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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. 10-FH-286
	)
Claimant.	) Division Case No. [redacted]

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Alaska Temporary Assistance benefits on July 20, 2010. (Ex. 2.0) On August 12, 2010, the Division sent to Claimant a notice denying the Application.[1] The Division first imposed a job quit penalty that it determined would end on August 9, 2010. Since she was a school teacher and would be returning to employment with the school district in August, she would be over the income limit after that time. Therefore, the Division denied her application. (Ex. 8) Claimant requested a fair hearing on August 12, 2010 regarding the job quit penalty only. (Ex. 8.3)

This office has jurisdiction pursuant to 7 AAC 49.010.

Claimant's Fair Hearing was held on September 9, 2010, and then continued to September 30, 2010. Claimant attended both hearings telephonically, represented herself and testified on her own behalf. [redacted] Public Assistance Analyst with the Division, attended both hearings in person, represented the Division and testified on its behalf.

ISSUE

The Claimant only disputes the issue regarding the job quit penalty. She does not dispute the fact she would be over the income limit for the Alaska Temporary Assistance Program once she resumed her teaching position in August 2010. Therefore, the issue is:

[1] This denial notice and imposition of penalty is set forth in a Division notice titled "Assistance Denied – Work Refusal, Reduction," which is Exhibit 8.

Was the Division correct when, on August 12, 2010, it imposed a job quit penalty against Claimant because Claimant voluntarily separated from her job due to action(s) within her control?

FINDINGS OF FACT

The following facts have been proven by a preponderance of the evidence:[2]

1. Claimant had been a manager of a golf course for many years. (Testimony of Claimant) Her employers were [redacted] and [redacted], husband and wife. (Testimony of Claimant)

2. Claimant has received positive feedback regarding her supervisory skills:

a. A June 6, 2008 letter from the [redacted] to employees states: "[redacted] bends over backwards for many of you to make a work schedule to accommodate your other jobs, vacation & family schedules, summer activities and requests." Ms. [redacted] handwrote on this letter: "[redacted], I appreciate all the different things that you do!!! Especially the customer complaints." (Ex. A, p. 8)

b. In a Direct Deposit Advice for Claimant dated June 6, 2008, a handwritten note written in [redacted]' handwriting states: "[redacted], I appreciate all the different things that you do!!!" (Ex. A, p.6)

c. On a July 2008 e-mail message from a patron commending golf course staff, [redacted] hand wrote: "[redacted] Thank you. I know that you facilitated this." (Ex. A, p. 4)

d. d. On a June 4, 2010 letter from [redacted] to employees, Ms. [redacted]' hand wrote a note stating: "[redacted], Thank you for the excellent hands on training for interns & others . . . ." (Ex. A, p. 7)

e. A July 1, 2010 e-mail from [redacted], a subordinate of Claimant for two years, states positive attributes to Claimant's supervision. (Ex. A, p. 2)

f. An October 11, 2010 letter from [redacted] a four-year subordinate of Claimant, states how respectful Claimant is to staff. (Ex. A, p. 9)

g. An undated letter from Dave [redacted] a patron of the club for four years, states Claimant deals well with patrons. (Ex. A, p.3)

3. On June 25, 2010, Claimant received an e-mail message from her employer, [redacted]. The e-mail message had a personnel action enclosed. The document stated in pertinent part:

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[2] Claimant was given an opportunity to provide a recording of the testimony taken at her hearing for unemployment insurance. This testimony included that of her employers. At the hearing in this case, she was told the unemployment insurance decision would not be admitted. After the hearing she submitted the unemployment insurance decision but not a recording of the testimony. The unemployment insurance decision will not be admitted into the record and will not be considered when making a decision in this case.

It has been brought to my attention by several members and employee who witnessed [redacted] harassing [redacted] the cart attendant to the point of quitting. Witnesses say she harassed and shamed young [redacted], who probably has been a target of ridicule and owner of low self esteem throughout his life, in the parking lot, in a loud and rude tone, about something as ridiculous as washing windshields, among other deficiencies. Those who witnessed said that if it was them, she would not have gotten half as far into her discourse. They give [redacted] credit for walking away.

I consider this gross abuse of authority, and certainly does not represent the relationship we wish to have amongst fellow employees at the [redacted] Golf Club. I am shocked, even angered that she would behave this way under our employ.

Now there have simply been far too many instances, year after year, of employees quitting or not returning simply because of the over dominating and micro managing style of Ms. [redacted]. The story presented by Ms. [redacted] to myself and [redacted] always seems to be greatly tempered in her favor compared to that of the employees version, always what was wrong with the employee, avoiding the issue of her own behavior. It is clear to me that she does not possess the temperament to be an effective supervisor.

There must be many things she could do instead, such as making sure deliveries are on time, all systems are up and running, coordinating food and beverage for outings, helping with employee time cards, deposits, training, etc. etc. . . .

Perhaps it will be difficult for her to do her job in the "background", [sic] but that is precisely what needs to happen. Rather than worrying about every little detail of everyone else's job performance, she could work on her own list...

(Ex. 3.3)

4. Claimant testified as follows at the hearing:

a. Claimant did not mistreat an employee, nor had she ever mistreated an employee. Claimant stated that the incident she was cited for in the June 25, 2010 document would have been on video camera. No video was ever reviewed or produced regarding that incident.

b. The day of the e-mail message, June 25, 2010, Claimant met with her employers. During this meeting her employers terminated her employment.

c. After the June 25, 2010 meeting, [redacted] left town for the week. Claimant talked to [redacted], and offered to work a golf tournament that weekend. Ms. [redacted] told her she was not to enter the golf course until her husband returned.

d. After June 25, 2010, [redacted] asked her to continue working part-time ordering food. However, this work required less than two hours per week. This was not sufficient work for Claimant.

e. [redacted] is impulsive and has an explosive personality. Claimant thought the incident on June 25, 2010 was a result of that personality trait. Claimant thought that

when he returned from being out of town, Mr. [redacted] would calm down and her employment would return to normal.

f. Claimant and her employers exchanged e-mail messages over the course of the next couple of weeks discussing terms of employment.

g. Claimant e-mailed her employer stating that she felt there were too many misunderstandings to continue. However, what she meant was that there were too many misunderstandings to continue with the e-mail correspondence and that she thought the communication should be in-person.

h. Claimant has never received any disciplinary action in the past regarding her job performance.

i. Claimant's last day of pay was June 24, 2010. Ms. [redacted] called her after that date and asked her questions regarding managing the course. Ms. [redacted] told Claimant she would pay her, however, Claimant never received pay for those consultations.

5. Claimant signed and submitted an application for Temporary Assistance benefits on July 20, 2010. (Ex. 2)

6. Division personnel telephoned Claimant's employer on August 5, 2010. Division notes indicate that [redacted], a manager, explained that Claimant "was offered job changes and she did not accept it." (Ex. 4)

7. Division personnel contacted [redacted] regarding Claimant's termination of employment. On August 6, 2010, Ms. [redacted] e-mailed the following to the Division:

> She was offered other employment in a nonsupervisory/management position with possibility of similar hours and same hourly wage. If you are referring to the Sun 11 Jul 2010 13:04:39 email from [redacted]@hotmail.com ([redacted]) did you get her reply from Sunday 11 July 2010 2:44 PM? I don't know if she misunderstood that we were offering her a different position as her reply indicated that she thought she'd being doing supervision/management plus the other position we proposed. Her final comment was : [sic] "I feel there are too many misunderstandings to continue." She did not ask for further clarification. We accepted that as her resigning from employment with us on July 11th. Her position as supervisor was eliminated but she was offered continued employment in a different capacity.
>
> The last day she physically worked at the course was 6/24/10. She was asked to take leave over the weekend of 6/25 – 6/28 so we could talk with other employees about her supervision and the incident which percipitated [sic] all this. . .
>
> In July she received only this payment. If she did not provide her e-mail reply from 7/11/10 I would be happy to.

(Ex. 6)

8. On August 12, 2010, the Division denied Claimant's Application on the grounds that Claimant quit a job, which restricted her from receiving benefits until August 9, 2010. The notice stated the situation that caused her application was: "On July 11th your final comments to the employer were "I feel there are too many misunderstandings to continue." Resignation per [redacted]" Since she would return to other employment in August, she would be over the income limit for that program after that time. (Ex. 8)

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).

If an applicant refuses or voluntarily terminates suitable employment "within 60 days before submitting an application for ATAP benefits, a rebuttable presumption is established that the assistance unit's demonstrated need for ATAP benefits is due to that refusal or termination, and the department will impose upon the assistance unit the appropriate period of ineligibility." 7 AAC 45.970(a).

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.

Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the [triers of fact] that the asserted facts are probably true. *Robinson v. Municipality of Anchorage,* 69 P. 3d 489, 495 (Alaska 2003).

III. Alaska Temporary Assistance Program

The Division is required to impose a penalty upon the household receiving Alaska Temporary Assistance benefits if the adult applicant voluntarily separates from employment within 60 days before submitting an application for Temporary Assistance and this voluntary separation is without good cause. AS 47.27.015(c) and 7 AAC 45.970(a).

A. Voluntary Separation.

The term "voluntary separation" as used in AS 47.27.015(c) is expressly defined in regulation 7 AAC 45.990(b). Voluntary separation is defined as any of:

(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.

Regulation 7 AAC 45.970(e) ("Penalties for refusal or voluntary termination of employment") provides guidance as to what may be intentional on the job misconduct by an employee which causes the employer to terminate the employment. Regulation 7 AAC 45.970(e) provides:

> 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 under AS 47.27.015 and the department shall enforce the period of ineligibility specified in AS 47.27.015(c). (Emphasis added.)

B. Good Cause Exception.

The finding of a voluntary separation from suitable employment under AS 47.27.015(c) is subject to good cause exceptions enumerated in regulation 7 AAC 45.261. Regulation 7 AAC 45.261 establishes eighteen (18) "good cause" exceptions which may excuse a person from being subject to a finding of voluntary separation as provided by AS 47.27.015(c). Two good cause exceptions in 7 AAC 45.261 are as follows:

> (9) the recipient accepts a job with gross wages and employee benefits equal to or greater than those at the job left. . .
> (11) the recipient's wages are reduced for a reason outside the recipient's control and not due to recipient's action or inaction;

C. Penalty period.

Regulations provide a 30 day period of ineligibility for a first voluntary separation from employment without good cause. For a recipient, the period of ineligibility begins on the date that suitable employment is refused or voluntarily terminated. 7 AAC 45.970(d).

ANALYSIS

I. Issue

The issue is whether or not the Division was correct, on August 12, 2010, to impose a job quit penalty against Claimant that made her household not eligible to receive Alaska Temporary Assistance Program benefits from July 20, 2010 to August 9, 2010.[3]

Included within this issue is the sub-issue: did the Division prove Claimant's termination of employment from the golf course was a voluntary separation resulting from an action or inaction within her control?

[3] It is unclear from the record when the Division imposed the job quit penalty. However, given the disposition of this case, it is not necessary to discuss this issue further.

II. Burden of Proof and Standard of Proof

Applying for benefits is a change from the status quo. Therefore, the Claimant has the burden of proof. The Claimant must prove by a preponderance of the evidence that she was not terminated due to an action or inaction within her control. 7 AAC 45.970(a); *see also,* AS 47.27.015(c).

III. "Voluntary Separation" is A Pre-requisite to Imposition of a Job Quit Penalty

a. Separation.

The first issue needing to be addressed is whether and when Claimant separated from employment. AS 47.27.015(c). On June 25, 2010, Claimant met with her employers. She testified that during this meeting, they told her she could no longer supervise, which was a substantial part of her position as a manager of a golf court. Furthermore, she was not allowed at the golf course for at least a week after June 25, 2010. The Division offered no evidence to rebut this testimony. A substantial part of Claimant's management position was supervisory. Another substantial part of her employment was actually being on the golf course premises. By eliminating her supervisory duty and her ability to go to the place of her employment, the employers terminated her from her position and she became separated from employment.

This finding is bolstered by [redacted]' August 6, 2010 e-mail which stated: "She was offered other employment in a nonsupervisory/management. . . ." This language indicates she was terminated on June 25, 2010, and then offered other employment. Therefore, the Division's contention of a termination date in July of 2010 is not accurate.

b. Voluntary.

It must next be determined whether the separation was voluntary. A "voluntary separation" is found to have occurred if the termination from employment was caused by "intentional misconduct by an employee on the job." 7 AAC 45.990(b)(2) Intentional misconduct is action or inaction within the employee's control. 7 AAC 45.990(e). On June 25, 2010, Claimant's employer accused Claimant of an undated incident in which she verbally abused a subordinate, and also of years of dominating micro managing style. These accusations were made in a personnel action document. (Finding of Fact # 3) The Division did not offer any other verification that the specific incident in question actually occurred or that Claimant has had a dominating micro management style. Despite the Claimant's testimony stating the incident would have been videotaped, the Division did not bring forth this video or evidence that such video did not exist. (Finding of Fact # 4.a)

In contrast to the hearsay evidence, Claimant testified in-person that she has been a respectful supervisor for years and has always been appreciated. She produced a number of documents regarding the positive feedback she had received regarding her supervisory skills. (Finding of Fact #2) She further denied the specific undated incident of abuse.

Claimant's evidence outweighs the evidence provided by the Division. Based on Claimant's testimony, the documents attesting to Claimant's abilities, and the lack of substantiated evidence on

the Division's part, the Claimant has proven by a preponderance of the evidence that she committed no intentional misconduct while on the job. Accordingly, Claimant has also proven by a preponderance of the evidence that her separation was not "voluntary." 7 AAC 45.970(e).

CONCLUSIONS OF LAW

1. The Claimant has proven by a preponderance of the evidence that she separated from employment on June 25, 2010, but this separation was not voluntarily.

2. The Division was not correct when, on August 12, 2010, it imposed a job quit penalty against the Claimant that made her not eligible to receive Alaska Temporary Assistance benefits.

DECISION

The Division was not correct when, on August 12, 2010, it imposed a job quit penalty against the Claimant, which made her not eligible to receive Alaska Temporary Assistance benefits.

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, 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

If the Claimant appeals, the 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 30th day of November 2010. [redacted]

Patricia Huna
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 30th day of November 2010, true and correct copies of the foregoing were sent to:

Claimant by Certified Mail, Return Receipt Requested
and to other listed persons by e-mail:

[redacted], Public Assistance Analyst
[redacted] Director
[redacted], Policy & Program Development
[redacted]n, Staff Development & Training
[redacted], Administrative Assistant II
[redacted], Eligibility Technician I
[redacted], Chief of Field Services
[redacted]

J. Albert Levitre, Jr.
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