

- DECISION -

Claimant:	Decision No.:	130-BR-15
KUNTA L THORNTON	Date:	January 21, 2015
	Appeal No.:	1418898
	S.S. No.:	
Employer:	L.O. No.:	65
POHANKA OF SALISBURY INC	Appellant:	Employer

Issue: Whether the claimant was discharged for misconduct or gross misconduct connected with the work within the meaning of Maryland Code, Labor and Employment Article, Title 8, Section 8-1002 or 1003.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: February 20, 2015

REVIEW OF THE RECORD

The employer and the claimant have both filed timely appeals to the Board from an Unemployment Insurance Lower Appeals Division Decision issued on September 4, 2014. That Decision held the claimant was discharged for misconduct within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-1003*. Benefits were denied for the week beginning July 6, 2014, and the following nine weeks.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner or

evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., §8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The record is complete. The employer appeared and testified. The employer was given the opportunity to offer documents and to object to documentary evidence. The employer was offered the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the record from which the Board may render its decision.

After a review of the record, the Board adopts the first three paragraphs of the hearing examiner's findings of fact. The Board deletes and does not adopt the hearing examiner's *Findings of Fact's* last paragraph. The Board finds these facts warrant a reversal of the hearing examiner's simple misconduct decision.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002 provides:

- (a) Gross misconduct...
 - (1) Means conduct of an employee that is:
 - i. deliberate and willful disregard of standards of behavior that an employing unit rightfully expects and that shows gross indifference to the interests of the employing unit; or
 - ii. repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations...

In determining whether an employee has committed gross misconduct, "[t]he important element to be considered is the nature of the misconduct and how seriously it affects the claimant's employment or the employer's rights." *Dept. of Econ. & Empl. Dev. v. Jones, 79 Md. App. 531, 536 (1989)*. "It is also proper to note that what is 'deliberate and willful misconduct' will vary with each particular case. Here we 'are not looking simply for substandard conduct...but for a willful or wanton state of mind accompanying the engaging in substandard conduct.'" *Employment Sec. Bd. v. LeCates, 218 Md. 202, 207 (1958)*(internal citation omitted); also see *Hernandez v. DLLR, 122 Md. App. 19, 25 (1998)*.

Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003 provides:

- (a) Grounds for disqualification – an individual who otherwise is eligible to receive benefits is disqualified from receiving benefits if the Secretary finds that unemployment results from discharge or suspension as a disciplinary measure for behavior that the Secretary finds is misconduct in connection with employment but that is not:
- (1) Aggravated misconduct...or
 - (2) Gross misconduct...

The term "misconduct" as used in the statute means a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction from duty, or a course of wrongful conduct committed by an employee within the scope of the employment relationship, during hours of employment or on the employer's premises, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1003*. (See, *Rogers v. Radio Shack*, 271 Md. 126, 314 A.2d 113).

Simple misconduct within the meaning of §8-1003 does not require intentional misbehavior. *DLLR v. Hider*, 349 Md. 71 (1998); also see *Johns Hopkins University v. Board of Labor, Licensing and Regulation*, 134 Md. App. 653, 662-63 (2000)(psychiatric condition which prevented claimant from conforming his/her conduct to accepted norms did not except that conduct from the category of misconduct under §8-1003). Misconduct must be connected with the work; the mere fact that misconduct adversely affects the employer's interests is not enough. *Fino v. Maryland Emp. Sec. Bd.*, 218 Md. 504 (1959). Although not sufficient in itself, a breach of duty to an employer is an essential element to make an act connected with the work. *Empl. Sec. Bd. v. LeCates*, 218 Md. 202 (1958). Misconduct, however, need not occur during the hours of employment or the employer's premises. *Id.*

Without sufficient evidence of a willful and wanton disregard of an employee's obligations or gross indifference to the employer's interests, there can be no finding of gross misconduct. *Lehman v. Baker Protective Services, Inc.*, 221-BR-89. Where a showing of gross misconduct is based on a single action, the employer must show the employee demonstrated gross indifference to the employer's interests. *DLLR v. Muddiman*, 120 Md. App. 725, 737 (1998).

In its appeal, the employer reiterates its testimony from the hearing and argues that the weight of the evidence supports a finding that the claimant's license was suspended in violation of the employer's rules. The employer does not cite to the evidence of record and makes no other contentions of error.

The Board agrees with the employer's argument that a finding of gross misconduct is supported. The claimant was unable to legally perform essential duties of his job that included driving. The claimant did not sufficiently demonstrate that his license was in good standing. The claimant knew, or should have known, that his license was suspended since January 2014. The claimant was improperly working while his driver's license was suspended. The claimant's actions in this regard are a willful and deliberate disregard of the standards of behavior that his employer had the right to expect.

The only statement from the claimant is contained in the *Agency Fact Finding Report*. See *Agency Exhibit 1*. Although the Agency Fact Finding Report is a public document, the statements contained

therein are hearsay. While hearsay is admissible in an administrative proceeding, it is usually given less weight than credible, first-hand testimony. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 413 (1997); also see *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989) ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

The hearing examiner made no such examination into the reliability of the hearsay evidence in his evaluation of the evidence in this case. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991). A fully explained administrative decision also fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision" *Id.*; also see *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 56 (2002); *Fowler v. Motor Vehicle Administration*, 394 Md. 331, 353 (2006); *Crumlish v. Insurance Commissioner*, 70 Md. App. 182, 187 (1987).

In *Kade v. Charles H. Hickey School*, the Court of Special Appeals reversed a decision by an administrative agency for similarly relying on hearsay evidence without establishing the reliability of that evidence. In *Kade*, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

Even though the statements were relevant, *there was no indication that this hearsay evidence was reliable, credible or competent*. The statements which were submitted by appellant's co workers are not under oath and do not reflect how they were obtained.... No reason was given as to why the declarants were unavailable.

The Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case. Therefore, the Board does not adopt the hearing examiner's *Evaluation of Evidence*.

The Board finds that the hearing examiner gave undue weight to the *Agency Fact Finding Report*. The claimant's statements were not under oath or affidavit and referred to a document not in evidence. The Board gave more weight to the employer's witness' credible testimony.

The Board notes that the claimant, duly notified of the date, time and place of the hearing, failed to appear. In his appeal to the Board, the claimant provides no reason for his failure to appear. In the appeal to the Board, the offered no reason for failing to appear at the hearing. There is no postponement request in the record. The claimant, duly noticed of the date, time and place of the hearing, was afforded a full

and fair opportunity to present a case before the hearing examiner. Notwithstanding the Board's discretion to take new evidence, *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)(2)*, "the presentation of evidence must come to an end at some point". *Maryland State Police v. Zeigler*, 330 Md. 540, 556 (1993).

The appellant / claimant in the instant case had clear notice of the obligation to present a case before the DLLR Hearing Examiner. *DLLR v. Woodie*, 128 Md. App. 398, 411 (1999). The hearing notice provided,

This hearing is the last step at which either the claimant or the employer has an absolute right to present evidence. The decision will be made on the evidence presented. The decision will affect the claimant's claim for benefits, and it may affect the employer's contribution tax rate or reimbursement account.

In addition, the notice stated, in bold print, that additional "important information" could be found on the reverse side of the notice. Because the claimant was on notice that the only absolute opportunity to present evidence was before the DLLR Hearing Examiner, the claimant had no legitimate justification for the failure to present the evidence in the first hearing. *See DLLR v. Woodie*, 128 Md. App. 398, 401 (1999).

If an appealing party fails to appear at a hearing having been given the required notice of the hearing, the hearing examiner or the Board of Appeals may issue a decision on the facts available or may dismiss the appeal. *COMAR 09.32.11.02(N)*; *COMAR 09.32.06.03(M)*.

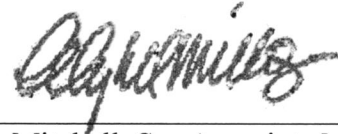
There are no cognizable defects in the record. Instead, the only end served by the Board remanding this case or having an additional hearing before the Board would be to allow the claimant a second opportunity to present evidence: evidence he was free to present at the first hearing. *See DLLR v. Woodie*, 128 Md. App. 398, 408 (1999). In the instant case, the Board finds that the parties were afforded their due process rights of notice and an opportunity to be heard.

The Board finds, based upon a preponderance of the credible evidence, that the employer did meet its burden of proof and show that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., §8-1002*. The decision shall be reversed, for the reasons stated herein.

DECISION

The Board holds that the claimant was discharged for gross misconduct within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 1002*. The claimant is disqualified from the receipt of benefits from the week beginning July 6, 2014, and until the claimant has earned twenty-five times his/her weekly benefit amount and becomes unemployed under non-disqualifying conditions.

The Hearing Examiner's decision is Reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

KUNTA L. THORNTON

POHANKA OF SALISBURY INC

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

KUNTA L THORNTON

SSN #

Claimant

vs.

POHANKA OF SALISBURY INC

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1418898

Appellant: Employer

Local Office : 65 / SALISBURY

CLAIM CENTER

September 04, 2014

For the Claimant:

For the Employer: PRESENT, LISA BROOKE

For the Agency:

ISSUE(S)

Whether the claimant's separation from this employment was for a disqualifying reason within the meaning of the MD Code Annotated Labor and Employment Article, Title 8, Sections 8-1001 (voluntary quit for good cause), 8-1002 - 1002.1 (gross/aggravated misconduct connected with the work) or 8-1003 (misconduct connected with the work).

FINDINGS OF FACT

The claimant, Kunta L Thornton, began working for this employer, Pohanka of Salisbury Inc., on or about July 16, 2012. At the time of separation, the claimant was working as a detailer. The claimant last worked for the employer on or about July 7, 2014, before being terminated for allegedly having his driver's license suspended.

Claimant had applied for another position with the employer as a shuttle driver. The employer obtained the claimant's driving record from the Maryland Department of Motor Vehicles, DMV, through its agent, Screen One. Their report on July 8, 2014 indicated that the claimant's driving license had been suspended in January, 2014. A second report obtained August 5, 2014 from Screen One indicated that the claimant's license was still suspended.

Claimant maintained that his license had not been suspended and that the DMV had made a mistake. He told the employer that he had a letter from DMV confirming that a mistake had been made. The employer relied on the report it had obtained from its agent and terminated the claimant for working without a valid driver's license. Claimant was not able to submit the letter to the employer.

The Fact Finding Report, Agency Exhibit #1, states the claimant submitted a letter from the DMV to the Claims Specialist after the first determination was issued denying the claimant benefits. The letter provided that, "Due to an Administrative error your Maryland driving privilege was suspended on March 5, 2014. The suspension was deleted on May 12, 2014. Your Maryland driving privilege is in good standing at this time." As a result of the letter the Claims Specialist issued a redetermination allowing benefits on July 29, 2014 which is the subject of this appeal by the employer.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-1003 provides for a disqualification from benefits where the claimant is discharged or suspended as a disciplinary measure for misconduct connected with the work. The term "misconduct" is undefined in the statute but has been defined as "...a transgression of some established rule or policy of the employer, the commission of a forbidden act, a dereliction of duty, or a course of wrongful conduct committed by an employee, within the scope of his employment relationship, during hours of employment, or on the employer's premises." Rogers v. Radio Shack, 271 Md. 126, 132 (1974).

Md. Code Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits where he or she is discharged or suspended from employment because of behavior which demonstrates gross misconduct. The statute defines gross misconduct as conduct that is a deliberate and willful disregard of standards that an employer has a right to expect and that show a gross indifference to the employer's interests. Employment Sec. Bd. v. LeCates, 218 Md. 202, 145 A.2d 840 (1958); Painter v. Department of Emp. & Training, et al., 68 Md. App. 356, 511 A.2d 585 (1986); Department of Economic and Employment Dev. v. Hager, 96 Md. App. 362, 625 A.2d 342 (1993).

Md. Code, Ann., Labor & Emp. Article, Section 8-1002 provides that an individual shall be disqualified from receiving benefits when he or she was discharged or suspended from employment because of behavior that demonstrates gross misconduct. The statute defines gross misconduct as repeated violations of employment rules that prove a regular and wanton disregard of the employee's obligations.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

The employer had the burden to show, by a preponderance of the credible evidence, that the claimant was discharged for some degree of misconduct connected with the work within the meaning of the Maryland Unemployment Insurance Law. Ivey v. Catterton Printing Company, 441-BH-89. In the case at bar, that burden has been met.

The claimant did not appear for the hearing to provide testimony with regard to the letter he obtained from the DMV. The Fact Finding Report is not clear if the claimant's license suspension was cleared completely off his record or only as of May 12, 2014 when the claimant was employed by the employer and required to drive cars as a part of his job. It is not clear if the suspension was or was not in effect prior to May 12, 2014. Without additional clarifying testimony I find that the employer acted reasonably based on its agent's report and the claimant was terminated for misconduct. Because there is not complete clarity on the suspension issue and claimant did not appear to provide necessary testimony, I will find that there has been insufficient testimony to support a finding of gross misconduct, only simple misconduct.

I hold that the claimant committed a transgression of some established rule or policy of the employer, a forbidden act, a dereliction of duty, or engaged in a course of wrongful conduct within the scope of the claimant's employment relationship, during hours of employment, or on the employer's premises. An unemployment disqualification shall be imposed based on Md. Code, Ann., Labor & Emp. Article, Section 8-1003 pursuant to this separation from this employment.

DECISION

IT IS FURTHER HELD THAT the claimant was discharged for misconduct connected with the work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-1003. Benefits are denied for the week beginning July 6, 2014 and for the 9 weeks immediately following. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

The determination of the Claims Specialist is reversed.



A S Levy, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right of Further Appeal

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision may request a further appeal either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by September 19, 2014. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: August 21, 2014
BLP/Specialist ID: USB26
Seq No: 001
Copies mailed on September 04, 2014 to:

KUNTA L. THORNTON
POHANKA OF SALISBURY INC
LOCAL OFFICE #65