Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Ph: (907)-334-2239
Fax: (907)-334-2285

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

In the Matter of	)	
	)	
[redacted],	)	OHA Case No. 09-FH-590
	)	
Claimant.	)	Division Case No. [redacted]
	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) was receiving Alaska Temporary Assistance benefits in August and September 2009. (Ex. 1) On September 15, 2009, the Division of Public Assistance (Division) sent the Claimant notice it was terminating her Temporary Assistance benefits for a six month period, beginning October 1, 2009, due to her losing her job because she did not show up for work or call in. (Ex. 5) The Claimant then asked the Division to reconsider, and the Division reaffirmed its termination of her Temporary Assistance benefits on October 21, 2009. (Exs. 7.0 – 7.2, 8, 9) Claimant requested a fair hearing on October 30, 2009. (Ex. 10.0)

This office has jurisdiction pursuant to 7 AAC 49.010.

Pursuant to the Claimant's request, a hearing was held on January 14 and February 16, 2010. The Claimant attended the hearing telephonically; she represented herself and testified on her own behalf. [redacted], Public Assistance Analyst with the Division, attended in person; she represented the Division and testified on its behalf.

ISSUE

Was the Division correct to impose a job quit penalty against the Claimant that made her not eligible to receive Alaska Temporary Assistance benefits for a six month period beginning October 1, 2009, because the Division alleged the Claimant had lost her job due to actions within her control?

FINDINGS OF FACT

1. The Claimant was receiving Alaska Temporary Assistance benefits in August and September of 2009. (Ex. 1)

2. The Claimant began working at [redacted] on July 27, 2009. (Claimant testimony) On August 4, 2009, her supervisor, [redacted], issued the Claimant a verbal reprimand for not calling in prior to her not showing up for her 9 a.m. shift. (Ex. 23.1) The August 4, 2009 incident report signed by Ms. [redacted] was not signed by the Claimant, despite there being a space for her signature. *Id.* An employee signature on the form is not required as shown by the line containing the following language: "Witness; (if employee refuses to sign)." *Id.* However, the incident report does not contain a witness signature. *Id.* The Claimant disputed that she had been written up. (Claimant testimony)

3. On August 6, 2009, the Claimant signed an acknowledgment that she had received and read the [redacted] employee handbook. (Ex. 22.1) The employee handbook contains the following language with regard to tardiness and absenteeism:

> It is realized that you may not be able to meet your assigned schedule due to unforeseen emergencies or illness. Please notify a manager if possible, at least two hours prior to your shift . . .
>
> * * *
>
> **Late to Work:** If you are late and did not call in to advise a Manager, a verbal warning will be issued. The second such incident will result in a written reprimand and the third offense could result in termination.
>
> **Missing a Scheduled Shift: If you entirely miss a scheduled shift without notifying a Manager, you will be considered a "NO CALL, NO SHOW." The first offense can result in termination. However, the management will try to contact you at home. We prefer not to terminate people that we have hired and trained.**

(Ex. 22.0, Emphasis in original)

4. During the evening/night of August 9 or 10, 2009,[1] the Claimant was caring for her supervisor's brother's children while the Claimant's sister and the supervisor's brother were out together driving in the Claimant's car. Both the Claimant's sister and the supervisor's brother were also employed at [redacted]. While the Claimant's sister and the supervisor's brother were out together, they were both arrested. (Claimant testimony; Ex. 7.0 – 7.2)

5. As a result of the logistics involved that night, i.e. arranging for someone to pick up the supervisor's brother's children, having to pick up her car to avoid impound, and dealing with her sister being incarcerated, the Claimant was up all night. (Claimant testimony; Ex. 7.0 – 7.2)

[1] The exact date is not clear from the record. It is either August 9 or 10, 2009.

6. The Claimant prepared a written statement on September 29, 2009 that she texted, [redacted], at 6 a.m. the morning following the arrest, informing her that she would not be in to work that day:

> Around 6:00 a.m. I texted [redacted]'s phone, wich (sic) was normal for us to communicate by texting, stating that because of the incident that happened last night I didn't get to sleep at all and I would be useless pretty much, at work so I was calling off. I waited until 9:00 a.m. to lay down to make sure [redacted] didn't need me to come in. I got no texts. Then when I woke up around 1:00 p.m. I had a text from [redacted] saying that I was to turn in my uniform cause I did not have a job any longer.
>
> * * *
>
> I had never, not once not called in if I couldn't make it to work. I did call off a couple times, but I always let [redacted] know through texts . . .
>
> * * *
>
> The day after our boss's brother goes to jail, while in mine and my sisters company, we both get fired. That's too obvious. [His] family and friends and even employees at [redacted] blamed us for [him] getting arrested.

(Exs. 7.1 – 7.2) The Claimant's testimony was consistent with her written statement. In addition, the Claimant testified that she always texted her supervisor, Ms. [redacted], and that she was not told that texting was not allowed.

7. On August 11, 2009, Ms. [redacted] signed a [redacted] employee termination form stating that the Claimant was fired for "constant tardy & no call no show." (Ex. 23.2) The form states the Claimant's last day of work was August 10, 2009. *Id.*

8. On August 11, 2009, Ms. [redacted] signed a [redacted] incident report for the Claimant for "Absenteeism and Tardiness," indicating it was the "Final Written" level of discipline, and describing the incident as "[y]ou did not call to say you weren't coming in. I called you at 11:30. You just attended orientation and were informed of what would happen. Termination." (Ex. 23.0) That report also referred to the earlier August 4, 2009 incident report. (Ex. 23.1)

9. On or about October 20, 2009, a Division Eligibility Technician called [redacted] and spoke to a supervisor by the name of [redacted], who informed her that [redacted] required an employee who was going to be absent to call in and verbally speak to a supervisor or manager, that text messages were not accepted, and that employees were informed of this policy. (Ex. 8)

10. After speaking to [redacted], the Division determined that the Claimant lost her job because of her failure to show up to work and reaffirmed its decision to terminate her Alaska Temporary Assistance benefits:

> Good cause is not approved for your case as the reason your job ended was due to job abandonment – No call/ no show. Although you report that you contacted

> your supervisor via text the employer was very clear that they speak with all employees regarding their compnay (sic) policy that you must make verbal communication with your supervisor or manager if you are not able to work your scheduled shift.

(Ex. 9)

11. The Claimant has one prior Temporary Assistance penalty in December 2007, because she was fired by a previous employer for poor attendance. (Ex. 4.5)

PRINCIPLES OF LAW

I. Burden of Proof

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).

II. Standard of Proof

The regulations applicable to this case do not specify any particular standard of proof. A preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n,* 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Therefore, the standard of proof is the preponderance of the evidence.

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)

III. Alaska Temporary Assistance Program (ATAP)

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

> (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 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.

Alaska Temporary Assistance recipients are disqualified from receiving Temporary Assistance benefits for one month the first time they have "voluntarily separated" from employment without good cause. AS 47.27.015(c)(1). The penalty period for a second instance of "voluntary separation" from employment without good cause is six months. AS 47.27.015(c)(2).

ANALYSIS

The primary issue in this case is whether or not the Division was correct when it imposed a second job quit penalty against the Claimant, causing her to become not eligible for Alaska Temporary Assistance benefits for the six month period beginning on October 1, 2009, because she was fired from her job at [redacted]. The Division has the burden of proof in this case because it is seeking to impose the penalty.

The undisputed facts in this case are as follows:

1. Following her sister's and her supervisor's brother's arrest, the Claimant texted her supervisor at 6 a.m. the next morning informing her supervisor that she would not be to work.

2. The Claimant and her sister were then both fired. The reason for the firing was given by the supervisor as the Claimant not having called in to work prior to her not showing up for her scheduled work shift.

3. On August 6, 2009, which preceded the August 11, 2009 firing, the Claimant was provided a copy of the [redacted] employee handbook that explained employees were required to "notify a manager" if she was going to be absent from work. The handbook also stated employees were required to "call in" if they were going to be late to work.

There are disputed facts in this case. The Claimant's written statement, which was consistent with her testimony, was that she texted her supervisor to notify her she was not coming to work, and that she had texted her supervisor in the past. She also testified that she was not told that text messages were not an acceptable form of communication.

In contrast, a Division Eligibility Technician spoke to a supervisor at [redacted] (not the supervisor who terminated the Claimant). That supervisor told the Division Eligibility Technician that employees were told that texting was not allowed for absenteeism notification purposes and that they were required to telephone and verbally speak to a supervisor. No one from [redacted] testified at hearing, nor was there an affidavit presented into evidence. The supervisor's statement to the Eligibility Technician is a classic example of hearsay. It is given less weight than the Claimant's sworn testimony.

Further, the supervisor's statement, even taken at face value, are not sufficient to contradict the Claimant's statements that she texted her own supervisor (Ms. [redacted]), as she had in the past. In other words, the Claimant's statements established that she had a pattern of conduct with Ms.

[redacted], which was that Ms. [redacted] allowed the Claimant to contact her via text message. While this may have violated the non-texting policy, as explained to the Division's Eligibility Technician by a supervisor, the Claimant was allowed to text her supervisor. Because Ms. [redacted] did not testify, there is no evidence contradicting the Claimant's statements that she was allowed to contact her supervisor by text message.

In addition, the employee handbook is somewhat equivocal. It uses the term "call in" with regard to tardiness. It states that an employee may be terminated if they do not appear for an entire shift without "notifying" a manager. Nowhere does it say that an employee is required to physically speak to a supervisor. A text message is transmitted from telephone to telephone, i.e. it is called in and received by a telephone. And it is clear from the Claimant's testimony that she considered a text message as the equivalent of physical speech during a telephone call.

It must also be noted that Ms. [redacted]'s August 11, 2009 "termination" report, which states the Claimant did not "call in" before her absence, is suspect. It relies on the August 4, 2009 incident report where the Claimant was verbally reprimanded for her attendance. However, that August 4, 2009 incident report does not bear the Claimant's signature, nor is it witnessed as required if the Claimant refused to sign the report. Accordingly, the accuracy of the August 4, 2009 report is doubtful. Consequently, the August 11, 2009 report is also suspect. Further, because Ms. [redacted]'s brother had been arrested while in the Claimant's sister's company, Ms. [redacted] could have been biased against the Claimant.

In summary, the Claimant's statements, although she definitely has an economic motive to be less than honest, are more credible than the employer's hearsay evidence for the following reasons. First, the August 4, 2009 incident report, that preceded the Claimant's August 11, 2009 termination, is not signed by the Claimant or witnessed as required. Second, the Claimant established that she had an established pattern of texting her supervisor, Ms. [redacted], which was condoned by Ms. [redacted]. Third, the employee handbook does not, on its face, forbid text message communications. Fourth, Ms. [redacted] could have been biased against the Claimant, given the fact her brother had been arrested while in the Claimant's sister's company. Fifth, Ms. [redacted] did not testify nor was there any evidence to contradict the Claimant's testimony she had texted Ms. [redacted] prior to her not showing up for work on the day in question other than the suspect August 11, 2009 termination report.

Because of the Claimant's credible testimony and the lack of contradictory evidence, the following facts are established:

1. The Claimant was allowed to text her supervisor about her work attendance.

2. The Claimant texted her supervisor at 6 a.m. on the morning in question, to advise her that she was not coming into work.

3. The reason for the Claimant's firing, that she was a "no call/no show" was not credible, given that she had texted her supervisor in advance of her absence.

The Division had the burden of proof in this case by a preponderance of the evidence. In light of the above facts, the Division did not meet its burden of proof. While the Claimant was admittedly absent from her job, she was not fired from her job for being absent but because she allegedly did not contact her supervisor in advance. The facts of this case show she did contact her supervisor in advance. As a result, the Claimant did not voluntarily separate from employment, as required by 7 AAC 45.990(b).

Because the Claimant did not voluntarily separate from her employment, the Division was not correct to impose a job quit penalty against the Claimant that made her not eligible to receive Alaska Temporary Assistance benefits for a six month period beginning October 1, 2009.

CONCLUSIONS OF LAW

1. The Division had the burden of proof in this case by a preponderance of the evidence to establish the Claimant "voluntarily separated" from her job by her failure to contact her supervisor in advance of her absence from work.

2. The Division did not meet its burden of proof. The evidence in this case established that the Claimant did contact her supervisor, by text messaging her, which notified her in advance that the Claimant would not be coming into work.

3. The Division was therefore not correct when it imposed a job quit penalty against the Claimant that made her not eligible to receive Alaska Temporary Assistance benefits for a six month period beginning October 1, 2009.

DECISION

The Division was not correct when it imposed a job quit penalty against the Claimant, which made her not eligible to receive Alaska Temporary Assistance benefits for a six month period beginning October 1, 2009.

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 11th day of March, 2010.

/Signed/
Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 11th day of March 2010, true and correct copies of the foregoing were sent to:
Claimant by U.S.P.S., Certified Mail
and to the following by e-mail:
[redacted], Public Assistance Analyst
[redacted], Director
[redacted], Policy & Program Development
[redacted], Staff Development & Training
[redacted], Administrative Assistant II
[redacted], Eligibility Technician I
[redacted], Chief of Field Services

J. Albert Levitre, Jr.
Law Office Assistant I