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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
 [REDACTED],) OHA Case No. 08-FH-73
)
 Claimant.) Division Case No. [REDACTED]
_____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (hereinafter "Claimant") was receiving Alaska Temporary Assistance benefits in September 2007. (Ex. 1) On September 25, 2007, the Division of Public Assistance (hereinafter "Division") sent the Claimant notice it had imposed a penalty against his Temporary Assistance benefits ("job quit penalty") because he had been terminated from employment without good cause. (Ex. 3) Claimant requested a fair hearing on October 3, 2007. (Ex. 4.0) This office has jurisdiction pursuant to 7 AAC 49.010.

Pursuant to the claimant's request, a hearing was held on February 13, 2008.¹ The Claimant attended the hearing in person and represented himself. [REDACTED], Public Assistance Analyst with the Division, attended in person to represent the Division. [REDACTED], an Eligibility Technician II with the Division, attended telephonically and testified on behalf of the Division.

ISSUE

Was the Division correct to impose a job quit penalty against the Claimant on September 25, 2007, that made him ineligible to receive Alaska Temporary Assistance benefits for a one month period beginning October 1, 2007, because the Division alleged the Claimant had voluntarily separated from his employment with [REDACTED]?

¹ Pursuant to Alaska Fair Hearing regulation 7 AAC 49.180, a hearing is to have been held and the decision issued "no later than 90 days after" a hearing request. This decision is therefore substantially overdue, since the decision was due on or before January 1, 2008 (90 days after the claimant's October 3, 2007 hearing request). However, this Office did not receive the Division Notice of Hearing, dated February 1, 2008, until February 4, 2008.

FINDINGS OF FACT

1. Claimant began working with [REDACTED] in early August 2007 as an independent truck driver. He was self-employed and not an employee of [REDACTED].
2. At the time he began driving for [REDACTED], the Claimant did not have a commercial driver's license ("CDL"). He had a CDL instruction permit, which was issued on August 6, 2007. (Ex. F)
3. The Claimant testified he had a verbal agreement with one of the principals of [REDACTED]. Because the Claimant did not have a full CDL, merely an instruction permit, he was required to have a commercially licensed driver with him in any truck he drove. Mr. [REDACTED] performed that function and rode with the Claimant, who drove Mr. [REDACTED]'s truck. The Claimant further stated Mr. [REDACTED] agreed to let him use Mr. [REDACTED]'s truck when he did take the CDL test.
4. The Claimant testified both he and Mr. [REDACTED] thought the Claimant was covered under [REDACTED]'s insurance. However, in early September 2007, while checking in at the Elmendorf Air Force Base gate, he and Mr. [REDACTED] were informed he was not insured.
5. The Claimant said as a result of the insurance information, he immediately stopped driving with Mr. [REDACTED], and that Mr. [REDACTED] refused to let him use Mr. [REDACTED]'s truck to obtain his CDL.
6. The Claimant was able to obtain the use of a truck to take his CDL test, passed the test, and obtained his CDL on September 12, 2007. (Ex. A)
7. The Claimant testified that after he obtained his CDL, he went back to [REDACTED], and that Mr. [REDACTED] refused to utilize him as a driver, without providing a reason for the refusal.
8. The Claimant then obtained a job as a driver for [REDACTED].
9. The Claimant's first and only day on the job with [REDACTED] was September 17, 2007. The Claimant testified he showed the owner of [REDACTED] his CDL at the beginning of the day, and drove a truck for [REDACTED] that entire day. The Claimant said at the end of the workday, September 17, 2007, he drove the truck from Eagle River to Anchorage, with an excavator on the trailer. While backing the truck and trailer up at his destination, the Claimant admittedly jammed the transmission. The Claimant said his jamming the transmission was accidental, and was the result of having to repeatedly shift between first gear and reverse, due to having to back a truck and a trailer into a very tight spot. The Claimant was subsequently terminated from [REDACTED].
10. On September 24, 2007, Ms. [REDACTED], the eligibility technician, on the Claimant's case, spoke to Mrs. [REDACTED] at [REDACTED], and [REDACTED] (no last name provided) at [REDACTED] about the Claimant's work at both companies. [REDACTED] is not the owner of [REDACTED]. Ms.

█████ testified regarding her conversations with Mrs. █████ and █████.² Neither Mrs. █████ nor █████ testified.

11. Ms. █████ testified Mrs. █████ from █████ told her the Claimant had told █████ he had a CDL, and that the insurance company found out he did not have a CDL. As a result, █████ could no longer use the Claimant as a driver.

12. Ms. █████ testified █████ from █████ told her the Claimant was let go from █████ after his first day because he did not show them his CDL and because he broke the transmission on a truck.

13. On September 25, 2007, Ms. █████ sent the Claimant notice a penalty would be imposed against his Temporary Assistance case because he had left his employment: “BOTH EMPLOYERS HAVE CHOSEN TO LET YOU GO FOR FAILURE TO PROVIDE PROOF OF C.D.L. AND DAMAGE TO THEIR PROPERTY.” (Ex. 3) The specific penalty was that the claimant’s Temporary Assistance benefits would be terminated effective the end of September 2007, and that his family was not “eligible to receive Temporary Assistance until November 1, 2007.” *Id.*

PRINCIPLES OF LAW

This case involves the issue of whether the Division was correct when it imposed an Alaska Temporary Assistance program job quit penalty against you, which terminated your Temporary Assistance benefits for a one month period. The Division has the burden of proof³ by a preponderance of the evidence⁴ when it seeks to terminate or modify benefits.

Alaska Temporary Assistance regulation 7 AAC 45.970 reads in pertinent part:

(b) Termination of self-employment or a subsistence activity is not considered a voluntary separation . . .

* * *

(e) If the department determines that an individual’s separation from suitable employment was caused by action or inaction within the individual’s control, the

² The Claimant objected to Ms. Olson’s testimony as hearsay. The testimony was allowed over the Claimant’s objection.

³ “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

⁴ Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black’s Law Dictionary 1064 (5th Ed. 1979)

department shall consider the separation as a voluntary separation . . . and the department shall enforce the period of ineligibility . . .

Alaska Temporary Assistance regulation 7 AAC 45.990(b) defines “voluntary separation” as

- (1) voluntary termination of employment by an employee;
- (2) intentional misconduct by an employee on the job, causing the employer to terminate the employment; or
- (3) failure of an employee to show up for work as scheduled.

The Division is required to provide a public assistance recipient a minimum of ten days written notice “before the date the division intends to take action denying, suspending, reducing, or terminating assistance.” 7 AAC 49.060.

ANALYSIS

The primary issue in this case is whether or not the Division was correct when it imposed a job quit penalty against the Claimant because he lost his employment with both [REDACTED] and [REDACTED].

1. [REDACTED]

The Claimant was not technically an employee of [REDACTED]. He was self-employed. The regulation that addresses the status of self-employed persons plainly states “[t]ermination of self-employment . . . is not considered a voluntary separation.” 7 AAC 45.970(b). A Temporary Assistance recipient’s “voluntary separation” from a job is required to trigger a job quit penalty. 7 AAC 45.970(e). Because the regulation explicitly states a self-employed person’s employment termination is not a “voluntary separation,” it follows that the Division cannot impose a job quit penalty against a self-employed person for employment termination, regardless of the reason for the termination. The Division was therefore not correct when it imposed a job quit penalty against the Claimant because [REDACTED] decided to no longer use him as an independent truck driver.

2. [REDACTED]

The Claimant was an employee of [REDACTED], albeit only for one day. [REDACTED]’s representative, [REDACTED], told Ms. [REDACTED] the Claimant was let go from [REDACTED] for two separate reasons, that he did not provide proof of his CDL, and that he broke a transmission on a truck. Each of these reasons must be examined to determine whether they satisfy the regulatory definition of “voluntary separation” and justify the imposition of a job quit penalty.

The first reason, the failure to provide proof of a CDL, requires the resolution of a factual dispute. The Claimant testified he showed [REDACTED]’s owner his CDL on September 17, 2007, his only day of work at [REDACTED]. It is undisputed the Claimant had a valid CDL as of September 12, 2007. The contrasting evidence is hearsay: Ms. [REDACTED]’s testimony that [REDACTED] told her the Claimant did not provide proof of his CDL.

Although there is no reason to disbelieve Ms. [REDACTED]'s testimony, her hearsay testimony is given less weight than the Claimant's. That is because [REDACTED]'s statements to Ms. [REDACTED] were not made under oath, and were not subject to cross-examination. Additionally, the Claimant's testimony is consistent. The Claimant said he showed his CDL to the owner of [REDACTED], not to [REDACTED]. Given the Claimant's history with his CDL and his having lost his self-employment driving a truck for [REDACTED] because he did not have a full CDL, it is reasonable to believe Claimant when he said he showed his CDL to his new employer. Accordingly, the Claimant's testimony is credible. The Division did not meet its burden of proof to establish that [REDACTED] terminated the Claimant for failure to produce proof of his CDL.

The second reason, the breaking of a truck's transmission, does not require resolution of a factual dispute. The Claimant admits he jammed the transmission. He testified it was accidental, and gave an explanation of the circumstances. Regardless, of whether the Claimant broke the transmission or merely jammed it, the only evidence whether or not the damage was intentional or accidental is the Claimant's testimony.

If an employee is terminated for "intentional misconduct," then the termination is considered to be due to the employee's voluntary act, and a job quit penalty is justified. 7 AAC 45.970(e); 7 AAC 45.990(b)(2). However, the only evidence on this point is the Claimant's testimony that the damage to the truck was accidental. The Division made no showing whatsoever, even through Ms. [REDACTED]'s hearsay testimony, that the damage to the truck was intentional. The Division did not meet its burden of proof to establish that [REDACTED] terminated the Claimant for intentional misconduct.

3. Timeliness of Adverse Action Notice

A review of the record indicates there is another issue in this case. It was not raised by the Claimant or this hearing officer. However, the Division's notice it was imposing a job quit penalty did not meet regulatory requirements. The notice sent on September 25, 2007 informed the Claimant his family's Temporary Assistance benefits would terminate at the end of September 2007. (Ex. 3) State regulations require the Division provide ten day advance notice for adverse actions. *See* 7 AAC 49.060. It is not necessary to base this Decision on the timeliness issue. However, the parties should be aware of this issue.

CONCLUSIONS OF LAW

1. The Division was not correct to impose a job quit penalty against the Claimant for the loss of self-employment driving a truck for [REDACTED].
2. The Division was not correct to impose a job quit penalty against the Claimant for his termination from his job with [REDACTED]. The Division did not meet its burden of proof as to each of the two reasons articulated by [REDACTED]. First, the Claimant's credible testimony showed he provided proof of his CDL to [REDACTED]'s owner. Second, the Claimant's credible and undisputed testimony showed his damage to [REDACTED]'s vehicle was accidental and not intentional.

DECISION

The Division was not correct when it imposed a job quit penalty against the Claimant, which caused him to lose his Temporary Assistance eligibility for a one month time period beginning October 1, 2007.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, the Claimant must send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

An appeal request must be sent within 15 days from the date of receipt of this decision. Filing an appeal with the Director could result in the reversal of this decision.

DATED this 19th day of February, 2008.

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this __ day of _____, 2008, true and correct copies of the foregoing were sent to:

Claimant – Certified Mail, Return Receipt Requested.

_____, Director
_____, Policy & Program Development
_____, Staff Development & Training
_____, Fair Hearing Representative

Al Levitre
Law Office Assistant I