answers to questions will result in discipline, up to and including termination/loss of employment."

24. In his written statement, the claimant reported that the patron had walked towards the claimant and then began to make an aggressive gesture when he was close to the claimant. The claimant reported that he pushed the patron in order to defend himself. Because of his knee injury, the claimant wrote that he lost his balance when he pushed the patron and fell backwards. The claimant stated he then got up and left the building telling the manager he did not want any problems. When the claimant was in the parking lot the police arrived.
25. When questioned by the captain on February 8, 2012, the claimant reiterated the same version of the January 7<sup>th</sup> incident that he had described in his written report.
26. Although the claimant's description of the January 7<sup>th</sup> incident was inaccurate, the claimant reported what he remembered happening.
27. The claimant's memory of the January 7<sup>th</sup> incident was impaired due to his consumption of alcohol that evening.
28. After reviewing the video footage of the events, the employer realized that the claimant's version of the event was not accurate.
29. The employer requires its police officers to be honest and truthful at all times. If officers are not trustworthy, the police risk losing the respect and support of the public and the criminal justice system which would render the department unable to effectively function.
30. [A], an employee at the [ ] bar, stated to the investigating captain that the claimant seemed angry or high strung on January 7<sup>th</sup>, but she did not believe he was drunk. Ms. [A] served the claimant a drink. Ms. [A] had received TIPS training, a program that teaches the responsible serving of alcohol.
31. [B], an employee at the [ ] bar, made no observation regarding whether or not the claimant was drunk. Mr. [B] had received TIPS training. Mr. [B] was not present at the beginning of the altercation. Mr. [B] responded to the report of a fight and intervened to stop the claimant.

32. [City] police officer [C] wrote a report of the incident at the time. Officer [C]'s report does not mention whether the claimant seemed intoxicated. Officer [C] was interviewed by the investigating captain on January 26, 2012. Officer [C] told the captain that he did not think the claimant was intoxicated but may have had a couple of drinks.
33. In a telephone interview on January 14, 2012, the investigating captain spoke to Officer [D], an off-duty police officer present during the entire January 7<sup>th</sup> incident. Officer [D] described the claimant as being "completely out of control" on January 7<sup>th</sup>.
34. It is not known if Sgt [E] made a contemporaneous report of his interaction with the claimant on January 7, 2012. Sgt [E] was interviewed by the investigating captain on January 26, 2012. Sgt. [E] told the captain that he thought the claimant was fine, and did not believe the claimant was intoxicated but may have had a couple of drinks earlier.
35. In an interview on February 6, 2012 with the investigating captain, [F], the claimant's friend, told the captain the following: That she met the claimant at the bar in [Town] at approximately 8 pm and stayed for a few hours. She reported that they both had a few drinks, but were not intoxicated. That she and the claimant drove from [Town] to [City] in separate cars. Ms. [F] stated that the claimant was "fine and in a good mood" until the patron at the [Name of Tavern] started "mouthing off." After leaving the [Name of Tavern], the claimant and Ms. [F] went in Ms. [F's] car to another restaurant.
36. At an interview on February 8, 2012, the claimant told Chief [G] that he (the claimant) had been drinking but did not feel he was intoxicated. On January 12, 2012, the claimant submitted a written report regarding the January 7<sup>th</sup> incident. That written report does not mention whether the claimant had been drinking or was intoxicated.
37. In his report of the investigation, Captain [H] concluded (in paragraph numbered 7) that the claimant "intentionally records false statements in his written report dated 1/12/2012. He does this after being advised of the potential consequences in writing within his notification letter date 1/11/201..." The paragraph then lists a number of areas in which the claimant's version of events differed from what the captain observed on video or was told by witnesses.
38. In his report of the investigation, Captain [H] concluded (in paragraph numbered 8) that the claimant had been untruthful during his interview on February 8, 2012. The paragraph then enumerates the areas in which the claimant's version of events differed from what the captain observed on video or was told by witnesses.

39. The employer's Oath of Office/Code of Ethics reads: "I will keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my Department."
40. The following are excerpts from the police department's rules and regulations:
- "Effective and efficient performance of his/her duty requires that a police officer maintain the respect and cooperation of his community. This requirement dictates that the conduct of all police officers be above reproach in all matters both within and outside the Division."
  - "[An officer will] promptly, truthfully and accurately complete and submit all reports and forms as required."
  - "[An officer will] truthfully state the facts and in all other ways cooperate fully when appearing before any judicial, divisional or other official investigation, hearing, trial or proceeding."
  - "The following acts by a member of the Division are prohibited or restricted: a. Criminal Conduct – Commission of any felony, misdemeanor or violation of any town by-law on or off duty..."
41. The employer gave the Oath of Office/Code of Conduct and the police department's rules and regulations to the claimant.
42. The employer had issued the claimant a written reprimand in 2010 after the claimant was arrested for domestic assault and battery. Those charges were later dismissed.
43. The employer issued to the claimant a second written reprimand in 2011 for being absent without leave and being uncooperative during the investigation of his absence.
44. On April 10, 2012, the employer held an internal hearing to determine if, on January 7<sup>th</sup>, the claimant had engaged in conduct unbecoming a police officer and whether he violated the department's rules and regulations and oath of office.
45. At the disciplinary hearing held on April 10, 2010, the claimant was represented by counsel. Witness testimony at the hearing was sworn. At the

hearing, the investigating captain presented the results of his investigation. The claimant's counsel had the opportunity to ask questions of witnesses. The claimant's counsel made a presentation on behalf of the claimant.

46. The hearing officer concluded that the claimant's instigation of the fight in the bar and his subsequent inaccurate descriptions of the January 7<sup>th</sup> incident violated: the officer's oath of office, the requirements to keep one's personal life unsullied and to be above reproach on all matters, the requirement to be truthful during investigations, and the prohibition to refrain from engaging in criminal conduct.
47. The hearing officer recommended that the employer discharge the claimant for his conduct.
48. On May 9, 2012, the employer discharged the claimant for violating the police department's oath of office and rules and regulations due to his behavior on January 7<sup>th</sup> and his inaccurate descriptions of the event during the employer's investigation into the incident.
49. The claimant is a veteran. In October 2011, he was diagnosed as an alcoholic suffering from post traumatic stress disorder (PTSD) and depression.
50. The claimant had begun attending alcoholics anonymous (AA) prior to October 2011. After October 2011, the claimant began to regularly see a therapist. Despite such treatment, the claimant frequently lapsed and consumed alcohol.
51. In February 2012, the claimant began treatment with a different therapist who uses both group and individual counseling to treat individuals suffering from PTSD as well as substance abuse problems.
52. The claimant currently goes to therapy weekly. He goes to AA at least three times per week. If his child care commitments allow, the claimant attends AA daily.
53. At the time of the hearing, the claimant had been 12 weeks sober.

#### Credibility Assessment

The claimant stipulated at hearing that the employer's description of the claimant as the aggressor on January 7<sup>th</sup> was accurate. The claimant did not dispute any of the employer's facts about who did what to whom at the [ ] bar. The major disagreements between the parties centered on

whether the claimant was under the influence of alcohol on January 7<sup>th</sup> and whether he intentionally lied to the employer about what happened on January 7<sup>th</sup>. The only difference of opinion between the parties over objective facts concerned when the claimant's friend joined him at the [Town] bar, how long they stayed, and whether or not they were at the claimant's apartment prior to going to the [ ] bar.

I accept the claimant's testimony that he and his friend were at his apartment prior to going to the [ ] bar. Whether or not the two had gone to the claimant's apartment had not been a significant point of contention when the captain interviewed Ms. [F]. For example, Ms. [F] was not specifically asked whether the two had stopped anywhere between the [Town] and the [City] bars. In contrast, the claimant has been cross-examined regarding his whereabouts from noon to the time of the fight on January 7<sup>th</sup> and has consistently testified that he and his friend were at his apartment for some time before walking across the street to get something to eat. There is no apparent reason for the claimant to be untruthful about this assertion since he spent the day drinking – whether it was in the [Town] bar or at his apartment.

The claimant's testimony is somewhat supported by the fact that witnesses did not see the claimant's or friend's car at the [City] restaurant, which is consistent with the claimant's testimony that they parked at his apartment. I therefore find the claimant's testimony about his whereabouts before the fight to be more persuasive than the timetable of locations relayed by Ms. [F] to Captain [H].

Since the basic facts of the fight were not in dispute, I accept all of Captain [H's] conclusions *except* his conclusions that the claimant was not intoxicated on January 7<sup>th</sup> and that he intentionally lied when he described what he remembered happening that night. I conclude, based on all the testimony and evidence presented, that the claimant was intoxicated. The claimant had surgery the day before and was attempting, in part, to self-medicate to control the pain. The claimant is an alcoholic. He began drinking around noon and continued to drink for the next ten hours. Officer [C] and Sergeant [E] both noted that the claimant may have had a few drinks, although they did not believe he was intoxicated. Officer [D], who was a customer at the bar that evening and had observed the entire incident, described the claimant as being "completely out of control" during the fight. It is more likely that the claimant was intoxicated at the time of the fight than that an alcoholic in physical pain who spent the day drinking was able to drink responsibly so that he remained in control of himself at all times.



Because I conclude that the claimant was intoxicated on January 7<sup>th</sup>, I find the claimant's testimony that he accurately relayed his memory of the incident to the employer to be credible. There is no doubt that the claimant's memory was inaccurate; but memories created during intoxication are not reliable. I conclude that the claimant did not intentionally lie to the employer about January 7<sup>th</sup>.

### 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 . . . .

The employer fired the claimant after an investigation into the claimant's involvement in an off-duty barroom brawl led the employer to conclude that the claimant had violated the employer's code of conduct for police officers by perpetrating a criminal assault and battery and by lying thereafter to the employer in the course of an investigation. Before his discharge, the claimant was afforded an evidentiary hearing before a neutral hearing officer who concluded that the employer had proven each of the charges.

The claimant's argument for unemployment benefits is that he is an alcoholic and, on the night of this incident, he was so impaired by alcohol and prescription pain medication that his conduct in the bar was not wilful but the product of intoxication. Additionally, the claimant argues that, although the self-serving account of the incident given to the investigator was demonstrably false, he sincerely believed it to be true at the time, also due to his intoxication.

We remanded the case for subsidiary findings of fact on the question of the claimant's intoxication and the corollary issue of whether the claimant intentionally lied to the captain or merely gave an account based on a memory clouded by alcohol. Despite contrary accounts from every witness including the woman who spent the entire evening with the claimant, the review examiner found that the claimant was so impaired by alcohol that he had a false memory of the events of the evening.

The claimant does not deny that he gave the captain an account of his actions that portrayed himself as a victim forced to defend himself against an unprovoked assault, which account is flatly contradicted by the video from security cameras in the bar where the fight took place.

Video from the bar and the accounts of all other witnesses show the claimant instigating a fight, striking the first blows, and punching a patron who was down on the floor of the bar. The claimant also took a swing at a pub employee as he attempted to remove the claimant from the area. At the discharge hearing, and again before the DUA review examiner, the claimant stated that he was severely intoxicated, so much so that his memory was faulty, and that, when he gave his account of the incident, he was sincere but wrong.

The employer presented evidence from which it could have been found that the claimant had been drinking but was not intoxicated when he drove from [Town] to [City], went to a local bar, became angry upon learning that the kitchen was closed, and initiated a fistfight with other patrons. The most persuasive evidence is the claimant's own testimony when he was formally interviewed by the chief of police. However, the review examiner believed the claimant's denial, and we will not disturb this finding.

The review examiner also found, and indeed the claimant did not deny, that his behavior amounted to violations of the employer's code of conduct. For the purpose of unemployment benefits, we must decide whether the claimant's conduct was deliberate misconduct or a knowing violation of those policies so as to support a disqualification, under G.L. c. 151A, § 25(e)(2). We conclude that it was.

The actions of a police officer must be held in a different light than those of other employees whose responsibilities do not involve law enforcement and public protection.

Police officers 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 Comm'r of Boston v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371 (1986).

We do not accept the proposition that the claimant's alcoholism can neutralize – under the color of "mitigation" — the disqualifying effect of his misconduct when the actions that led to his discharge were crimes of such a serious nature. Indeed, the particular crimes at issue here, which involved acts of violence against another person, are directly antithetical to the core public protection mission of the police. *See Police Comm'r of Boston v. Civil Service Comm'n*, 39 Mass. App. Ct. 594 at 597, 601 (1996) (affirming Boston Police Commissioner's determination that "off duty, drunk and belligerent conduct" of a police officer was "incompatible with public safety").

Since the claimant engaged in behavior which was conduct unbecoming a police officer, his discharge was attributable to deliberate misconduct in willful disregard of the employing unit's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

We further note that, in her initial decision, the review examiner relied in part upon the claimant's intoxication at the time of a portion of the misconduct (beating patrons in the bar) and concluded that he was not disqualified from receiving unemployment benefits, based on our decision in BR-109710 (March 18, 2010). In that case we stated that:

... [it] is commonly accepted that an employee fired for alcohol-related misconduct is not to be disqualified from receiving benefits unless the employer proves that the employee had control of his alcoholism or that he deliberately and wilfully refused to accept help in controlling it.

The review examiner's reliance on the above-quoted passage is misplaced, however, for two reasons. First, the statement quoted above was not the holding of the decision but merely a summary of what we understood to be commonly accepted interpretation of Shepherd v. Director of Division of Employment Security, 399 Mass. 737 (1987) by the DUA at that time. The point of the statement was to serve as a prelude to our decision, announced later in BR-109710, to undertake a comprehensive review of the question of alcoholism as a mitigating factor in discharge cases.

Secondly, the review examiner did not consider the results of the review we announced in BR-109710 and whose outcome we articulated in BR-117863 (October 31, 2011). As we stated in that case, the proper inquiries in a discharge case involving the defense of alcoholism are: (1) whether, at the time of the incident that resulted in the discharge, the claimant's conduct was a product of his alcoholism, which he was unable to control despite sincere efforts to do so; and (2) whether the claimant's alcoholism sufficiently mitigates his misconduct as to make it non-disqualifying. Even if we were to accept the proposition that the claimant met the first prong of the test, we do not believe that he met the second.

We have long taken the view that mere alcoholism or addiction to some other intoxicating substance is not by itself sufficient mitigation to overcome certain, particularly egregious types of misconduct. Thus, in BR-103415 (June 28, 2007), we held that mere alcoholism, standing alone, was not an adequate defense when a police officer had been terminated for committing an off-duty assault and battery on a former girlfriend while intoxicated. Similarly, in BR-112754-A (March 30, 2011), we held that a claimant's theft of \$1,000 of his employer's property was not sufficiently mitigated by his addiction to drugs as to make that conduct non-disqualifying.

So here, we believe that the claimant's actions in the tavern were so egregious, and so directly antithetical to the core function of a police officer, as to make his alcoholism mitigation defense unavailing.

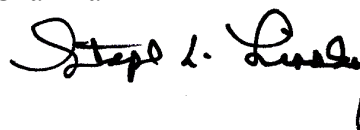
We, therefore, conclude as a matter of law that the claimant's separation was attributable to deliberate misconduct in wilful disregard of the employer's interest, as defined in G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending May 12, 2012 and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - April 4, 2013**



John A. King, Esq.  
Chairman



Stephen M. Linsky, Esq.  
Member

Member Judith M. Neumann 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-**

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.

LH/rh